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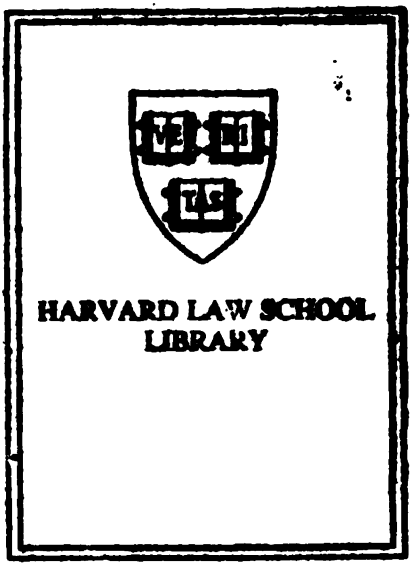
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ERRATA.

Sections 2 and 9, and section 605, Civil Code, in second line from the close of the syllabus in case of Alexander's Ex'ors v. Alford, surviving partner, etc., should be subsections 2 and 9 and section 606.

In case of Cooper v. Nelson & Dabney, on page 891, in the first line of third paragraph the word merely should be members.

In same case, on page 892, after the word first the word but should be that, and the word but after the word second should be that.

In the case of Marion County v. L. & N. R. R. Co., page 963, in the third paragraph from the bottom of the page and second line, after the word judicial the word rule should be sale.

In the first line of the syllabus in the case of Hopkins, &c. v. Hopkins' Adm'r. &c., page 945, instead of the words the plaintiff recovered a judgment in favor of defendant should be the defendant recovered a judgment.

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KENTUCKY COURT OF APPEALS.

COMMONWEALTH V. TATE, &C.

(*Filed Feb.* 27, 1890.)

1. *Official bond of treasurer—Defalcation—Estoppel*—In an action by the Commonwealth to recover of the sureties of James W. Tate on his official bond as treasurer of Kentucky the sum of $63,948.91, the amount of alleged defalcation by said Tate as treasurer, which occurred during his term of 1882 and 1883, the appellees, as sureties, allege as a defense to the action on the bond for that term that he had committed defalcations for large sums during his preceding terms, which, by means of false entries, were carried into the term of 1882 and 1883 as so much cash on hand, and that they are not liable on the bond for same because the law made it the duty of the auditor and secretary of state to make biennial settlements with the treasurer, and of the auditor to make monthly settlements with the treasurer, and that with the faithful performance of said duties by the auditor and secretary of state the defalcations of said treasurer would have been easily detected, and that a faithful discharge of the duties of said auditor and secretary of state formed a part of the contract with the appellees, and that as said officers had, previously to 1882 and 1883, reported monthly and biennially that said treasurer had kept faith with the state, and thus induced appellees, relying upon the truth of said reports, to become sureties on the bond for 1882 and 1883, and take no steps for their indemnity, that the Commonwealth is estopped to maintain this action against them. *Held*—That a failure of the secretary of state and auditor to perform their duties, as required by chapter 108 of the General Statutes, will not estop the Commonwealth from a recovery against the sureties on the bond executed by them for the faithful performance by their principal of the duties enjoined on him as treasurer under chapter 108 of the General Statutes. The Commonwealth invested the auditor and secretary of state with the powers of examination of the books and of making settlements with the treasurer, not as a guarantee to the sureties that the treasurer would faithfully discharge his duties; if such had been the purpose, there would have been no need of the treasurer giving security for the faithful discharge of his duties, but the power was given to them as an additional guarantee to the people.

2. *Evidence—Pass books—Peremptory instruction*—The lower court erred in excluding from the jury the pass books kept by the treasurer with the banks when the evidence shows they were regularly and accurately kept by him.

The court having excluded from the jury the pass books and given a per-

emptory instruction to find for the defendants, this court will not presume that the absent evidence authorized the verdict.

This court will indulge the presumption that evidence absent from the record would support the verdict only where the issue has been submitted to the jury, or where the law and facts have been tried by the court.

3. *Experts*—Where the books and transactions are numerous and an examination, item by item, is necessary to ascertain the amount of defalcation, the testimony of an expert who has made a careful examination of them, and who is competent to understand them, is competent evidence to go to the jury on the trial of such issue.

Thos. H. Hines and P. W. Hardin for appellant.

A. Duvall, Wm. Lindsay, D. W. Lindsey, Frank Chinn, J. W. Rodman, P. B. Thompson, sr., and W. A. Sudduth for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

James W. Tate, on the first Monday in August, 1867, was elected treasurer of the appellant for the term of two years, begining on the first Monday in January, 1868. He was elected biennially thereafter until the first Monday in August, 1887, at which time he was again elected for the term of two years, and held the office until the 20th of March, 1888, at which time the governor and secretary of state suspended him from the duties of his office; and in a few days thereafter the legislature impeached him and he was removed from office.

The appellant seeks by this action to recover of the appellees, the sureties of said Tate on his official bond for the term of 1882 and 1883, the sum of $63,948.91, the alleged official defalcation of said Tate during said term.

The appellees, as the sureties aforesaid, denied that Tate committed any act of defalcation during said term; they alleged that he had committed defalcations for large amounts during his preceding terms, which, by means of false entries, were carried into the term of 1882 and 1883 as so much cash on hand; but in fact the sum apparently carried forward into said terms as so much cash on hand was not cash, but represented said Tate's previous defalcations; and the appellees were not bound on said bond for the same. They also plead that Tate, as treasurer, could receive no public money, and did receive none, except by the written permit of the auditor, and could pay out no public money, and did not pay out any, except upon the warrant of the auditor; and as the auditor was required to settle with him once a month, and the auditor and secretary of state were required to make biennial settlements of his accounts, &c., it was impossible for him to make any defalcation and not be detected in the fact by the auditor, or the auditor and secretary of state, unless these officers were derelict in their duty; that said duties of these officers entered into the contract with the appellees as the sureties of said Tate, and became a part of it; and as the auditor had monthly settlements with Tate during the years 1882 and 1883, and the auditor and secretary of state made a biennial settlement of his accounts, &c., for those years on the 7th day of January, 1884, and reported his accounts with the appellant as all right, and the appellees in good faith, relying on the same as correct, and, therefore, taking no steps to indemnify themselves against the alleged defalcation, and if there was such defalcation, the same

could not have happened or remained undiscovered except by the negligence of the auditor and secretary of state; and as a faithful discharge of their duties in this regard formed a part of the contract with the appellees, and as their neglect to perform them would cause a loss to fall on the appellees, which would not have fallen upon them had these officials diligently and efficiently discharged these duties, they, the appellees, are released. They also allege that said auditor and secretary had previously to 1882 and 1883 reported monthly and biennially that said Tate had kept faith with the State, and his official dealing with it as treasurer was correct, and as it was upon the faith of the truth of these statements that they signed said Tate's bond as sureties; and as it was upon the faith of these monthly and biennial statements relative to the term of 1882 and 1883 that caused the appellees to rest under the belief that Tate was not in default, and to take no steps for their indemnity, the appellant is estopped to proceed against them.

The bond executed by Tate and the appellees for the term of 1882 and 1883 is as follows: "Whereas, James W. Tate, of the county of Franklin, was, at the general election, held the first Monday in August, A. D., one thousand eight hundred and eighty-one, duly elected treasurer of the State of Kentucky; now we, James W. Tate, principal, and the other subscribers hereto, as his sureties in this official bond of said Tate, do hereby bind ourselves, jointly and severally, to the Commonwealth of Kentucky, that the said James W. Tate, as treasurer aforesaid, shall faithfully and diligently discharge all the duties appertaining to said office. In witness whereof the said James W. Tate and the other subscribers hereto, as his sureties, have set their respective hands," &c.

The treasurer's duties are (among others) to receive and safely keep in the treasury all money due or payable to the Commonwealth from collectors of revenue, public officers and others, when tendered, accompanied by the permit of the auditor of public accounts, stating the amount to be received, on what account, and from whom to be received. He shall immediately make out a receipt for the amount received, and for what, and of whom received, and deliver it to the auditor, who shall in like manner give a receipt to the officer or person paying the same. The receipt, besides stating the amount paid, shall also, if it be all that is due from the officer or person, so state." Section 9, chapter 108, General Statutes.

"The treasurer shall not receive into nor pay out any money from the treasury, except upon the certificate or warrant of the auditor." Section 7, chapter 108, General Statutes.

"If the treasurer wilfully misapply any of the public money, or shall loan or use the same for his own purposes, or for the uses or purposes of another, he shall be guilty of felony," &c. Section 10, chapter 108, General Statutes.

According to these statutes it was the duty of the treasurer to receive and safely keep in the treasury all public money tendered upon the permit of the auditor, and to pay the same out only upon the warrants of the auditor, specifying the amount to be paid, to whom and for what. It was his duty to safely keep said money, unless paid out, as aforesaid, and to appropriate the same to his own use or that of another, &c., was a plain violation of his official duty, a breach of official trust, for which his sureties, by the express terms of the bond, were liable. There are no conditions or provisos in or attached to this bond whatever. The bond is a plain, unqualified and unconditional undertaking on the part of the appellees, as the sureties of Tate, to be responsible for the faithful and diligent dis-

charge of all the duties appertaining to the office of treasurer, and to answer in damages for any failure of his to discharge any of said duties; and, as we have seen, one of said duties was not to use or appropriate for his own benefit or that of another any of the public money entrusted to his safe keeping, except to pay the same out upon the warrant of the auditor.

But did the failure of the auditor to do his duty, whereby the treasurer was enabled to appropriate the State's money to his own use and conceal the fact, and receive from the auditor monthly, and from the auditor and secretary of state biennial, statements that his official duties in regard to the state's money were honestly and correctly discharged, release the sureties from their obligation to pay to the state the amount of Tate's defalcation? In other words, did the auditor's and secretary's duty impliedly form a part of the contract with said sureties, or estop the state, so far as the sureties were concerned, from contradicting said settlements?

It is contended that Tate could not have stolen from the treasury and have escaped the detection of the auditor and the secretary of state had the first-named made proper and efficient monthly settlements, and the two together biennial settlements, with him. Rather he could not have stolen from the treasury except after the last monthly settlement and before the next without the theft at said next settlement being detected, if the auditor had performed his official duty in that regard, and the theft, however often committed, would be discovered beyond a peradventure at the next biennial settlement, if the auditor and secretary of state had performed their official duty.

The treasurer could receive no money due the State, except by the permit of the auditor, stating the amount to be received, on what account, and from whom received. It is the treasurer's duty to immediately receipt the auditor for the same, stating the amount received, for what, and from whom received, and the auditor in like manner receipts the officer or person paying the same. Each transaction of this sort is entered in detail in the official books of each officer, and the permits and receipts are preserved by each.

The treasurer can pay no money out of the treasury except upon the warrant of the auditor, specifying the amount, to whom, and for what; which amount, to whom and for what, he must enter in his books. His books must show in full and in detail the respective amounts paid into the treasury, when, by whom, and for what. They must also show to whom warrants have been issued, when, and for what amount, and that the same has been receipted for by the treasurer; also the treasurer must report once per week to the auditor all payments at the treasury, and the warrants upon which the same were made, &c. (Section 3, article 2, chapter 108, General Statutes.) Also the "auditor and treasurer shall, once in each month, make a settlement of the receipts and disbursements of the money at the treasury of every description, under appropriate heads, and file the same with the secretary of state, whose duty it shall be to report them to the general assembly within the first ten days of each regular session. And the auditor shall, once in each month, ascertain whether the money on hand in the treasury agrees with the books of the treasurer. The result of such investigation he shall immediately report to the governor." (Section 4, article 2, chapter 6, General Statutes.) "Upon the expiration of his term or resignation of his office, or death, the secretary of state and auditor shall examine his accounts, state the same, count the money in the treasury, take an inventory of the property, &c., of his office, and

take a receipt for same from his successor in office." (Section 4, article 1, chapter 108, General Statutes.)

It will be seen that it was the duty of the auditor to give permits for the receipt of all public money by the treasurer, and he could lawfully receive no public money without said permit; and if he had received it without such permit the auditor, whose duty it was to look after the payment of such money, would, if he did his duty, soon discover the fact. And it was the duty of the auditor to issue all warrants for the payment of the public money, and the treasurer could make no payment of the same without such warrants. Said warrants should state the amount to be paid, to whom and on what account. And the auditor should make corresponding entries of these matters on his books. It was also the duty of the treasurer to make weekly reports to the auditor of all payments at the treasury, and the warrants upon which the same were made, &c. From these reports the auditor could and should see whether or not the payments were made in accordance with his warrants, an accurate account of which was in his office, and from which he could tell how much money ought to be on hand; also it was the duty of the auditor to make monthly settlements with the treasurer of the receipts and disbursements of the money in the treasury of every description, etc. The auditor could and should ascertain from his own books how much money the treasurer had received during the month, and how much he had been authorized to pay out; and it was his duty to *ascertain* whether the money on hand in the treasury agreed with the books of the treasurer, &c. As before said, he could tell whether the books of the treasurer truly showed the amount of money that had been received and the amount authorized to be paid out, and by making a deduction of any outstanding checks that had been issued by the treasurer on his warrants he could tell whether the money on had agreed with the treasurer's books.

Merely settling by comparing the balance sheets of the auditor's and treasurer's books, and thereby ascertaining the respective amounts of the receipts and expenditures, was not a compliance with the statute *supra*. Under such practice the treasurer could steal for two years, which the statute *supra* was designed to prevent; also in the biennial settlement of the treasurer's accounts, as required by section 4, article 1, chapter 108, General Statutes, the auditor's books, if correctly and truly kept, would show the amount of money, and by whom paid, that went into the treasury during said term, and the amount of disbursements, and to whom, during said term; also he could, without involving an unreasonable task, count the money in the treasury and ascertain whether the same was correct, or, if the same was in the banks used as depositories, personally apply to them for the correct amounts.

If some of the public debtors had paid by checks drawn on some one of the banks of the State, and the same had not been collected, the auditor's books would show that permits had been granted for these amounts, and the exhibition of the checks themselves would show that they had not been collected; or, if they had been forwarded by any one of the three banks, used by the treasurer as State depositories, and had or had not been collected, the same could be ascertained at such bank. Or, if the treasurer had exhibited a list of checks drawn in favor of any creditors of the State on any one of said banks, the auditor, by simply comparing them with the corresponding warrants and receipts, could tell whether they were authorized; and the actual amount of money in the treasury or banks

would show how many of these checks had been paid to the creditors, and how much money had been received on the checks given to them by the State's creditors. The law requires these duties of said officers in making their monthly and biennial settlements of the treasurer's accounts, &c., in order to additionally secure the safety of the public money, and to speedily and certainly detect and expose any theft of it by the treasurer.

On the 7th of January, 1884, the biennial settlement of the treasurer's accounts was made as of the 31st of December next preceding. Between the 31st of December and the 7th of January the treasurer, upon the permits of the auditor, had received about $75,000. It seems that the treasurer took a sufficiency of this sum to make his books correspond with the auditor's down to the 31st of December, and then entered the amounts making up the $75,000 as of the proper dates in the months of January; thereby the books down to December 31st were made to balance, and the January statement was made to appear all right. Why did not the auditor and secretary detect this fraud? The auditor says it was because he did not consult his books in reference to said matter on the occasion of said settlement; that said settlement was made by the treasurer's books alone. This the auditor says was "not excusable, of course." He also states that the treasurer's accounts at the banks were not personally examined; but that the treasurer's entries and evidences of the same were relied on in ascertaining the amount of the public money therein. We have been thus particular to state the auditor's and secretary's duties, and their alleged omissions of duties, without meaning to cast any personal reflections on either of them.

But the statements are made in view of the fact that the appellees rely upon these supposed omissions as a breach of contract on the part of the State or as an estoppel, whereby the appellees are released from liability on said bond, which propositions we will proceed to discuss.

The appellees went the sureties of Tate that he would faithfully and diligently discharge all the duties of his office. There were no conditions or provisos attached to this undertaking. If he could not have stolen, except by the auditor's connivance or negligence, a fact not decided as established, and he was thus enabled to steal, it was nevertheless a breach of faith on his part for which his sureties are liable. The lawmakers attempted to hedge him in with safeguards so that he could not steal without the theft being almost immediately discovered and him deprived of his office if the officer or officers, whose duty it was to look after him, did their duty; nevertheless he was required to give bond, with sureties, in a large sum that he would faithfully discharge his duties. Also the auditor was not the trusted supervisor of the treasurer; for he, too, was required to give bond for the faithful discharge of his duties. The fact that this officer might be negligent did not license Tate to steal; it nevertheless was his duty to be faithful and diligent, and the appellees covenanted that he would be. If it were true that the auditor's negligence made it imperative on Tate to steal, it might be then justly said that the appellees ought to be released. But the auditor's negligence did not have this effect; it was the duty of Tate not to steal, notwithstanding the auditor's and secretary's negligence, &c., and the appellees covenanted that they would be responsible if he did. It was not the auditor's and secretary's faithful discharge of duty that was to guarantee that Tate would faithfully and diligently discharge his, but the appellees covenanted that they would guarantee that fact, and be responsible for his failure.

The Commonwealth invested the auditor and secretary of State with the powers above mentioned, not as a guarantee to the sureties of Tate that he would faithfully discharge his duties. If such had been the purpose there would have been no need of Tate giving security for the faithful discharge of his duties; but the power was given to them as an additional guarantee to the people. Hence the law required Tate to give bond, with sufficient sureties, that he would faithfully and diligently discharge his duties. And not being satisfied with this security alone, additional safeguards were thrown around his official conduct in the way of preventing his stealing, and speedily detecting the same, as additional security to the people; and as still an additional security to the people bond, with sufficient sureties, were required of the auditor that he would faithfully and diligently discharge his duties. We concede that these duties were mandatory upon the auditor. But it does not follow that Tate's sureties are not also responsible; for both bonds were required as independent secureties to the people. It was supposed that the auditor might be faithless, negligent, or *particeps criminis* with the treasurer, consequently he was required to give bond for the faithful discharge of his duties. Hence it can not be said that he was the trusted agent of the State any more than was Tate. Each gave bond for the faithful and diligent discharge of his duties. Each covenanted to be faithful and diligent independently of the action of the other. The State required this covenant. The *particeps*, even if such were the case, or negligence of the auditor or the secretary made Tate none the less a criminal, and his sureties none the less responsible for his defalcation. Tate was expressly informed by the statute that he must not obey the auditor in the exercise of unlawful authority, if he attempted it. Each bound himself with sureties that he would do his duty independently of the conduct of the other. The law required this as independent and additional security to the people. The following language, in Taylor v. The Bank of Kentucky, 2 J. J. M., 564, is, as far as the principal is concerned, applicable here: "Suppose these several agents combine to defraud their principal, is the one excused by the fact that the other is *particeps*? Is the surety of one exonerated because the other has co-operated in the malfeasance? Or suppose one connive at the fraud or improper conduct of the other, is the employer responsible because one of its agents knew of the delinquency and might have prevented its occurrence? * * If A employ an agent to transact particular business, and exact from him security for his fidelity, and constitute another agent to perform other associate and supervisory functions, surely, if they both conspire to defraud their constituent, the security shall not be permitted to say that the act of the agent is that of the principal." It is clear from what has been said that the duties of the auditor and secretary did not form a part of the contract with Tate's sureties. Nor did their conduct estop the State from proceeding against the sureties.

The pleadings concede that Tate was a defaulter prior to 1882, but it is denied that he committed any acts of defalcation in 1882 and 1883. It is alleged that he carried these prior defalcations over, and was charged with the amount of them in his biennial settlement of the first Monday of January, 1882, which went to make up the $512,000, or the $482,000, supposed to be on hand as cash at that time. It is also alleged that the appellees are not responsible for the same. It was the duty of Tate to safely keep the public money in the treasury, and not to apply the same to his own use, or to that of another, unless authorized by the warrant of the auditor, and any

such application would be an unlawful conversion, for which the sureties on his bond for that term would be liable; and he could not thus carry an account with the State over to the next term and make his sureties for that term liable for it. The conversion occurred at the moment of the appropriation, and, *eo instanti*, the sureties on his existing bond became liable for it; and to make his sureties on a subsequent bond liable for it would be to make them liable for money not on hand at the time they became bound as sureties, nor that come to hand during said term.

After the appellant had concluded its evidence the court instructed the jury to find for the appellees. This they did.

The record states that it contains all the evidence introduced or offered by the appellant. This statement complies with the law. But the record shows that auditor's books, treasurer's books, the bank books, Tate's reports to the legislature, his stubs and pass books were all considered as read to the jury, the pass books, however, were rejected as evidence. These books, &c., are not before the court, and the appellees contend that we must presume that they contained evidence that authorized the court to give said peremptory instruction. As said, it was admitted that Tate had committed defalcations, and the question was whether or not he had committed them during his term of 1882 and 1883. It is sufficient to say that the evidence tended to show that a part of the defalcations was committed during said term. It has been held by this court time and again that if the plaintiff's evidence tends to make out his side of the issue in whole or in part, it is the duty of the court not to take the case from the jury, but to let them pass upon the issue, although the court might be of the opinion that if there was a verdict for the plaintiff it should be set aside. Also in such case the issue should be submitted to the jury, although in the opinion of the court the evidence on the other side was overwhelming. The jury have the exclusive right to weigh and pass upon the evidence, and for the court to take the case from them, because in its opinion the evidence on the other side overwhelms that on the other, would usurp the prerogative of the jury. We may presume that the books and other papers referred to would show all that is claimed; nevertheless the appellant had evidence before the jury that tended to support its side of the issue, and contradictory of the books, &c. And it was entitled to have the jury pass upon this conflict of evidence, although its evidence was weak and insignificant as compared with that which the books showed for the appellees. Had the jury passed upon the issue, and the case were here for review upon a record that showed all the evidence used before the jury was not here, then we would presume that the absent evidence authorized the verdict. The same rule obtains in trials by the court. But the rule does not obtain where the court has withdrawn the issue from the jury; in such case the only question is, was there evidence enough to entitle the party offering it to go to the jury? Easley v. Easley, 18 B. M., 93.

The auditor's and treasurer's books, including the pass books involving the treasurer's official transactions that showed his defalcations, are a great many, and for a jury to be required to investigate the books, item by item, in order to determine whether there was a defalcation, and when and to what extent, would devolve a duty upon them that they could not understand; therefore, it would suggest of itself at first blush that persons who were competent to investigate and understand the books, and had investigated them sufficiently to explain them to the jury in reference to the question

at issue, should be allowed to do so. Of course he should be able to tell what the books show in reference to these questions, and he should refer to the books themselves if required to do so. The pass book, according to the proof, was regularly and accurately kept by Tate in connection with the discharge of his duties, and it was competent for it to go to the jury as a part of his official transactions in a contest with his sureties on his bond.

The judgment is reversed, and the case is remanded, with directions to grant the appellant a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH V. TATE, &C.

(Filed Feb. 27, 1890.)

Pleading—Petition—In an action by the Commonwealth against the sureties on the bond of James W. Tate, State Treasurer, for defalcations amounting to $162,286.81, which occurred during his term of 1886 and 1887 or 1888 and 1889, the petition is in three paragraphs. In the first a cause of action is set up against the appellees as sureties on the bond for 1886 and 1887; in the second a cause of action is set up against the appellees as sureties on the bond for 1888 and 1889, with the exception that the amount of defalcation is left blank in each paragraph, while the third paragraph alleges that the defalcation occurred during said two terms, amounting to $162,286.81, but plaintiff was unable to state the amount of defalcation occurring during each term. The demurrer of appellees to each paragraph having been sustained on appeal by the Commonwealth, *Held*—That the third paragraph should have been treated as an addenda to the first and second, and that a cause of action is set out in the petition, treated as a whole, against the sureties, they being liable on both bonds for the defalcations occurring during both terms, may be sued on both bonds in the same action, under section 26 of the Civil Code of Practice. It is no objection to the maintenance of such action that the rights of the sureties to demand contribution from their co-sureties not sued would be better ascertained if a different form of proceeding was adopted. The sureties as to contribution must look out for themselves.

Thos. H. Hines and P. W. Hardin for appellant.

Wm. Lindsay, D. W. Lindsey, A. Duvall, F. Chinn, J. W. Rodman, W. A. Sudduth and P. B. Thompson, sr., for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The facts relating to the election of James W. Tate to the office of treasurer of this State, his repeated elections to said office, his suspension from office, impeachment and removal, are stated in the opinion in the case of James W. Tate and his sureties on his official bond for the term of 1882 and 1883, this day rendered.

This action is against his sureties on his official bonds for the two terms, one for 1886 and 1887, the other for 1888 and 1889, to recover the amount of said Tate's defalcations for either or both of said years.

The appellant, in paragraphs one and two, set out a cause of action on each bond, and filed a copy of the same with each paragraph, except the amount of defalcation occurring in each term was left blank.

The third paragraph reiterates substantially all the allegations of the first and second paragraphs, together with the additional statement that the amount of defalcation occurring in said two terms was $162,286.81; and that the appellant could not tell what portion of said defalcation occurred during the term of 1886 and 1887, or what part occurred in the term of 1888; but it did occur during said terms, but the fact as to the amount converted by Tate during each term was peculiarly within his knowlede.

The 26th section of the Civil Code provides: "Persons severally liable upon the same contract, and parties to bills of exchange, to promissory notes placed upon the footing of bills of exchange, or to common orders and checks, and *sureties on the same or separate instruments may all, or any of them, * * be included in the same action at the plaintiff's option.*"

According to this provision of the Code it seems that if the plaintiff holds two or more separate obligations, payable to himself, and the same sureties are to each obligation, all at the option of the plaintiff may be sued in the same action.

But where the principal is the same, and the sureties are in part the same to each instrument, there also can be no doubt of the right to include those that are the same to each instrument in the same action. The Code expressly provides that he may sue any of them at his option. Of course each obligation should be for the performance of the same class of duties.

While it is true that they all may be included in the same action, yet where there are two or more instruments, although the sureties sued are the same, each instrument should be set out in a separate paragraph in order to show the contract by which they became severally bound.

Here each bond is set out in a separate paragraph, and the same sureties on each bond are sued. The sureties that are on one bond and not on the other are not sued. The appellant as said had a right to include these in the same action. Whatever defalcation occurred during said two terms, all the sureties sued being the same on both bonds, are equally liable to the appellant for the whole amount, whether all of the defalcation occurred during either term or partly in both. And as said the foundation of the necessity of suing on each covenant is to show how they became bound. But the respective obligations make them severally bound for the entire defalcations that occurred during said two terms. And the appellant has the perfect right to sue and collect this money off of all or anyone of them. In suing and collecting its debt off of anyone of them it is not bound to so shape its suit as to preserve or facilitate appellees' remedies against their unsued co-sureties or against each other that is sued. It is true that it can not do anything to destroy the appellees' remedies against their co-sureties. But whatever the law authorizes it to do in the way of forcing the collection of its debt, although the pursuit of the remedy may cause incidental inconvenience and hardship and consequent loss to the parties sued, in reference to their remedies against their unsued co-sureties, or in reference to each other, it has the perfect right to do, else the law would not have given it such remedy. It is its debt that it is trying to collect by such means as the law gives. That law does not require it to pursue such a course as to preserve an easy remedy against the appellees' co-sureties. Their remedy against their co-sureties grows out of equities wholly independent of the appellant, and about which it has no concern whatever, except to do

nothing that will impair that right, save what may incidently grow out of its pursuit of its remedies.

Now, the petition shows on its face a cause of action against the appellees. The first and second paragraphs are defective only in not stating the amount of defalcation occurring during the term for which the bond was given. They both say that there was a conversion during each term, but the amount is left blank. The third paragraph says that during said two terms the said amount converted was upwards of $162,000.

The appellees are each bound to the appellant for this entire sum, the recovery of which the appellant is alone interested in looking after. The equities of the appellees in reference to contribution among each other, or in reference to contribution from the unsued co-sureties, the appellant is not one whit concerned. Its money is all it wants, and the appellees agreed to pay it. Suppose that the appellant's petition, by being in three paragraphs, is informal or defective by reason thereof, but, nevertheless, taken all in all, states a cause of action, and it certainly does, should the appellant be turned out of court on demurrer?

Pomeroy on Remedies, &c., section 549, says: "The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete and defective, such insufficiency pertaining, however, to the form, rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before trial to make the averments more definite and certain by amendment."

Here, as before said, the petition in the three paragraphs, sets forth a cause of action against each one of the appellees for the full amount claimed.

The first and second paragraphs were proper, as showing the respective obligations by which the appellees each became liable for the entire sum; and they are only liable for the entire sum by virtue of their being on each bond, otherwise the parties to each bond would only be liable for the defalcation that occurred during the term that such bond covered. Then, as the appellees were liable severally on each bond for the entire defalcation that occurred during the two terms, and as that liability required two paragraphs to set it forth, the only error consisted in the fact of having the third paragraph. Said paragraph should have been simply an addenda or continuation of the first and second paragraphs, and explaining why the respective amounts of Tate's conversions or defalcations in each was left blank. But it is said that the Code only authorizes a party to allege alternatively the existence of one or another fact, in case either constitutes the same cause of action.

If we concede this interpretation of the Code to be correct, then the appellees are confronted with the fact that each appellee is liable for the whole sum claimed. If the entire defalcation, if any, had occurred in either term, the appellees would have been liable for it, but the defalcation was scattered over two terms, and appellees equally are liable for it. In either case, as aforesaid, it constitutes but one liability. As to the question of contribution the appellees will have to look out for themselves. The appellant is, under the law, entitled to coerce the whole amount of the debt out of any one or all of them; and it is not bound to so shape its pleadings, or

to so shape its allegations as to make the appellees' right to contribution easy, or appear as to the amount, of record.

Upon the return of the cause the appellant should be allowed to amend its petition in conformity with the foregoing views.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

(Modified opinion—*Filed June* 17, 1890.)

Opinion modified by striking out of the original the following words, viz:

"Or, if each obligation has a different set of sureties, they all may nevertheless be joined in the same action at the plaintiff's option, provided the covenants are for the performance of substantially the same class of duties; for it is presumed that if the codifies had meant that the sureties should be the same to each obligation in order to entitle the plaintiff to join them in one action they would have said so. It could have been done by simply using the expression 'if the sureties be the same on,' preceding the word 'separate.' But they did not use this expression nor any expression of similar import. But the language used as before intimated entitles the plaintiff holding separate obligations with different sureties to each, if these obligations are for the performance of substantially the same thing, to include them all in one action. Of course in such case there would have to be the same principal to each obligation, otherwise there would have to be separate actions. We have been speaking of the case of a totally different set of sureties, but with the same principal to each instrument."

Also by striking out of the original the words "as between the appellant and appellees there is but one cause of action set out, although upon separate instruments; for," which were between the words "that" and "each" in the following sentence: "If we concede this interpretation of the Code to be correct, then the appellees are confronted with the fact that each appellee is liable for the whole sum claimed."

BRYAN, &C. V. BOARD OF EDUCATION OF THE KENTUCKY ANNUAL CONFERENCE OF THE M. E. CHURCH, SOUTH, &C.

(*Filed March* 15, 1890.)

1. *Constitutional law—Vested rights*—In 1858, at a meeting of the citizens of Millersburg for the purpose of devising means of establishing an institution of learning, a resolution was adopted pledging the members who should subscribe to pay the amounts subscribed on the following conditions: *First*. That it be an institute for the Covington District Kentucky Conference, and under control of the Methodist Episcopal Church, South. *Second*. That the trustees and building committee be appointed by the Quarterly Conference of the Millersburg Station, the former to be subject to approval of the conference. *Third*. That it be upon the joint stock principle, the shares, $25 each, subject to sale and transfer. *Fourth*. That in case said church fails to sustain the institute, and it be discontinued, the property to revert to the shareholders *pro rata*. On February 16, 1858, "An act to incorporate the Millersburg Male and Female Collegiate Institute" was passed, the preamble of which recited that divers citizens in and near the town of Millersburg, in Bourbon county, had subscribed considerable sums of money for the purpose of erecting in or near said town a seminary of learning, to be under the control and supervision of the Kentucky Annual

Conference of the Methodist Episcopal Church, South. By the provisions of the act certain persons were named as trustees, with power to receive additional subscription, and to establish rules for the government of the institution. But the Quarterly Conference of the Millersburg Station was empowered to appoint trustees subject to approval of the Annual Conference. Section 4 provided that the shares of stock should be $25, and for a reversion of the property to the stockholders in case of abandonment or relinquishment of control by the Methodist Church. By section 5 the right to amend or repeal the act was reserved to the Legislature. In September, 1858, the trustees presented to the Annual Conference a written memorial, stating that the charter had been secured, and subscriptions of stock secured, amounting to $7,500, a suitable lot purchased, and steps taken to erect necessary buildings, and requesting conference to accept the subscriptions, land, &c., upon the terms set forth in the charter, which was done, and at the same time conference resolved to raise an additional sum of $10,000, to be subscribed as stock, and to constitute an educational fund. It was subsequently, during the same session, agreed that each party should raise an additional subscription of $10,000. In September, 1858, the board of education appointed by conference, which had not then been created a body-corporate, agreed to change the plan of the college, making it a larger institution, and to this end proposed that if the original stockholders would raise $10,000 in addition to the $10,000 already pledged by them, the entire amount of $20,000 thus raised to be invested in the erection of buildings, for which they would issue scholarships for said $20,000, provided their amount of stock in that case was surrendered in lieu of said scholarships to the Kentucky Annual Conference of the Methodist Episcopal Church, South. This plan having been submitted to the original stockholders assembled in Millersburg, was, without dissent, accepted by those present, and the scholarships were afterwards accepted in lieu of their stock. In the following year the plan proposed by the board of education was approved by the Annual Conference, and by direction of that body, on January 12, 1860, "An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South," was passed by the Legislature, which authorized the board of education to carry out the erection of a college as provided in said act. Section 11 of that act is as follows: "That an act to incorporate the Millersburg Male and Female Collegiate Institute, approved February 16, 1858, be, and the same is hereby repealed." Section 12 reserved to the Legislature the right to amend or repeal the act. On September 17, 1861, the board of education procured the passage of an amendment to the act of January 12, 1860, section 1 of which directed the trustees of the Millersburg Male and Female Collegiate Institute, who were in office when the charter of that institute was repealed, to convey its property to the Board of Education of the Kentucky Annual Conference, which deed of conveyance was shortly thereafter duly executed and recorded in the Bourbon County Court clerk's office. Section 2 of said amendment provided that nothing contained in the act incorporating said board, approved January 12, 1860, should be so construed as to prevent the removal of said college from Millersburg to any other place within the bounds of the Kentucky Annual Conference. In 1886 the Annual Conference adopted a resolution appointing a committee to receive and pass upon any proposal looking to a continuance of the college in Millersburg or its removal, their action to be binding. In 1887 said committee reported to conference in favor of accepting a proposition from the citizens of Winchester for the removal of the college to that place, which report was approved by the conference, and a removal of the college directed to be made, which action has been enjoined by appellant and seven other shareholders in the board of education. *Held*—That the citizens of Millersburg and subscribers to the board of education have no vested rights which require that the college should remain in Millersburg.

2. *Same—Repealing act*—Section 11 of the act of January 12, 1860, is unconstitutional, because relating to the repeal of the act incorporating the

Millersburg Male and Female Collegiate Institute, a subject not embraced in its title. The repeal of that act was not necessary, as that corporation had practically ceased to exist when it contracted with the board of education.

3. *Same—Judicial act*—Section 2 of act of September 17, 1861, is not unconstitutional, although declatory of the meaning of a former act is not judicial in its nature.

4. *Same—Impairing obligation of contract*—Section 2 of act of September 17, 1861, does not impair the obligation of any contract, and is, therefore, not in violation of the Constitution of the United States.

Hargis & Eastin, Thos. H. Hines and Lockhart & Lyng for appellants.

B. F. Buckner, D. L. Thornton and W. A. Sudduth for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Lewis.

This action was brought by G. W. Bryan and seven associates for themselves and other shareholders in the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and in the Millersburg Male and Female Collegiate Institute, against said board for an injunction, that was granted temporarily, restraining defendant from selling or disposing of a certain lot of land and buildings of the Kentucky Wesleyan College, or removing its capital or property from Millersburg to Winchester, or using any of such capital of fund for any other purpose, or at any other place, than proper conduct and management of the college at Millersburg.

It appears that in January, 1858, a meeting of citizens of Millersburg was held to devise means to purchase land and such buildings for an institution of learning and boarding-house, to cost about $15,000, and to be under supervision of some denomination. At that meeting a resolution was adopted, pledging the members for the amounts respectively subscribed, in order to secure a male and female collegiate institute at that place, on the following conditions: "One. That it be an institute for the Covington District Kentucky Conference, and under control of the Methodist Episcopal Church, South. Two. That the trustees and building committee be appointed by the Quarterly Conference of the Millersburg Station, the former to be subject to approval of the conference. Three. That it be upon the joint stock principle, the shares, $25 each, subject to sale and transfer. Four. That in case said church fail to sustain the institute, and it, for any cause, be discontinued, the property to revert to the stockholders *pro rata*."

To carry out the enterprise thus stated "An act to incorporate the Millersburg Male and Female Collegiate Institute" was passed February 16, 1858, the preamble thereof being as follows: "Whereas, divers citizens in and near the town of Millersburg, in the county of Bourbon, have subscribed a considerable sum of money for the purpose of erecting in or near said town a seminary of learning, to be under control and supervision of the Kentucky Annual Conference of the Methodist Episcopal Church, South."

By provisions of the act Wm. Nunn and others were constituted a body-corporate, by name of "Trustees of the Millersburg Male and Female Collegiate Institute," with power to receive additional subscriptions and donations in aid of the institute, and to establish rules for its government. But the Quarterly Conference of the Millersburg Station was empowered to appoint trustees, subject to approval of the Annual Conference.

Section 4 is as follows: "All persons who shall subscribe $25 or more in aid of said institute shall be stockholders therein, said sum to constitute a share. And if said Methodist Church shall ever relinquish or surrender, or cease to exercise a control over said institute, then, in that case, its control and management shall revert to, and vest in, said stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees. And if said corporation shall cease to exist or be dissolved, or its charter surrendered or repealed, all its property, of every kind and description, shall vest in said stockholders in proportion to their respective shares."

By section 5 the right to amend or repeal the act was reserved to the Legislature.

September, 1858, the trustees presented to the Annual Conference, in session at Millersburg, a written memorial, stating the charter had been secured, subscriptions of stock, amounting to $7,500, obtained, a suitable lot of land purchased and steps taken to erect necessary buildings, and requesting conference to accept the subscriptions, land, &c., upon the terms set forth in the charter, which was done. And conference at the same time resolved to raise an additional sum of $10,000, to be subscribed as its stock in the institute, and to constitute its educational fund.

But it was subsequently, though during the same session of conference, agreed between it and the original stockholders for the charter to be so amended as to make it a male, instead of mixed, school, and that each party would raise an additional subscription of $10,000.

However, September 30, 1858, the board of education appointed by conference, though not then made by statute a corporation, at a meeting of its members, desired a different and enlarged plan, which involved founding a first-class college, having an endowment fund of $20,000, one-half of which it was designed to raise by issue and sale of scholarships. But, according to that scheme, no part of the capital raised for the educational fund was to be appropriated to pay salaries of professors, nor any other expenses, only $10,000 thereof as already pledged by conference to be used for erecting college buildings. And, at the same time, as a part of the plan the following proposition was made: "That if the original stockholders of the Millersburg Male and Female Collegiate Institute will raise in Bourbon county, and that portion of Nicholas lying in the vicinity of Millersburg, $10,000, in addition to $10,000 already pledged by them, the entire amount of $20,000 thus raised to be invested in the erection of the buildings, we will issue scholarships for said $20,000 on the same terms as to others, provided their amount of stock in that case be surrendered, in lieu of said issue of scholarships, to the Kentucky Annual Conference of the Methodist Episcopal Church, South, to be held by said conference as part of the educational fund."

The plan of the board of education having, October 1, 1858, been submitted to the original stockholders assembled in Millersburg, was, without dissent, accepted by those present. And we think it sufficiently established that either at that time, or even after, it was agreed to, and scholarships received in lieu of their stock by all of them.

September, 1859, the plan proposed by the board of education, and acceptance by the original stockholders, were reported to, and approved by, the Annual Conference held in Georgetown. And by direction of that body an act was applied for, and January 12, 1860, passed by the Legislature, entitled "An act to incorporate the Board

of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South," the preamble thereof being as follows: "Whereas, the Kentucky Conference of the Methodist Episcopal Church, South, has resolved to form an educational fund, and establish a college for the promotion of literature, science, morality and religion within the limits of said conference, and having, in fact, secured the sum of $57,000 in cash and reliable notes, and located an institution at Millersburg, Bourbon county, which is now ready for occupancy, in order to give full legal effect thereto."

By provisions of the act certain persons were constituted a corporate body, by name of "The Board of Education of the Kentucky Conference of the Methodist Episcopal Church, South," and invested with authority to carry out the purposes set out in the preamble, subject, however, to control of the Annual Conference.

Section 11 is as follows: "That an act to incorporate the Millersburg Male and Female Collegiate Institute, approved February 16, 1858, be, and the same is hereby, repealed." And by section 12 the Legislature reserved the right to amend or repeal the act.

September 17, 1861, the board of education procured the passage of an act amending the one of January 12, 1860, section 1 thereof being as follows: "That it shall be lawful for the trustees of the Millersburg Male and Female Collegiate Institute, who were in office January 12, 1860, when the act incorporating said institute was repealed, or their successors, to convey by deed to the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, the property held by said trustees in or near the town of Millersburg, for the purpose of carrying into effect any contract made by said trustees, as stockholders of said institute, with said board, and their conveyance recorded in the proper office, shall be effectual to pass title of said property to said board, and their successors."

By section 2 it is provided that "nothing contained in the act incorporating said board, approved January 12, 1860, shall be construed so as to prevent or hinder said board, or their successors, from removing the seat of their college from Millersburg to any other place in the bounds of the Kentucky Annual Conference."

The action of the board of education was duly reported to the Annual Conference held in Paris, September 25, 1861, and the act mentioned was by it accepted. And in November, 1861, the trustees of Millersburg Male and Female Collegiate Institute by deed, recorded in the Bourbon county court clerk's office, conveyed the lot in question to the board of education.

In September, 1886, the Annual Conference, held in Winchester, adopted a resolution for appointment of a committee of twenty, including members of the board of education, to receive and pass upon "any proposal looking to continuance in Millersburg, or removal of Kentucky Wesleyan College," their action to be binding and final. And September, 1887, that committee reported to the Annual Conference, held in Covington, acceptance by it of a proposition made by citizens of Winchester, to give five acres of land on which to erect buildings, and $35,000, upon condition the college be removed from Millersburg to that place. And thereupon conference approved the committee's action, and directed the removal made, but it has been so far prevented by the injunction mentioned.

It seems to us the original stockholders of the Millersburg Male and Female Collegiate Institute are not in a position to question either the efficiency or validity, except as to section 11, of the act of January, 1860. For it is not only in strict pursuance of, and entirely

consistent with, but was indispensable to carry out the plan of the board of education, which they accepted without, so far as this record shows, any dissent, and have had the benefit and enjoyment of ever since.

Section 11 is in conflict with section 37, article 2 of the State Constitution, and, therefore, void, because repeal of the charter of February 16, 1858, which was sought to be accomplished by it, does not relate to, nor is embraced by, the subject expressed in the title of the act of January, 1860. But repeal of that charter was not actually necessary, because the corporation created by it ceased to exist after the contract made between the original stockholders and board of education, whereby the latter acquired for the use of the Kentucky Wesleyan College possession of, and equitable title to, all property of the Millersburg Male and Female Collegiate Institute, and the trustees thereof were deprived of their function, and divested of every right, except the naked legal title. And as section 1 of the act of September 17, 1861, merely empowered those trustees to convey that property to the board of education, which they might have without, been coerced to do by a court of equity, no injury was done by it.

It thus results that the decisive question in this case is whether section 2 of the last-named act is valid?

Counsel for appellant contends it is unconstitutional, because, being declaratory of the meaning of the act of 1860, already passed, and not enactment of what should thereafter be law in that regard, it is in its nature judicial and not legislative. "But, in any case, the substance of the legislative action should be regarded, rather than form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it without too nicely inquiring whether the mode, by which the new rule is established, is or is not the best." Cooley's Con. Lim., 115. And as, therefore, the power of removal had not been expressly granted by the act of 1860, incorporating the board of education, and could not have been exercised without, section 2 of the act of 1860 may fairly, and should, be regarded as intended to then give it.

Counsel for appellee contends that in virtue of the reservation contained in section 12 of the act of 1860 the Legislature had the unqualified right to enact section 2 of the act of 1861 as an amendment. But it seems to us, in view of the purpose of the act of 1860, which was to effectuate the contract previously made between the original stockholders and board of education, the power to amend reserved by the Legislature could not have been exercised to the prejudice of vested rights, if such existed. And at last the inquiry arises whether the section in question is, in meaning of the United States Constitution, a law impairing the obligation of a contract.

The Male and Female Collegiate Institute, projected in January, 1858, was evidently intended to be local in character, established and sustained principally, if not wholly, by citizens of Millersburg and vicinity. And, although by the act of February, 1858, the Quarterly Conference of Millersburg Station was empowered to appoint trustees, and the control and supervision of the institute was given to the Annual Conference, still, at the time the memorial heretofore mentioned was presented to that body, no stock had been subscribed, except by citizens of Millersburg and vicinity, nor did they, in virtue of contract or otherwise, have a right to, or reasonable expectation of, assistance from others. It was, therefore, then necessary, in order to protect their rights, and in the power of the original stockholders to

provide, as was done in section 4 of that act, that in case the corporation thereby created ceased to exist, or was dissolved, or its charter was surrendered or repealed, all its property should vest in the stockholders in proportion to their respective shares.

But by the plan subsequently adopted, what was at first intended to be and in the preamble to the act of February, 1858, called a seminary, was changed to a first-class college, for the endowment and support of which aid of the Annual Conference was pledged; the stock subscribed originally, with the single object of buying a lot and erecting buildings suitable for a seminary, was voluntarily commuted by the owners for scholarships in the college; an endowment fund of $200,000 was contemplated, of which nearly $100,000 was agreed to be paid for scholarships sold to persons residing in different parts of the conference bounds, and the title and possession of all the property passed to the board of education, to constitute part of the endowment fund, where it remained, without dispute or protest, from 1860 to the institution of this action.

Neither the contract between the original stockholders and board of education, nor act of 1860, contains an express condition that the title of the property which became part of the endowment fund was to be held upon condition the college be forever conducted and maintained at Millersburg, and nowhere else within the territorial limits of the Annual Conference; and such condition exists, if at all, by implication only.

But the law does not presume a party entitled to a right, or benefit of reservation claimed under contract, in the absence of an express stipulation, except such as reason and justice dictates.

Not only those residing elsewhere, but as well residents of Millersburg and vicinity, must be presumed to have regarded the establishment and successful maintainance of a first-class college under the patronage and control of the Annual Conference as the first and main consideration for the outlay of money made, and the particular locality as of secondary importance. And, therefore, all that can be fairly and reasonably implied in behalf of the citizens of Millersburg is that they expected and believed successful operation of the institution would prove more compatible with continuance of it at that place.

To now imply any thing else or more would not only involve the absurdity of hazarding or sacrificing an institution of learning, the successful and useful operation of which, within the bounds of conference, was clearly the main inducement for the great outlay already made, but be in disregard of the rights and interests of those residing elsewhere than at Millersburg, who have contributed, either by purchasing scholarship or donations, very much more than has been raised at that place.

There is mention made in the act of 1860, and also in the certificates of scholarship, of the college being established at Millersburg, but the language used does not import an agreement it shall permanently remain there; on the contrary, we think it showed, as can fairly be interpreted, merely description of the institution.

In our opinion, therefore, there exists no contract or understanding, express or implied, for continuance of the institution at Millersburg any longer than its useful and successful operation requires. And as the power of removal was conferred by the act of 1861, which all parties interested must manifestly have been aware of, accepted and acquiesced in for more than a quarter of a century, it is now too late to call it in question.

And, in the absence of fraud, the board of education, controlled

by the Annual Conference, must be presumed to have acted in good faith, and under belief success of the college required the removal from Millersburg to Winchester. Consequently we need not inquire whether they are or not pursuing the wisest policy, especially as the evidence shows the college has so far been a failure at its present location.

Judgment affirmed. .

CASEY V. CASEY, &C.

(*Filed March* 20, 1880—*Not to be reported.*)

1. *Decedent's estate—Void sale by executor*—A purchaser of land sold by an executor under a void power of attorney from the devisees took the estate subject to the debts of the decedent, as the will conferred no power of sale upon the executor.

2. *Exceptions to claims*—A purchaser of real estate of decedent at a void sale can not except to allowance of claims against the estate.

Geo. R. McKee and Wm. Lindsay for appellant.

Hallam & Myers for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

This court, in a former opinion rendered, held that the executor had no power to sell the real estate of the testator under the power of attorney, executed to him by the devisees, and as the will gave no such power, Worthington, the purchaser from the executor, acquired no title, except the title of the devisees, who united in or authorized the sale. The testator had provided in his will the mode of distributing his estate between the devisees, and for the protection of Worthington, the purchaser, it was further held that if there was an estate sufficient, after the payment of debts, to give to the appellants, Mrs. Smith, &c., their interest, without disturbing the purchaser, it should be done. This depended on the amount of the indebtedness.

On the return of the case, when the case went to the commissioner, the debts due the banks and others by the testator, that were recovered by the devisees, was held by the chancellor not to be debts due by his estate, and that the failure of the appellants, Mrs. Smith, &c., to except to those debts as proper vouchers against the estate was such laches on her part as relieved the property purchased by Worthington from any claim she had upon it, upon the idea that if these claims had been disallowed there would have been property or an estate sufficient to pay these appellants without disturbing the purchaser. It may be well argued that as this question could have been raised on the former appeal, the claims having been already allowed, or no exceptions taken to them, the whole matter was *res adjudicata;* but whether so or not, they were claims against the estate, although paid, or the notes renewed by the executor or the devisees.

In the absence of fraud or bad faith Worthington would not be allowed to say that in the settlement of the claims against the estate that certain claims ought not to have been allowed, and would not if exceptions had been filed by the devisees. He had purchased property to which he had no title. It belonged to the estate of the

testator. A court of competent jurisdiction had said that the claims were just, and if the appellants have not received their distributable portion of the estate under the will of Casey the property purchased by Worthington, or its proceeds, must be subjected to the payment of what she is entitled to, as indicated and adjudged in the former opinion.

The judgment is, therefore, reversed and remanded, with directions to distribute the estate as heretofore directed, and for proceedings consistent with this opinion.

JOHNSON V. COMMONWEALTH.

(*Filed March* 22, 1890.)

1. *Receiving a bribe—Indictment*—An indictment charging appellant with receiving a bribe to vote for a certain candidate for a seat in the House of Representatives of the United States, was defective in failing to state where the vote was cast, or that an election was held in the county in which the indictment was found for such representative.

2. *Appeals—Jurisdiction*—Although the penalty imposed by the lower court was a fine of only $10, yet the judgment of the court adding the exclusion of appellant from office and suffrage, the Court of Appeals has jurisdiction of the case, as exclusion from office and suffrage is a violation of a most sacred right of a citizen.

3. *Instructions*—The Commonwealth having proved by one witness that he loaned appellant $5, but not to influence his vote in any manner, but did not know that he would have loaned it but for the election, and that the appellant entertained the same political views as the witness, the court, on motion of appellant, erroneously refused to instruct the jury to find appellant not guilty. The court erred in refusing to instruct the jury that before they could find appellant guilty they must believe the money was given to him by the witness for the purpose of influencing his vote, and that for said money the accused did vote for the party stated in the indictment, and that if the money was in good faith loaned the accused is not guilty.

J. D. Jones for appellant.

P. W. Hardin for appellee.

Appeal from Carter Criminal Court.

Opinion of the court by Judge Pryor.

The appellant, James Johnson, was indicted by a grand jury of the Carter Criminal Court of the offense of unlawfully receiving a bribe in money, paid to him by one Strother. That for a consideration in money, paid to him by Strother, he voted for T. H. Paynter, who was at the time a candidate for a seat in the House of Representatives of the United States. There was a demurrer to the indictment for a failure to allege where the vote was cast, or that an election was held in the county of Carter for representative. While the indictment should have been more specific and the demurrer sustained, it is proper to notice other grounds raised, and upon which this case will be finally determined in the court below.

It is first insisted by the attorney for the State that the appeal should be dismissed, as it is an indictment for a misdemeanor, and the fine imposed is only $10. The Code gives this court jurisdiction

(now belonging to the Superior Court) when the fine exceeds $50. Section 347, Carroll's Code.

This being a misdemeanor by statute, it is urged that the extent of the punishment can not give the jurisdiction unless the fine exceeds $50. There is no imprisonment imposed in this case, and the fine made at $10 only, which is much less than the sum fixed by the statute. It provides that "any person guilty of receiving a bribe for his vote at an election, or for his services or influence in procuring a vote or votes at an election, shall be fined from $50 to $500, and be excluded from office and suffrage."

How the jury arrived at the amount of a fine not authorized by the statute is not explained, but, if the party is guilty, the fact that he was made to pay a less fine than that authorized by the statute to be imposed affords no ground for a reversal, and if this was the only punishment inflicted the appeal would be dismissed. It is plain that if the fine had been $500, the limit prescribed by the statute, the Superior Court would have had the jurisdiction, and a denial of the right of suffrage being annexed to the penalty and imposed by the court below, the jurisdiction of this court would attach, as a franchise involving the inestimable right of suffrage is directly involved in the issue. The court below, after the verdict of guilty, pronounced this judgment: "And it is further adjudged by the court that the defendant shall hereafter be disqualified from holding or discharging the duties of any office of honor, trust or profit under the laws of this State or any town, city or municipality thereof, and prohibited from exercising the right of suffrage within the State of Kentucky during his natural life." That dollars and cents are to be more highly valued in determining the jurisdiction of this court by reason of the statute than the right of suffrage, or the infliction of a punishment that degrades the offender for all time, can not be conceded; and while the offense is termed a misdemeanor, the deprivation of such a right will be treated in this court as a direct proceeding to deprive the offender of the rights of a citizen, and the judgment entered by the court below, depriving the appellant of the right to vote and of the right to hold office, being the result of the verdict imposing the fine, this court will necessarily assume jurisdiction of the entire judgment. It was never contemplated by the law-making power that an appeal could be prosecuted from the judgment imposing a fine of $500, and not from a judgment entered by the court, based on a verdict for that amount or a less sum by which, during the natural life of the offender, he is prohibited from voting, and from holding any office of trust or profit within this Commonwealth. "The offense is a high misdemeanor, and depriving the citizen of a most sacred right, he can be heard in this court." Clark v. Commonwealth, 87 Ky., 42.

Strother, the witness for the State, says "that he loaned the appellant $5, but not to influence his vote in any manner, but did not know that he would have loaned it but for the election; that the accused entertained the same political views that the witness did."

On this testimony, it being all introduced by the State, the defense moved to dismiss the indictment, because no offense had been proven. The court refused the instruction. This was error. The distinct charge was that the accused had voted for Paynter for Congress and received a bribe to do so.

The voting was by ballot, and there was no evidence by the State that any such vote was cast.

The system of voting by ballot is based upon the idea that it makes

the action of the voter independent, and to enable him to vote for whom he pleases..

No one has the right to examine the ballot of the voter, or to testify as to its contents, with a knowledge acquired in any other mode than the information given him by the voter himself. His ballot, says Mr. Justice Cooley, "is absolutely privileged, and the veil of secrecy should be impenetrable, unless the voter voluntarily lifts it." Court Limitation, page 763. It places the voter beyond the influence of wealth and power, and if the manner of his voting is open to investigation as any other issue, the virtue of the entire system is destroyed.

The jury, therefore, had no right to speculate as to the person for whom the vote was cast, or to reach such a conclusion from the former political convictions of the accused. The motion to dismiss should have been sustained. The court below having refused to dismiss the case the accused then testified, substantially, as the witness for the State, but admitted that he voted for Paynter. At the conclusion of the testimony the court instructed the jury that if the accused, in consideration of a bribe in money paid him by Strother, voted for Paynter, they must find the defendant guilty. The defendant then asked the court to say to the jury, in effect, that they must believe the money was given to him by Strother for the purpose of influencing his vote, and that for said money the accused did vote for Paynter. That if the money was, in good faith, loaned, the accused is not guilty.

This is, in substance, the instructions asked by defendant and refused. What conclusion the jury reached as to the facts necessary to constitute bribing does not appear, but we see no reason for refusing an instruction, based upon testimony conducing to show at least that it was a loan of the money in good faith, and not for the purpose of influencing the vote for Paynter. The defense, in so far as it was sustained by the testimony, should have been presented to the jury, and the failure to do so may have led their minds to the conclusion that a case of bribery had been made out.

The judgment below is reversed and remanded for proceedings consistent with this opinion. A new trial will be granted.

HOLMES, &C. V. HERRINGER, &C.

(Filed April 3, 1890—Not to be reported.)

Ejectment—Instructions—In an action by the owners of two adjacent tracts of land, held under the same patent, to settle a disputed division line, *Held* -The court erroneously instructed the jury that they "should find for the plaintiff as to the land in controversy unless they find from the evidence that the defendant, and those under whom he claims, had been in the actual possession of the land, or some part thereof, by themselves or their tenants, with claim of ownership up to a defined boundary, openly and continuously for fifteen years or more before the 10th day of August, 1886, in which case the jury should find for the defendant as to the whole or such part of the land, as the case may be, governed by the proof as hereinbefore stated." Said instruction assumed that defendant had possession of the land for fifteen years, while the true location of the division line was the only question proper for the jury to inquire about.

Jno. D. Ellis and Reiley & Reiley for appellants.

T. M. Hill for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Lewis.

The parcel of land in dispute in this case is 55-100 of an acre, and the question for consideration is as to the correctness of the following and only instruction of the court: "The jury should find for the plaintiff as to the land in contest, if they believe she has proven title to it, or any part of it, unless they find from the evidence that the defendant, and those under whom he claims, have been in the actual possession of the land, or any part thereof, by themselves or their tenants, with claims of title upon a defined boundary, holding openly, notoriously, continuously and adversely to all the world for as much as fifteen years next before the 10th day of August, 1886, in which case the jury should find for the defendant, as the case may be, according to the proof as hereinbefore stated."

It seems to us that instruction is erroneous, and was prejudicial to appellant, plaintiff below. For as both parties claim under the same patent, no question of superiority of title arises in the case. Nor has either acquired any legal advantage by adverse possession of the land in contest, for both parties having the undisputed title to, and possession of, two adjoining tracts respectively owned by them, must be regarded as claiming and holding up to the division line, wherever that may be, until one or the other, by actual inclosure, takes possession beyond.

It is true appellee did have the disputed land under fence when the action was commenced by appellant, but as there is no evidence whatever showing it had been so inclosed fifteen years, he acquired no right thereby. Consequently the jury must have understood the instruction as requiring the plaintiff to establish her title to the land in dispute by a regular chain while allowing possession of the defendant to extend over the parcel in dispute, whether actually within the boundary of the tract owned by him or not.

Whether the land in dispute belongs to one or other party depends upon the true location of the dividing line between them, which is also the original division line between Covington and Beall. For as this record stands, if that line is north, or to the extent it is north, of the parcel in contest, the plaintiff is entitled to recover, otherwise not. It is a simple issue of fact where that line is.

Judgment reversed, and cause remanded for new trial and further proceedings consistent with this opinion.

(Response to petition for rehearing—*Filed June* 5, 1890.)

In the opinion an instruction which, as now suggested by counsel, was actually refused, was considered by this court as having been given, and made the ground partly for reversing the judgment.

The instruction given is as follows: The jury should find for the plaintiff as to the land in controversy unless they find from the evidence that the defendant and those under whom he claims had been in the actual possession of the land, or some part thereof, by themselves or their tenants, with claim of ownership up to a defined boundary, openly and continuously for fifteen years or more before the 10th day of August, 1886, in which case the jury should find for the defendant as to the whole, or such part of the land, as the case may be, governed by the proof as hereinbefore stated."

Instead of requiring the plaintiff to prove title to the land in dispute, as would have been the case if the instruction we quoted in the opinion had been, as we by mistake stated was, given; the one

first quoted assumes the plaintiff did have title, which was prejudicial to the defendant, for, as stated in the opinion, there is no question of the title between the parties. But the instruction given was also erroneous and prejudicial to the plaintiff, because it required or authorized the jury to find for the defendant upon the hypothesis he had possession of the land in dispute fifteen years before commencement of the action, when it is clear that no possession, except by actual inclosure, could avail either party, for both had, in legal contemplation, possession up to the dividing line, wherever that may be, and, as the record now stands, the true location of that line is the only question for the jury to inquire about.

There is no evidence the defendant had any part of the disputed land inclosed anything like fifteen years, and the jury must have been by the instruction induced to believe possession by the defendant, of that part of his tract not in dispute, extended even to the place where he claims the dividing line to be, whether it be there or not.

Petition for rehearing overruled.

WICKLIFFE, &C. V. MAGRUDER, &C.

(*Filed April* 17, 1890—*Not to be reported.*)

1. *Dedication of passway by will*—The appellee having purchased land from an executor through which the owner had, by his will, dedicated a passway, describing it as a lane, had no authority to obstruct the passway or change it so as to place one-half of same on the land of his neighbor.

2. *Dedication of passway by lapse of time*—A passway having been used as a matter of right for more than fifteen years is presumed to have been dedicated as such.

N. W. Halstead, J. C. Beckham and C. T. Atkinson for appellants.

John D. Wickliffe for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bennett.

This action was instituted by the appellant, R. C. Wickliffe, against the appellee, Magruder, to prevent him from obstructing or changing a certain passway, and to compel him to remove certain obstructions which he had placed therein. The appellant, Wickliffe, claimed the right to said passway as it had existed before the said appellee obstructed or changed it. Said appellee denied the appellant's right to said passway as it existed before he changed or obstructed it, and asserted his right to make the change and obstruction, which change, he alleges, simply puts the center of the passway upon the line that divides the appellee's land from others; whereas, before the change the passway was on his land exclusively nearly all the way, and the change was only made to the extent of so arranging the passway, and resetting the fence accordingly as to have the passway seven and a half feet on the appellee's land, and an equal distance on his neighbor's land.

The parties own their respective lands by virtue of purchases from the executor of Wilson Bowman. Wilson Bowman died in 1858. In his will he authorized his executor to sell all his lands in Nelson

county. In the fourth clause of said will is this language: "The Caney Fork tract, upon the same terms and conditions as the above tracts, with the understanding in the sale of all the tracts there is to be a passway, at least fifteen feet wide, near or where the present lane is, to the public road."

There is no doubt that the foregoing language, though uncertain as to the precise location, is sufficient to dedicate a passway, if the same is accepted by the parties concerned; if not accepted, it would be regarded as a mere proposition to remain open only for a reasonable time, which would be considered impliedly withdrawn after the lapse of a reasonable time, without the acceptance having been made, which acceptance need not be evidenced by any formal act, but a use of it as a matter of right would be sufficient evidence of such acceptance. It is true that the language, abstractly considered, refers to a passway near or at any lane that might have been on said land leading to the public road, but the concurrent facts show what lane was referred to by the devisor, which facts are that the lane and passway were then in existence, and were then used as a passway to the public road. If there had been other lanes in that locality leading to the public road, and only one of them had been used as a passway, that fact would be sufficient to prevent the dedication from failing for uncertainty, and to establish the same as the one that the devisor meant to dedicate. The evidence is clear and overwhelming that said passway had been used and enjoyed as a passway ever since it was dedicated until it was changed by the appellee; that this use was not merely permissive, but as a right; that its location as a passway had not fluctuated, sometimes changed to one place and some times to another place, to suit the convenience of the neighbors, but it remained at the same place that it was at the time of the dedication until it was changed by the appellee, and had been used as a passway, as thus located, as a matter of right all of that time.

Even if there had been no dedication by the will of Wilson Bowman, the proof clearly establishes the fact that this particular strip of ground had been used as a passway as a matter of right, not merely permissive, for more than fifteen years before the time that the appellee obstructed its use, which fact, according to the case of O'Daniel v. O'Daniel, 10 KY. LAW REP., 760, constitutes a dedication of the said slip as a passway. Said slip having been dedicated as a passway, it follows that the appellee had no right to change it, even for the apparently equitable purpose of having one-half of it to rest on the appellee's land, and the other half to rest on his neighbor's land. The slip of land having been dedicated so as to give the right to its use where it then was, the appellee had no right to change it, and persons having a right to travel on said passway had no right to change it, or encroach upon the appellee's adjoining land. To allow such right would subject dedicated passways to changes *ad infinitum*, and greatly inconvenience the parties concerned. The change that might be considered by some beneficial and convenient would, in fact, inconvenience and discommode others, and place the passway upon ground not desirable. For these reasons it is best that the passway, when once established at a particular place, should remain at that place until changed by proper proceedings.

The fact that said passway was not reserved in the deed from Bowman's executor does not entitle the appellee to deny that it was dedicated by the will, and that that dedication is binding upon him. The dedication was made in the will, which was notice to the appellee when he purchased the land, that the dedication was made,

and that he was as much bound by it as if it had been expressed in the deed to him.

The judgment on the original is reversed, with directions for further proceedings consistent with this opinion, and on cross appeal it is affirmed.

WRENN v. GIBSON.

(*Filed May* 10, 1890.)

Partition of land—Appellee having obtained an order from the chancellor directing that there be set apart to her one-third of a tract of land in which appellant owned the remaining undivided two-thirds interest, which land was divided, and appellee received as her share land of greater value than one-third of the whole, and the chancellor directed that appellant recover of appellee in money a sum sufficient to equalize the respective interests. *Held*—That the lower court erred in rendering such judgment.

The court had jurisdiction to have the allotment of their respective interests made in land if susceptible of a division, or, if not susceptible of a division, the court should have ordered a sale of the whole land and a division of the purchase money.

A. C. Ellis for appellant.

W. H. Mackoy for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The appellant and the appellee owned in fee simple a tract of land in the county of Kenton, containing about sixty-eight acres, and known as the Latonia Springs property. The appellee, by her petition in equity, instituted in the Kenton Chancery Court, asked to have her interest in the land set apart or severed from the interest of the appellant.

The appellant owned a greater interest than the appellee, the former owning two-thirds and the latter one-third of the entire tract.

The appellant, by his answer, alleged that the land could not be divided without impairing its value, and wanted the whole land sold and the proceeds divided. The report of the commissioner, to whom the case was referred, as well as other testimony, conduced to show that the land was susceptible of division, and while the proof is conflicting on the question it is apparent from the testimony that a division could have been made without affecting, materially, the rights of the parties by lessening the value of the land.

If the land can not be divided without materially impairing its value, or the value of the plaintiff's interest therein, or the interest of other parties to the proceeding, then the chancellor should order a sale; and, on the other hand, if the division can be had, and the parties interested desire it, a division should be directed.

In this case the judgment or order of partition was proper, and the division being unequal, and the appellee recovering more than one-third of the land in value, it was error to require the appellant to recover in money a sum sufficient to equalize the respective interests, and if the division can not be made without requiring a pecuniary compensation to produce this equality, the land should be sold, and not partitioned. It is true that court of equity in the partition of land between coparceners sometimes permitted the payment of

money to equalize the allotment, and this practice would now be tolerated, when it was to the interest of the heirs at law, and the money could be paid out of the fund to be distributed from the common estate; but under our statute, where one tenant in common or joint tenant seeks a division, the other joint tenant may ask for a sale of the whole, on the ground that a division can not be made without materially impairing the value of his interest, and he can not be required either to pay or to accept money as a compensation for any part of the tract in order that a division may be had. If money will compensate for the unequality, then a division may be had in every instance, and the chancellor permitted to exercise the power of fixing the price and passing the title from one joint owner to the other, without the consent of the parties in interest. If one joint tenant can be compelled to accept the money and part with his land, he may be compelled to pay his money and obtain that he does not wish to own, in order that partition may be made.

Under our practice, with the Code regulating the manner in which partition may be made, there is no necessity for requiring one joint tenant to pay, or the other to accept, money in lieu of land in order to a partition. The chancellor, therefore, erred in requiring the appellant to receive less land than he was entitled to, and accept as an equivalent its value in money, as fixed by the commissioner or by the terms of the judgment.

For this reason the judgment is reversed and remanded, with directions to partition the land, if it can be done without materially lessening the value of the interest of the joint tenants, or either of them; and, if this can not be done, the entire tract should be sold. As the record now stands we see no reason why the division can not be made.

SMITH V. UPTON, &C.

(*Filed May* 10, 1890—*Not to be reported.*)

1. *Conveyance—Life estate*—A deed having been made to the wife of "S. and her children," conveying to them, at the instance of S., about eighty acres of land in two tracts. After the death of the husband intestate the wife died, leaving surviving her several children, being issue of her marriage with S. She also devised her entire interest to one of her children. In an action by the devisee claiming an undivided half interest in said property under the will of his mother, *Held*—That his mother, by said conveyance, received only a life interest in said property. The presumption being that as said conveyance was made at the instance of S., he intended that his wife should enjoy a life interest in the property, and at her death their children should have the remainder.

2. *Sale of land insusceptible of a division*—Under subsection 2 of section 490, Civil Code of Practice, the court properly ordered the sale of the land and a division of the proceeds among the six different claimants.

That section provides for the sale of a vested interest in real estate, whether held in joint tenancy or by tenants in common or coparceners, if it be incapable of division without materially impairing its value.

The court had a right to decide, from the facts, that the two small tracts were not susceptible of an advantageous division among six persons.

B. L. D. Guffy and John L. Scott for appellant.

H. T. Clark for appellees.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Holt.

July 2, 1853, H. H. Smith executed to James B. Upton what is in form an absolute deed, but which was in fact but a mortgage upon three tracts of land, that composed the home farm, of about 180 acres, of the grantor.

His wife, Helen Smith, did not unite in it.

August 2, 1856, Smith and wife, in settlement of the debt owing to Upton, conveyed to him absolutely all of the land, save about eighty acres, and upon the same day he conveyed the eighty acres to Mrs. Smith and her children.

There had then been born to her and her husband seven children, and another was born thereafter.

One died intestate and without issue before the death of the father. Another died prior to the death of the mother.

She devised all her interest in the eighty acres of land to one child.

In this action brought by some of the heirs, asking a sale of it, her devisee claims that under the deed from Upton she and her children took by classes, she being entitled to one-half of it and they to the other half.

It is contended upon the other side that she took but a life estate, with remainder to the children.

The conveyance was to "Helen Smith, wife of Henry H. Smith, and her children."

It is urged upon the part of the devisee of Mrs. Smith, in support of the claim that the title to one-half of the land vested in her, that the consideration for it was the relinquishment by her of her potential right of dower in the land conveyed to Upton. Such a relinquishment may constitute a valuable consideration for a settlement upon the wife by the husband; but the deed makes no mention of any such consideration, and there is no averment of any mistake or fraud in its execution.

The intention of the parties is to be gathered from the language of the deed, it to be read in the light of the surrounding circumstances, and the relation of the parties.

While the nominal grantor in the deed was not the husband of Mrs. Smith, yet, in construing it, it should be regarded as if it had been made by him.

In equity the title was really in him. The first deed to Upton was in fact but a mortgage. The absolute deed to him was made at the same time that the deed was made to Mrs. Smith and her children. It is evident that it was the husband providing for his wife and children. She was named in it as "Helen Smith, *wife of Henry H. Smith.*"

The land mortgaged to Upton appears to have been ample to secure his debt without any release by Mrs. Smith, because it is proven that the portion left after paying him, by the conveyance of a part of it, is worth $800 or $900.

It was the *home* place of H. H. Smith, and what is more natural than that he should wish his wife to have the use of it for life and it then to pass to his children?

If the husband makes provision for the wife and children, an intention should be presumed upon his part to give the whole of it to her for life, remainder to the children, unless a contrary purpose appears from the terms of the provision or circumstances attending it.

Such a presumption is the reasonable one. We know from expe-

rience and observation that such is likely to be the intention, and to arrive at it is the object of construction.

It is true that the wording of the deed is to "Helen Smith, wife of Henry H. Smith, and *her* children," but it is evident the purpose was to provide for *their* children.

Where a father conveys to his child and that child's children, they are regarded as taking jointly; they are all of his blood, but an equal reason does not exist for supposing that a husband so intends where he conveys to his wife and children, because then, by her death, a portion of the property might pass to those who are strangers in blood to him.

This is the substance of the reasoning employed by this court in the case of Davis v. Hardin, &c., 80 Ky., 672, and subsequently approved in Helm's ex'or v. Rogers, 81 Ky., 568.

We concur in the conclusion reached by the lower court that Mrs. Smith took but a life estate.

The appellant also claims that his portion of the land should have been allotted to him and that the court below erroneously ordered a sale of the entire tract, and a division of the proceeds.

It consists of two adjoining tracts, one of forty and the other of thirty-five acres. They are ordered to be sold separately.

No complaint is made as to the order for the sale of the forty-acre tract. There are liens upon it, which are asserted in this suit.

The Civil Code, section 490, provides: "A vested estate in real property, jointly owned by two or more persons, may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant, first, if the share of each owner be worth less than $100; second, if the estate be in possession, and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

If it be said that a Code of procedure could not confer this power, then the answer is, even if this be true, yet the same provision is in substance to be found in the General Statutes, chapter 63, article 5, section 6.

It provides for the sale of a vested interest in real estate, whether held in joint tenancy or by tenants in common, coparceners, if it be incapable of division, without materially impairing its value.

It does not amount to the taking of the property of one person for the private use of another. If it did, then the statute would of course be unconstitutional.

Each owner gets his own. The form merely is changed. Kean v. Tilford, &c., 81 Ky., 600.

It is averred in the petition that the land sought to be divided is incapable of division, without a material impairment of its value. This is denied; and, it is said, there is no evidence in support of it. An affidavit to this effect is copied in the record; and, while it was doubtless treated as a part of the papers of the case upon the trial below, yet it does not appear to have been made so by any order of court.

Aside, however, from this it appears that the tract of land is a small one. There are six different interests in it. Each one is small, and the lower court had a right to find from the facts, and unquestionably did so correctly, that it could not be divided without a material impairment of its value.

Judgment affirmed.

McCoy and others v. Covington Transfer Railway Co.

(*Filed May* 10, 1890—*Not to be reported.*)

Condemnation of highway—The chancellor below having personal knowledge of the location of the highway along which the railroad was to be constructed, and having prescribed the manner of constructing said railroad, this court will not interfere with the judgment.

Hallam & Myers for appellants.

O'Hara & Bryan for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

In the absence of a brief by counsel stating the points relied on for a reversal this court is left to look for any error that may be prejudicial to the appellants. The condemnation of the public highway, whether under the control or sanction of the commissioners or the county court, was proper, and the construction of the railway ought not to be prevented unless by doing so it operates to affect private rights to an extent requiring the chancellor to interfere. The chancellor below, after examining the testimony, and with a knowledge as to the particular location of the railway, has protected the rights of the appellants by prescribing the manner of construction, requiring the company to locate and construct its railway so as to leave a clean roadway along the river road, between the city of Covington and the east line of the city of Ludlow, between the entire line of its track and the private property on either side, for the passage of ordinary vehicles used on common highways. The chancellor then proceeds to provide other safeguards for the protection of private property and those living on the highway. The railway is not complaining, and with the power remaining in the chancellor to enforce the mode of construction, and to punish the company by ever restraining it from proceeding with it; and, if in violation of the judgment, we perceive no reason for any further interference for the protection of appellants.

Judgment affirmed.

Reinder, adm'r v. The Black & Phillips Coal Co.

(*Filed May* 10, 1890—*Not to be reported.*)

Wilful negligence—Master and servant—The intestate, being an employe of appellee's coal company, engaged in moving coal along an elevated railroad constructed on trestles, about twenty feet feet from the ground, was killed by being thrown to the ground by the timbers of the trestle giving away and a heavy bucket used in conveying the coal falling upon him. In an action by his administrator for damages resulting from wilful negligence of the company in failing to keep the timbers in repair, *Held*—That the action can not be maintained, the evidence showing that the defects in the timbers were such as were not visible to an inspection by the most careful observer, and the mere fact that the timbers had been used for fifteen or twenty years was not sufficient to charge the company with wilful neglect.

Cleary & Hamilton for appellant.

O'Hara & Bryan and J. F. & C. H. Fisk for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The appellant's intestate, while in the employ of the appellee, lost his life, and the cause of his death is attributed to the negligence of the appellee. The deceased was a day laborer, and had worked for the coal company for a long time in transporting its coal from the elevator in a bucket over a railway, constructed on a trestle, some twenty feet from the ground. The railway was about four hundred feet in length, and the bucket would hold about 2,000 pounds of coal. When filled the intestate would push the bucket by means of planks that were placed on the track from the elevator to the place of deposit. A part of the timbers supporting the trestle work seem to have decayed, and while the deceased was moving the bucket, loaded with coal, the timbers gave way, and the intestate fell to the ground, the bucket falling on him, causing his death.

The action is under the statute to recover for the wilful neglect of the company in failing to have these timbers in proper repair.

The court below, at the close of the plaintiff's testimony, gave an instruction to find for the defendant. It is apparent, we think, from the proof that the plaintiff failed to show a case of wilful neglect. His own witnesses, who examined the timber after the accident, and say that it was doted and rotten; also state that they looked sound on the outside, but on the inside was entirely decayed; that the wood looked sound, but was in fact decayed on the inside. The argument of counsel for the appellant is: That the timbers had been used for fifteen or twenty years, and it was the duty of the company to have made an examination of their condition in order to the safety of their employes, and failing to do so the company is liable for the loss sustained. The failure to discover the defect in the timber, or its rotten condition, can not be regarded as wilful neglect, where the work from the outside presented every appearance of being perfectly sound, and its deceptive condition liable to mislead the most careful observer. The company had no reason to believe that their employes were in a perilous position when on this railway; nor is there the slightest proof that the condition of the timber was known to the company, and the only evidence of neglect is the presumption arising from the facts as to the necessity for repairing the railway. The failure to repair, after such a lapse of time, we are asked to say, was wilful neglect, when there was no other reason for believing the timbers to be out of repair.

The judgment below is affirmed.

SIMRALL & BODLEY V. MORTON.

(*Filed May* 30, 1890—*Not to be reported.*)

1. *Attorney fee—Instructions*—Appellee having employed a firm of attorneys for a fee contingent upon recovery of a debt by them from a railroad company, and after unsuccessful litigation for that purpose was had appellee was informed by the senior member of the firm, who had conducted the case, that further effort to recover it would be useless, whereupon appellee formed a syndicate and bought the railroad, which venture, after a number of years, proved successful, and enabled appellee to realize more therefrom than the amount of his debt. In an action by the firm for a fee, *Held*—That the court properly instructed the jury for appellee "that if appellee

was advised by his counsel in effect that further litigation was unnecessary, and that no recovery could be had so as to enable him to make his debt, &c., the law is for the defendant, but the plaintiffs can not be bound by the advice of anyone else given the defendant to that effect, unless the jury should believe from the evidence that the person so advising (if any) was authorized by the plaintiffs to do so." The following instruction, given for the appellants, was proper: "That if the defendant, at his own instance, and not at the advice of the plaintiffs, or some one authorized by them, surrendered the debt, for the collection of which he had been employed by the plaintiffs to sue, then the law is for the plaintiffs, and they are entitled to such a sum as will fairly compensate them for the services rendered in the effort to collect defendant's debt."

2. *New trial*—In this case the verdict of the jury being in favor of appellants for one cent and costs, while the finding of facts was substantially for the defendant, the court properly overruled appellant's motion for a new trial.

Wm. Lindsay, Brown, Humphrey & Davie for appellants.

Barnett, Noble & Barnett and Dodd & Grubbs for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

On the former hearing of the case in this court it was insisted by the appellants that the means adopted by the appellee to secure his debt was within the meaning of the contract under which they prosecuted the claim of the appellee, and when the object had been accomplished, viz, the debt secured, they were entitled to the agreed compensation, as there had been no express waiver of their claim for services; and it seems to us the only question now presented by the record is: Are the plaintiffs entitled to the value of their services rendered to the date of the formation of the syndicate and the abandonment of the litigation by the appellee? If abandoned without the consent of appellants, they should be paid; if at the instance of, or by the consent of the attorneys, for the reason that future litigation was hopeless, then no recovery should be had. This was substantially the issue presented by the pleadings and tried on the return of the case to the lower court. If the court below has followed the mandate of this court as to the law of the case, we can then perceive no reason for disturbing the verdict. The court, in instructions Nos. 1 and 2, presented the questions raised so that the jury could not have misconceived the issue. The jury was told that if the appellee was advised by his counsel in effect that further litigation was unnecessary, and that no recovery could be had so as to enable him to make his debt, &c., the law is for the defendant, but the plaintiffs can not be bound by the "advice of anyone else given the defendant to that effect, unless the jury should believe from the evidence that the person so advising him (if any) was authorized by the plaintiffs to do so." For the plaintiffs the jury was told "that if the defendant, at his own instance, and not at the advice of the plaintiffs, or some one authorized by them, surrendered the debt, for the collection of which he had been employed by the plaintiff to sue, then the law is for the plaintiffs, and they are entitled to such a sum as will fairly compensate them for the services rendered in the effort to collect defendant's debt." On this issue, and the only one entitled to be presented to the jury, either by the opinion formerly delivered in this case or from the

evidence the jury returned a verdict for the defendants, or rather for the plaintiff, fixing the recovery at one cent.

On the trial the appellee testified that the senior counsel in the case, Judge Bodley, after this court had decided adverse to the appellee in his effort to make the debt, said to the appellee that this ended the matter. Judge Bodley had bestowed a great deal of labor in the preparation of the case. Had argued the case in this court with much zeal and ability, and, on being informed of the result, was asked by the appellee what was to be done, and his reply was that this was the end of it, or words to that effect. It seems that the present appellants were not consulted, if at all, by the appellees, and that Judge Bodley, by reason of the magnitude and importance of the case, and his confidence in the recovery for the appellee, was intrusted with its sole control. His remark to the appellee, with the construction that would naturally be placed upon it, was sufficient to evidence the belief that in his, Judge Bodley's, opinion further litigation was useless; and so the appellee must have regarded it, if we are to judge by his subsequent conduct.

But it is said that after this conversation with Judge Bodley that the appellants, under the contract, proceeded to bring another action to hold the stockholders of the railroad corporation liable for the debt. This fact does not appear. An action was instituted by Wm. Pindell, in conjunction with the surviving members of the firm of Bodley & Simrall (Judge Bodley having died), with this object in view. The appellee, however, testifies that Pindell told him "there was nothing to be made out of the suit, and that the syndicate was the only chance for him." It is evident, therefore, that the lawyers with whom the appellee consulted, and who were the active managing attorneys in the preparation of the case, regarded the case as hopeless, and the appellee, with a view of securing his debt, and at the risk of losing a great deal more, entered into the syndicate and purchased the road. The stock, at the time of the purchase by the syndicate, was of no market value, and was in this condition until two years or more from the date of the purchase. The speculation turned out fortunately, the stock advancing in value to an extent that not only secured appellee's debt, but paid him greatly in excess of it. But for this act on the part of the appellee in purchasing the road it is manifest that not one dollar of his debt would ever have been realized, and its recovery can in nowise be attributed to the services rendered by the appellants. That the services were valuable, and rendered at much loss of time and labor, can not be questioned, but the fee depending on the recovery, as none was had, the appellants must sustain the loss, as this entire record shows that but for the act of the appellee in investing as much money in the syndicate as he had already lost, for the purpose of regaining it, the loss to him would have been complete. It is said, however, that the finding by the jury in favor of the plaintiffs for one cent in damages was inconsistent with the testimony, for if the plaintiff's theory was the correct one the appellant's were entitled to recover the value of their services, as proven.

It must be conceded that if the services had been rendered, to be paid for regardless of any contingency, that then the value of the services, as fixed by the testimony, must control, and the jury would have no right to disregard it, but here the testimony of the defendant conduced strongly to show that, although the services were rendered, the fee, by the contract depending upon the contingency, and that contingency, the happening of which entitled the appellants

to compensation, never happening, and the entire litigation abandoned, left the appellee to make his money as best he could. If the jury believed this, and doubtless they did, the verdict was in fact for the defendant, but requiring him, by giving nominal damages, to pay the costs of the suit. No claim or demand seems to have been made of Morton for these services for years, and not then until the stock in the road had become valuable, which was some years after the litigation had virtually ended. The surviving partners construed the contract as entitling them to compensation, although the money was secured *otherwise* than by the litigation. This construction was held to be erroneous, and the finding of the jury on the issue of fact, if the testimony of Morton is to be credited, ought not to be disturbed. The preponderance of the proof was on that side of the issue, and the appellants, not being entitled to any fixed sum, the verdict was not even against the evidence offered by the plaintiff. It was held in the case of Hubbard v. Mason City, 64 Iowa, 247, that where the verdict for the plaintiff was only one dollar, and the evidence being strongly against the right of recovery, the motion for a new trial was properly overruled. So the MS. opinions of this court in the cases of Callahan v. Harris and Ray v. Jeffries sustains the same view of the question as in the case reported in 64 Iowa, and those cases are distinguishable from the MS. opinions of this court in the cases of Houston v. Blackwell and James v. Braswell, where the services were rendered, and no question at issue but the sum to which the plaintiffs were entitled as compensation, this court holding that the verdict in the case of Houston v. Blackwell was inconsistent with the testimony, and the jury had no right to disregard it.

The inquiry being, why did the jury return a verdict of one cent only, is answered by a reference to the testimony that conduces strongly to establish the defense, while, on the other hand, if the value of the services rendered by the appellants had been the only issue, the finding of the jury would have been flagrantly against the testimony, and a new trial would have been granted. It appears from the testimony that Pindell, who prepared the last action or petition, was employed by the appellee to defend the action of Hallam against him for a like character of service and originating from the same contract; that no demand or claim for the reasonable value of the services was made until after the success of the venture in which the appellee had engaged; that the deceased partner regarded the litigation as ended, and the circumstances tend to show that the effort to recover by suit ceased when the syndicate was formed, and the fact the appellee was willing to incur an additional liability, equal to the amount already invested, the result of which depended upon what then seemed to be a reckless speculation, adds to the strength of the conclusion that all hope of recovery by suit had vanished. It is hardly reasonable to suppose that a man of business qualifications, with such heavy interests involved, would have turned a deaf ear to the advice of such distinguished counsel, who believed a recovery could be had, and embark in such a hazardous speculation as the appellee did in order to secure his debt. While the labor of years had been bestowed on the case in its preparation by an able and experienced lawyer, and the belief on the part of the junior members of the firm entertained that those labors would be fully compensated if success attended the speculation entered into by the appellee, this court is not justified in placing any other interpretation on the contract than has already been given it; and the issue of fact being in effect determined

for the defendant, in accordance with the law applicable to the case, the judgment below must stand. The interlineation of the instructions by the court, after the case had gone to the jury, could not have prejudiced either party, and so of the admission of the record in the suit against the railroad, showing its insolvency and the claims of creditors. This record could not have influenced the jury either way, and while the court should have designated what part of the record was to be considered as evidence, its introduction as a whole could not have affected the result. The instructions offered by plaintiff and defendant were properly refused, and the instructions given made the issue so plain and simple as that the jury must have known what they were called on to decide.

Judgment affirmed.

DUNCAN, &C. V. OWENSBORO WATER CO.

(*Filed Dec.* 10, 1889—*Not to be reported.*)

Liability of water company for damages from loss by fire—Breach of contract —Parties to action—A water company, in consideration of the city of Owensboro granting to said company certain privileges and paying certain rents for hydrants, agreed to keep the machinery in repair and furnish water for extinguishing fires in said city. In an action by a citizen against said company, alleging failure on the part of the company to comply with its agreement by which appellant's goods were destroyed by fire, *Held*—That the petition states a cause of action, and that a citizen who has suffered loss from the failure of said company to comply with its agreement with the city can maintain such action. The doctrine of the *Paducah Lumber Co. v. Paducah Water Supply Co.*, 11 KY. LAW REP., 738, approved.

G. W. Williams for appellants.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as an incorporated company, in consideration of the city of Owensboro giving the appellee the use of its streets, &c., for the purpose of laying its pipes, &c., and paying to the appellee so much each in the way of rent for the use of the hydrants to be thereafter erected by the appellee, and the exemption of the appellee's property from taxation for the space of two years, &c., agreed "to operate, in the city of Owensboro, waterworks for the supply of said city and the inhabitants thereof with water * * for public and private purposes," and for these purposes pipes and hydrants were to be established at proper and convenient distances, and with certain capacities, and "at all times be ready, unavoidable accidents excepted, to supply a sufficient quantity of water for public and private uses; to keep all hydrants rented of it by the city in good repair, and ready for instant use in extinguishing fire by the fire department of said city, and to furnish water direct from the pumps when an alarm is given to the party in charge of the pumping machinery."

The petition alleges that the appellant's merchandise, &c., were destroyed by fire in the city of Owensboro, by reason of the appellee's negligent failure to furnish water for instant use by the fire de-

partment when the fire alarm was given to the party in charge of the appellee's pumping machinery.

The petition also sets out the ability of the fire department, its readiness and willingness to extinguish said fire, had the appellee furnished the water according to its undertaking; the petition also sets out the fact that the reliance on the undertaking of the appellee caused the making of no other arrangement for the extinguishment of fires.

A demurrer to the petition was sustained and the appellant declining to amend the petition was dismissed, and he has appealed to this court.

The appellee insists, first, that there is no such privity of contract between the appellant, Duncan, and the appellee, as to enable the appellant to maintain this action against the appellee; second, the contract, by its terms, did not contemplate appellee's liability for the loss of individual property by fire; third, the loss of the appellant's property by fire was not the proximate cause of the failure of the appellee to furnish water, &c.

The well considered case of Paducah Lumber Co. v. Paducah Water Supply Co., decided last week (Chief Justice Lewis delivered the opinion, 11 KY. LAW REP., 738) settles the foregoing questions against the appellee.

It is therein settled, first, that the agreement of the water company in that case was for the benefit of the property owner in the city, as well as for the benefit of the city proper, and, as the consideration for the contract was paid by the property owner in the way of taxes, he had the right of action against the water company for the injury sustained by him, by reason of the neglect of the company to furnish water for the extinguishment of the fire, by which the owner's property was destroyed; second, that by the terms of agreement the water company agreed to furnish the fire department a sufficient quantity of water and of pressure with which to extinguish fires occurring in the city; the calculation being that the water thus to be furnished would be sufficient, if used in time, to extinguish any fire that might occur; and this being the purpose of the agreement, it was certainly contemplated that the water company should be responsible to the injured party, by reason of any neglect of duty in this behalf, to the extent that he might be injured thereby; third, that the burning of the owner's property, by reason of the water company's neglect to furnish the water as agreed, was the proximate cause of the fire, and entitled the owner to recover its value from he water company; fourth, the fact as to whether such negligence existed, and the owner's property was consumed by reason thereof, should be determined by jury; fifth, the fact that water company would be subjected to fine by indictment for a wilful or simple neglect of duty did not exonerate it from civil liability to the injured party.

The case *supra* in its essential features is similar to this, consequently the principles therein announced will control this case.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

RICHARDSON'S ADM'R v. GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS.

(*Filed Feb.* 20, 1890.)

Insurance—Forfeiture—Death of assured—An insurance company having in its policy issued to the assured insured his property against loss by fire, stipulating to pay any loss unto the assured, *his executors, administrators and assigns*. In an action by the administrator of the assured seeking to recover the amount of a loss to the property occurring after his death, the company, as grounds of demurrer, relied upon a subsequent clause in the policy, which provided that the policy should be void if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or *any change takes place in the title, use, occupation or possession thereof, whatsoever.* ***Held***—That the last clause mentioned can not defeat a recovery, as the express terms of the contract contemplate payment of loss after the death of the assured, with no limitation as to the time when the loss occurred, and this court will not give to the last clause such construction as would defeat the meaning clearly intended by the former clause. The better construction of the clause providing for a forfeiture, by reason of a change of title to the property insured, seems to be that it refers only to such change of title as might be caused or suffered by the act of the assured while living, and not to the change of title resulting from his death.

P. B. Thompson, sr., and H. C. Kauffman for appellant.

D. S. Clay for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an appeal from a judgment dismissing an action instituted by appellant, administrator of the estate of Joseph Richardson, to recover of appellee value of a dwelling house and furniture destroyed by fire, which was insured by a policy issued to decedent.

As all other conditions necessary to recover appear from uncontroverted allegations of the petition to exist, the single question presented is whether the policy became void and of no effect upon, and by reason of, death of the assured, which occurred before destruction of the property.

The policy, dated March 17, 1883, contains the following: "The German Insurance Company, by this policy of insurance, in consideration of two notes for $26.50, do insure Joseph Richardson against loss or damage by fire and lightning to the amount of $—— on * dwelling house and furniture. * And the said company hereby agrees to make good unto the said assured, *his executors, administrators and assigns*, all such immediate loss or damage, not exceeding in amount the sum insured, nor the interest of the assured in the property, nor the cash value of any building or other property at the time of loss, *as shall happen by fire or lightning to the property above specified, from the 10th day of March*, 1883, *at* 12 *o'clock noon, to the 10th day of March*, 1888, *at* 12 *o'clock noon*, except such portion of the above-mentioned period of time as this company shall hold against the insured any promissory note past due and unpaid in whole or in part, and during such portion of time the policy shall be null and void, and so continue till such promissory note is fully paid."

Following provisions in regard to amount of loss and damage to be estimated, and right of the company to repair or rebuild the

property destroyed, and others having no application to this case, is this clause in the policy: "If there is or shall be other prior concurrent or subsequent insurance, whether valid or not, on said property, or on any part thereof, without the company's consent known, or if the hazard shall be increased in any way, or if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or *any change takes place in the title, use, occupation or possession thereof whatever*, or if foreclosure proceedings shall be commenced, or if the interest of the insured on said property, or any part thereof, now is, or shall become, any other or less than a perfect legal and equitable title or ownership, free from any lien whatever, except as stated in writing hereon, or if the building or buildings stand on leased land, of which the assured has not a perfect title, or if this policy shall be assigned without written consent hereon, and in every such case the policy shall be void."

The right was in terms given to the insurance company to terminate the policy at any time by giving notice to that effect, and refunding unearned premiums, and also to the insured, to be, however, exercised by him only after full payment of premium.

According to the only meaning we think the language used fairly capable of, the property was insured for a specified period of time, which could, after the premium had been fully paid, be abridged by the company only upon notice and refunding the unearned part of the premium. For it agreed, in express terms, to make good unto, not merely the insured himself, but as well his executors, administrators and assigns, the immediate loss or damage that might happen by fire or lightning to the property at any time during that period, whether before or after his death. And, therefore, to treat that event as *ipso facto* a termination of the policy and liability under it would be contrary to the express terms of it, under the stipulation for payment to the personal representative of the insured superfluous, and allow the company to retain the full consideration paid, while being held to only part performance of its agreement.

It is true, as argued, the property might have been destroyed before, though the loss not made good until after his death; but the stipulation of the company to pay his personal representative was not necessary to meet such contingency, because the amount due could have, in that case, been collected without. On the other hand it is both rational and provident for a person obtaining a policy of fire insurance to have provision in it against destruction of the property after his death, and in such case the stipulation mentioned becomes applicable and necessary. It seems to us the force and effect of language so comprehensive and clear should not be neutralized, or to any extent impaired, by a subsequent forfeiting clause of a policy of insurance unless the words used for that purpose be so definite, explicit and free from ambiguity as to leave no other reasonable alternation. For while forfeitures are not favored by the law, and provisions in a contract therefor are always to be strictly construed, the terms of a policy of insurance, as said in Ætna Insurance Company v. Jackson & Co., 16 B. M., 242, should be liberally construed for the benefit of the insured, and so as to effectuate, as far as may reasonably be done, the indemnity he justly expected.

It is evident the clause referred to was prepared with care, and a purpose to guard every supposed right and interest of the company. Yet of the seven distinct clauses for forfeiting the policy therein enumerated, not one of them, in express terms, or by fair implication, relates to, or includes, the death of the insured; nor is it any

where mentioned as a condition or cause for forfeiting or terminating the policy.

The only part of the clause which can be construed to have any relation at all is expressed as follows: "Or any change takes place in the title, use or occupation or possession thereof, whatsoever." And that we think does not necessarily or properly refer to a change unavoidably resulting from his death, but rather to such as might be caused or suffered by act of the insured while living, which is the case in each one of the other causes or conditions set forth in the forfeit claim, as well as those which precede, as those following the one quoted. But be that as it may, each condition of forfeiture mentioned may, without destroying or lessening its proper meaning or effect, be reconciled with a continuation of the policy after such death to the end of the period; and it, therefore, should be donefor rather than defeat what was elsewhere in the policy clearly provided

We have been referred to the case of Sherwood v. A. I. Co., 29 Am. Rep., 180, and Wyman v. Wyman, 29 N. Y., 253. The first one has no application to this case, because there a change "by operation of law" was in terms made a cause of forfeiture. The latter involves practically the same question as this case, and the conclusion arrived at is different from what we think the proper one. For, according to rules of construction frequently approved by this court, a forfeiting clause in a contract should never defeat a right previously agreed upon and provided for unless the language used, strictly interpreted, require it.

We think a cause of action is stated in the petitien, and the judgment must be reversed and cause remanded, with directions to overrule the general demurrer and further proceedings consistent with this opinion.

CITY OF NEWPORT V. NEWPORT AND CINCINNATI BRIDGE COMPANY.

(*Filed May* 10, 1890.)

1. *Constitutional law—Police regulation*—The appellee, the Newport and Cincinnati Bridge Company, having been incorporated, and desiring to use a portion of one of the streets of the city of Newport for the purpose of constructing its bridge, or the approach to it, the city council passed an ordinance granting to the bridge company the use of a portion of the street for that purpose, providing, in the fourth section thereof, that "in consideration of the foregoing grant the rates of toll over said bridge shall be as follows, viz: Packages of 100 tickets to foot passengers for $1 to all persons applying for the same," &c. The bridge company accepted the terms of this ordinance in constructing its bridge. Subsequently the bridge company, instead of furnishing packages of 100 tickets for $1, began issuing packages of five cards for that price, each card being good for twenty crossings, and one perforation being made in it upon each crossing. The city council in the same year passed an ordinance imposing a penalty upon officers of the bridge company for failing or refusing to sell packages of 100 tickets for $1. The bridge company seek to enjoin the city from the enforcement of said ordinance. *Held*—That said ordinance is invalid, as it attempts to confer judicial powers upon the city authorizing it to construe a contract made by it and enforce it by a penal ordinance without application to a judicial tribunal. Said ordinance can not be upheld as a police regulation as it involves neither the morals, health or safety of its people, but merely their pockets. The form of the tickets issued was a substantial compliance with the contract.

E. W. Hawkins for appellant.

Ramsey, Maxwell & Ramsey for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Holt.

The appellee, the Newport and Cincinnati Bridge Company, was incorporated in 1868. Its charter authorized it to charge reasonable tolls, the *maximum* rate, however, not to exceed that charged by the Covington and Cincinnati Bridge Company.

Desiring the use of a portion of one of the streets of the appellant, the city of Newport, for the purpose of constructing its bridge, or the approach to it, the city council, on May 12, 1868, passed "an ordinance granting the Newport and Cincinnati Bridge Company the use of a portion of a street for the purpose of a bridge," the fourth section of which provides:

"In consideration of the foregoing grant the rates of toll over said bridge shall be as follows, viz: Packages of 100 tickets to foot passengers for $1 to all persons applying for the same; one horse and dray, 10 cents for a single crossing; one horse and express wagon, 10 cents; one horse and buggy, 15 cents."

The bridge company accepted the terms of this ordinance in the construction of its bridge. There is nothing in it relating to tolls for foot passengers save the provision relating to the sale of packages of 100 tickets for $1.

The other rates for a foot passenger charged by the company are 3 cents for a single crossing; 2½ cents each way to go and return; or he can purchase what are termed seven and twenty coupon crossings, entitling him to cross the one seven, and the other twenty, times for 10 and 25 cents, respectively.

In, and perhaps prior to, 1882 the bridge company, instead of furnishing packages of 100 tickets for $1, began issuing packages of five cards for that price, each card being good for twenty crossings, and one perforation being made in it upon each crossing.

The city council, in the year last named, passed an ordinance subjecting an officer or agent of the bridge company to a fine for failing or refusing to sell packages of 100 tickets for $1; and one of the company's agents having been arrested, charged with its violation, and the city threatening to have arrested and to prosecute all of the company's agents until it should furnish and sell packages of 100 tickets for $1, it brought this action enjoining the city from enforcing the ordinance.

The lower court perpetuated the injunction.

If the ordinance was invalid, then the company had the right, in order to prevent irreparable injury and a multiplicity of prosecutions, to go into a court of equity for relief.

The chancellor often interfers to prevent an illegal use of power by municipal authorities, and where such consequences follow the enforcement of an ordinance, as will result in this instance, a proper case is presented for equitable relief, if the ordinance be invalid. (Brown v. Trustees of Catlettsburg, 11 Bush, 435.)

The passage of the ordinance of May 12, 1868, was the tender of a grant by the city to the bridge company upon the condition that the tolls should be as therein fixed. Upon its acceptance by the company a contract arose between it and the city, and such a contract must be enforced by the judicial department of the government. It stands upon the same footing as one between individuals.

It would be exceedingly dangerous to individual right and liberty, which the common law so highly regards, to permit municipalities to enforce their own construction of their contracts by fines and penalties.

Whether the Legislature could confer such a power we need not inquire, inasmuch as it is not pretended that it has been attempted in this instance.

Where an ordinance is penal in character, the right of the municipality to enact it must clearly appear.

The enforcement of this ordinance would be an exercise of the police power. While it is difficult, if not impossible, to concisely define the extent of this power, yet it certainly should not be extended so far as to permit a city to enforce its view of its contracts by penal ordinances in cases involving neither the morals, health or safety of its people.

It may by ordinance limit the speed of railroad trains or street cars through its streets, and in the same manner regulate any matter which is conducive to the health or safety or morality of its citizens. The public welfare demands the existence of such a power, and when properly directed the municipality should not be restricted to a narrow limit in its exercise.

But where it is a matter of contract, affecting merely the pockets of its citizens or it financially, it must resort to the courts for relief in the same manner as individuals.

A construction of the contract between the parties was not necessary in order to afford the appellee proper relief.

This was given by enjoining the enforcement of the ordinance.

Its petition, however, asks that the issual of the five card packages be adjudged a compliance with the clause in the ordinance relative to the 100 ticket packages, while the answer of the appellant not only asks a dissolution of the injunction, but in counterclaim form requests the court to order the appellee to furnish and sell packages of 100 tickets for $1.

The lower court determined this question, holding that the issual of the five cards was a compliance with the spirit of the contract; and as this judgment would be binding upon the city, in any case where it would have the right to sue the company, it is proper to consider it.

The law looks to the spirit of a contract, and not the letter of it. The question, therefore, is not whether a party has literally complied with it, but whether he has substantially done so.

The ordinance in question was not designed to enable persons to purchase tickets for resale at an advanced price.

The statute prohibited any such traffic. Its object was a commutation of fare to those who desired to cross the bridge frequently. The mere form of the ticket is immaterial.

The purpose was to regulate the price for 100 crossings; and the issual of the five cards, each good for twenty crossings, for $1 was a substantial compliance with the contract.

Judgment affirmed.

BROWNING, &C. V. MULLINS, &C.

SAME V. SAME.

(*Filed March* 20, 1890—*Not to be reported.*)

1. *Turnpikes—Estoppel*—A turnpike company having been authorized by

its charter to construct a turnpike road to a certain point, and, subsequently, an amendment to said charter was obtained from the Legislature, by which it was authorized to extend the turnpike to a point beyond the terminus fixed by the charter, and the company was authorized to issue bonds to pay for the construction of same, due and payable in five years, but redeemable at the option of the company after three years, to be secured by mortgage on the road.

The company issued the bonds, due and payable in three years, and stipulating that the interest should be payable annually, and if not paid within ninety days after maturity the debt itself became due and payable. In an action by the appellee, the holder of the bonds and mortgage, to enforce satisfaction of the debt the appellants, as stockholders, resist the same. *Held*--That although the amendment to the charter was not passed by authority of the company, yet the stockholders, after obtaining knowledge of its existence and the action of the company thereunder, by their conduct and acquiescence in the construction of the road and the loan of the money by appellee, are estopped to resist the enforcement of the debt.

2. *Corporate powers—Ultra vires*—The bonds issued being payable within three years instead of five years, and the stipulation as to the maturity of the debt, upon failure of prompt payment of interest, were not authorized by the amendment, and, therefore, *ultra vires*, but the judgment of the chancellor subjecting said road to the payment of the debt, payable in five years, would not be disturbed.

Jno. H. Barker and E. W. Hines for appellants.

L. T. Applegate for appellees.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Bennett.

In 1856 the Legislature chartered the Falmouth and Milford Turnpike Road Company. There was no organization under this charter until 1879, when a president and directors were elected and entered upon the discharge of their duties. The road, by the terms of this charter, was to be constructed from Falmouth, Pendleton county, to Milford, Bracken county. By an act approved April 9, 1880, the company was given the power to extend the road to some point in the Robertson county line. Said amendment authorized the company for the purpose of completing and extending the road, &c., to borrow money and issue bonds for the payment of the same in denominations of $250, $500 and $1,000, bearing interest at not exceeding seven per cent. per annum, payable annually, said bonds to be due and redeemable in five years from their date, but payable at the option of the company in three years from their date. The company issued twenty-seven bonds for $250 each, due and redeemable in three years from date, with interest at seven per cent., payable annually, and if not paid in ninety days after maturity the debt itself became due and payable. The road, &c., were mortgaged to secure the payment of these bonds. Money was borrowed from the appelle Mullins, on these bonds and mortgage, and used in completing the construction of said road as extended. The bonds were not paid at their maturity, and the appellee instituted suit thereon to recover judgment and to foreclose said mortgage to satisfy said judgment.

The appellants, as a part of the stockholders in said company, by their petition to be made parties, which was treated as their answer, resisted payment of said bonds upon the ground that the issual of the same was unauthorized by the charter itself; that the company

never authorized it; that the stockholders never authorized it; that the amendment was passed without the authority of the company or stockholders, and the same was not ratified by either of them.

The appellants say that they did not authorize said amendment; nor did they expressly or impliedly ratify the same. But they do not say what proportion of the stockholders they are; whether they are the majority or not does not appear from the pleadings. If a majority of the stockholders consented to said amendment or ratified the same, it is all that is required in this State. It does not appear they did not. But from the fact that the appellants expressly confine their dissent to themselves and the other stockholders have acquiesced all this while, and are still acquiescing, it is presumed that they did consent to the amendment. Besides, it appears that they are the majority.

Also, the matter of issuing the bonds and giving the mortgage were made public, and the appellants knew of the same shortly after they were issued, if not then. Also, the money arising from the sale of said bonds was used in constructing said road for their benefit, which fact they, appellants, knew; but they suffered the same to be done without a murmur; even now they hold on to the property, extension and all, acquired by the expenditure of the appellee's money. If the enterprise had been a success there would have been no word of complaint from them. If there had been complaint made as soon as the alleged wrongful acts were discovered the appellee, Mullins, might have been able to place himself in *statu quo*, but it is too late now, consequently the complaint of the appellants, made at this late day, can not be heard.

The bonds being payable and redeemable in three years from their date, instead of five years from their date, and the same being payable and redeemable in ninety days after the maturity of the interest, if the same was not paid within said time, were contrary to the provisions of the amended charter, and consequently *ultra vires*. But the money received thereon having been expended in constructing the road for the appellant's benefit, and they having acquiesced therein until the same was expended for their benefit and placed beyond the reclamation of the lender, it is too late for them to refuse to pay the same. Therefore, the chancellor did right in subjecting said road to its payment by virtue of the mortgage, but payable in five instead of three years from date.

We are also of the opinion that it was right to adjudge that the appellants pay the receiver, &c.

The judgment on both appeals is affirmed.

KENTUCKY SUPERIOR COURT.

CARTMELL'S EX'OR V. ALLEN & CO.

(*Filed April* 16, 1890.)

1. *Order of delivery*—One whose property is in the custody of a court under an attachment against another may obtain possession of the property by an order of delivery.

2. *Attachment—Fraud*—One who has fraudulently purchased personal property, intending not to pay for it, takes a defeasible title, and none but purchasers, without notice and for value, can resist the vendor's right to rescind and reclaim, if exercised promptly. Therefore, although the property has been seized under an attachment against the purchaser, the vendor may reclaim it.

3. *Depositions*—Depositions which have been withdrawn are competent to contradict subsequent testimony given by the deponents, but extracts from a deposition should not be read for that purpose; the whole should be read.

4. *Number of new trials*—Not more than two new trials can be granted to the same party upon the ground that the verdict is against the evidence.

D. M. Rodman and C. S. Grubbs for appellant.

R. H. Blain and R. C. Kinkead for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bowden.

Cartmell sued Ewell in the Jefferson Court of Common Pleas on notes, and had an attachment levied on a lot of tobacco, of which the sheriff took possession. Two days thereafter E. S. Allen & Co. brough an action in that court against Ewell and the sheriff, under section 181 of the Civil Code, and obtained an order of delivery, under which the tobacco was taken from the sheriff and delivered to them. They allege that Ewell, being insolvent, fraudulently purchased the tobacco from them, intending at the time not to pay for it. Ewell did not answer, but Cartmell, the attaching creditor, having been made a defendant on his own motion, filed an answer, and contested the right to recover. A verdict for Allen & Co. was set aside, and on a second verdict for them judgment was reversed.

Whether at common law property thus in the custody of the court could have been taken in trover, replevin or detinue need not be considered; it may be done under the Code. "An order for the delivery of property to the plaintiff shall be made by the clerk, when an affidavit of the plaintiff is filed in his office showing * * * that it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him; nor seized under an execution or distress warrant or attachment against his property; or, if so seized, that it is by statute exempt from seizure." This is not one of the excepted cases.

If, as we understand from the statements of counsel, there were other attachments pending in the chancery court it was proper, under section 210 of the Code, to transfer Cartmell's action to that court; but as Allen & Co. had no attachment that section did not apply to their action. They claimed to be the owners of the tobacco, having reinstated their original title by repudiation of a sale fraudulently procured. If the facts existed as alleged their claim was just. It is sometimes said that sales so procured are void, but it seems to be the better opinion that they pass defeasible title, and that none but purchasers, without notice and for value, can resist the vendor's right to rescind and reclaim, if exercised promptly. Donaldson v. Farwell, 93 W. S., 631, and note to that case in Law Ed., where a great many cases are collected. Newmark on Sales, section 359. The legal issue of ownership was the only one presented, and as on that issue a jury trial could have been demanded a transfer would have been fruitless, since a verdict for Allen & Co. would have taken the tobacco out of court.

The depositions that had been withdrawn were still the declarations of the deponent; and were competent to contradict subsequent testimony given by them. But each deposition should be taken as a single writing, and each answer as a sentence. What one sentence means depends frequently on the whole tenor of the writing, and in order to present that meaning fairly the whole should be read.

A third verdict can not be assailed as against the evidence. But were this the first, or were it conceded that the second have no better standing, we could not say that the verdict before us is flagrantly against the evidence.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

HUNT v. DUNCAN'S EX'OR.

Filed May 14, 1890. Appeal from Madison Circuit Court. Opinion of the court by Judge Bowden, affirming.

A compromise needs no consideration other than the settlement of a contention made in good faith.

A. Duvall and J. W. Caperton for appellant; C. F. & A. R. Burnam for appellee.

DOYLE, &c. v. LACKEY, &c.

Filed May 14, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. *Negligence—Displaying goods on sidewalk*—Where one knowingly permits another to make a dangerous use of the wall of his storeroom as a support for instruments likely to fall on and crush anyone happening to be there, he is liable for an injury resulting from their fall.

2. *Same*—A city ordinance conferring upon any merchant the right to use the sidewalk "for the ordinary display of his goods," does not give the right to its use for the storing of his goods.

3. *Same*—Assuming that such an ordinance was competent evidence in this case for the purpose of requiring plaintiff to prove negligence in the manner of placing the instruments, the falling of which caused the injury complained of, the defendants were not prejudiced by the court's refusal to permit the ordinance to be read to the jury, as the instructions permitted a recovery only on the hypothesis that there was negligence in the manner of exercising a right.

James T. A. Baker and James S. Pirtle for appellants; John T. Milburn for appellees.

STANFORD AND HUSTONVILLE TURNPIKE ROAD CO. v. WRAY.

Filed May 14, 1890. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. *The liability of a turnpike road company for injuries to travelers* is not confined to cases where the actual injury occurs on its roadbed. It may be liable for injuries resulting from its failure to erect barriers.

2. *Res adjudicata*—The law as laid down by this court on appeal from a former judgment in this case is now the law of the case, and the court could not hold otherwise if inclined to do so.

J. W. Alcorn and Hill & Roberts for appellant; Warren & Welch for appellee.

WEDEKIND, &c. v. HALLENBERG, &c.

Filed May 14, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Executors—Attorney's fees*—An executor or trustee who brings a suit against conflicting claimants to obtain advice of the court is entitled to his attorney's fees and costs out of the fund; and the fact that he was one of a class asserting a claim to the fund does not deprive him of that right.

2. *Same—Interest*—Where a trustee holding funds during a contest between parties as to which is the beneficiary, has not used the fund or received interest upon it, and has not been required to pay it into court, he should not be held accountable for interest, although he may have asserted an interest in the fund in behalf of a class of which he was one.

C. B. Seymour and L. C. Woolfolk for appellants: O. A. Wehle for appellees.

M. & B. S. R. R. Co. v. GREENUP COUNTY.

Filed May 14, 1890. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Action by county for injury to road*—A county has such an interest in its highways as entitles it to an action in its own name for an injury thereto

2. *Same*—In such an action a general description of the road, with a particular description locating the part which has been injured or destroyed, is sufficient; the description by metes and bounds, &c., that is required in the locating or changing of roads is not necessary.

3. *Evidence*—The best evidence of the location of the road, and that it was under the control of the county, is the records of the county court establishing it, if they are in existence, but there being no objection or exception taken in this case to parol evidence, as to these matters, the appellant can not after the verdict complain that the best evidence was not offered.

The instructions were not erroneous in assuming the existence of a fact as to which the evidence was all one way.

W. H. Wadsworth and B. F. Bennett for appellant: E. B. Dulin and B. E. Roe for appellee.

BRAUN v. MONROE.

Filed April 30, 1890. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bowden, affirming; Presiding Judge Barbour dissenting.

A plea of payment is admitted by the failure to reply, notwithstanding the averment of the petition that no part of the debt has been paid. Such an averment in the petition can not be treated as a traverse.

John H. Barker for appellant: L. T. Applegate for appellee.

LOWE v. THOMAS' ADM'R.

Filed April 30, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, affirming.

Limitation—New promise by attorney—An attorney, unless expressly authorized to do so, can not bind his client by a new promise to pay a debt so as to extend the period of limitation.

Tisdale & Gray for appellant: A. C. Ellis for appellee.

TYLER'S EX'OR v. WIGGINTON.

Filed April 30, 1890. Appeal from Nelson Circuit Court. Opinion of the court by Judge Bowden, dismissing.

Appeal from order vacating judgment—Where a party, instead of appealing from a final order vacating a judgment in his favor, submits to have the case retried, and appeals from a judgment on the merits, which is affirmed, he can not thereafter appeal from the order vacating the judgment in his

favor. If complaint is to be made of that order an appeal from it should be prosecuted, so that the appellate court may pass upon it before or at the time at which it is called on to consider the final judgment.

J. D. Wickliffe for appellant; C. T. Atkinson and J. A. Fulton for appellee.

GRIFFIN v. WEIL.

Filed May 7, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Borbour, dismissing.

Appellate jurisdiction—In a proceeding under the statute to have conferred on a married woman the power to act as a *feme sole*, the publication of the notice required is necessary to give jurisdiction. Therefore, if no such publication appears the judgment is void, and an appeal will not lie until after a motion to set aside has been overruled.

Barnett, Miller & Barnett for appellant; Aaron Kohn for appellee.

LEAF, &C. v. LEAF.

Filed May 7, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Ward, reversing.

1. *Benefit societies—Change of beneficiary*—Where a certificate of membership in a benefit society provided that the amount named in the certificate should be paid to the wife of the member upon his death, provided "this certificate shall not have been surrendered by said member or cancelled at his request, and another certificate have been issued in accordance with the laws of this order," the member had the right to have the certificate changed so as to designate a different beneficiary. And even conceding that he could bind himself by an agreement with his wife not to make such a change, the fact that he gave the certificate to his wife, and that she, being empowered to trade as a *feme sole*, paid the dues out of her own earnings, implied no more than an agreement by the member that he would not change the certificate so long as his wife stood in the relation of a charter beneficiary, nor with reimbursing her for the assessments paid out of her own means. Therefore, the wife having instituted a proceeding for a divorce, which was subsequently granted, the husband had the right to have a new certificate issued, naming his children as beneficiaries. And it is immaterial that the original certificate was not surrendered, the member making affidavit that his wife refused to surrender it. But the wife is entitled out of the benefit fund to the assessments paid by her.

2. *Same*—Provisions in the charter of a benefit society defining the mode in which the certificate may be changed and a new beneficiary designated are for the protection of the society, and it may waive them and consent to a change made in some other way.

3. *Same*—A member of the "Knights of Honor" may designate as beneficiaries his children, whether adults or infants, and whether or not they live with him.

James S. Pirtle, L. N. Dembitz and W. McKee Duncan for appellants; Abbott & Rutledge for appellee.

BRONDRUP & Co. v. TUBEMAN & Co.

Filed May 7, 1890. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Ward, affirming.

Corporations—Individual liability of agents on contracts signed by them—Where an obligation signed by the agent of a corporation shows that it was given for a debt of the corporation, the presumption may be indulged that the parties signing it did not intend to assume an individual liability, and the obligation will be treated as that of the corporation.

By the writing sued on which recites that it is a contract between B. & Co. and "Mozart Hall Co.," B. & Co. agree to deliver on cars at factory certain

furniture, which is described, "in consideration of which the undersigned, being duly authorized to purchase the above articles, agree to pay," &c. The contract is signed by certain persons designating themselves as "Committee on Furniture." *Held*—That the Mozart Hall Co. is liable, and not the individuals signing the contract.

Harry Glenn and John P. Norvell for appellants; Ross & Owens for appellees.

FIREMAN'S INS. CO. v. CECIL & CO.

Filed May 7, 1890. Appeal from Mercer Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Insurance*—A policy of insurance is to be construed most strongly against the insurer.

2. *Same—Increase of risk*—policies of insurance, like other contracts, should have a practical and reasonable interpretation. Therefore, where it is apparent that an act was prohibited for the purpose of preventing an increase of the risk, the doing of the prohibited act will not work a forfeiture unless it appears that the risk was thereby increased, especially if the contract fails to provide that the doing of the act shall work a forfeiture.

A policy of fire insurance granted the privilege of keeping kerosene oil for lights, but provided that lamps should be put out at close of day's business. *Held*—That the mere fact that at some time during the life of the policy the insured failed to put out lamps at the close of day's business is not sufficient to prevent a recovery. The answer should have set out such fact as would have enabled the court to determine whether there was any increase in the risk.

E. H. Gaither, C. A. Hardin and S. G. Williams for appellant; Preston & Jacobs and T. C. Bell for appellees.

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KENTUCKY COURT OF APPEALS.

COMMONWEALTH, USE OF MARION COUNTY v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed November 27, 1888.)

1. Taxation of railroads—Prior to the passage of the act of the legislature, approved March 17, 1876, railroads in this State were not subject to local ad valorem taxation, and, therefore, the assessment of the portion of the L. & N. R. R. located within Marion county for ad valorem tax of that county, for the years previous to 1876, was unauthorized. Neither the act of 1865 nor 1869 authorized the imposition of an ad valorem tax for county purposes. Prior to 1876 the taxation on railroads was specific.

2. Jurisdiction of county court—Judicial act—Appeals—The duties devolved upon county courts by sections 14, 15, 16 and 22, article 6, chapter 92, General Statutes, requiring said courts to pass upon the question of liability of property of delinquents, reported by the sheriff, for taxation, are judicial acts, and an appeal lies from such decision to the circuit court.

A. Duvall and S. T. Spalding for appellant.

Wm. Lindsay and H. W. Bruce or appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

Marion county, the appellant, caused a summons to issue from the Marion County Court against the appellee to show cause why its railroad, etc., situated in said county, should not be assessed for the years 1867, 1871, 1872, 1873 and 1875, under the acts of 1865, 1867, 1869-70, and 1869, which authorized the appellant to levy and collect ad valorem taxes on the taxable property in said county for he benefit of the county.

The appellee, by its response, denied that its property in said county was subject to be assessed by the county for said years, or any of them.

The county court ordered its clerk to assess the appellee's road in said county at the rate of $20,000 per mile for each of said years.

Upon appeal by the appellee from said judgment to the circuit court, the judgment of the county court was reversed, and the appellant's proceeedings were dismissed.

The appellant has appealed to this court.

By the act of the legislature of 1864 all the railroads in this State were assessed at $20,000 per mile. The president, etc., of each road were required, on or before the 10th day of July of each year, to furnish, under oath, the auditor of the State the length of the road and its branches belonging to them; and each road was required to pay the same rate of tax on said assessment as was levied by law upon real estate. So, by said act, the tax upon railroads is specific.

The court, in the case of Applegate v. Ernst, 3 Bush, 648, held that in the absence of a statute expressly authorizing it, a railroad, for the reason that it was an entirety, could not be legally assessed in fragments; therefore, the portions of the road situated in each county could not be assessed in such county for local purposes

Also, in the case of the L. & N. R. R. Co. v. The Warren County Court, 5 Bush, 246, this court, reiterating the same doctrine, held that, under an act of the legislature of the State, passed in 1856, authorizing Warren county to collect an ad valorem tax to be levied on all the property in said county "listed for taxation for revenue purposes," the county of Warren had no power to force the L. N. R. R. Co. to pay taxes on its road in said county. The court, in that case, held that as the road, from end to end, was an entirety, it was not subject to fragmentary taxation, unless such taxation was expressly authorized by an act of the legislature; that enactments of the legislature, authorizing local ad valorem taxation, should not be made to apply to railroads by construction. The cases of the E. & P. R. R. Co. v. Elizabethtown, 12 Bush, 233; Graham v. Mt. Sterling C. R. Co., 14 Bush, 425; Franklin County Court v. L. & N. R. R. Co., 7 Ky. Law Rep., 810, construe the 3 and 5 Bush cases as above indicated.

But the appellant contends that the acts of 1865 and 1869 are more comprehensive than the act relied on in the 5 Bush case, and, therefore, included the appellee's road. The act of 1865 authorized a tax to be levied "on all property of said county liable to taxation for State revenue." The act of 1869 authorized a tax to be levied on "the taxable property in said county listed and taxed under the revenue laws of this State." The act relied on in the 5 Bush case means that Warren county was authorized to levy and collect an ad valorem tax on all the property in the county subject to taxation under the general revenue laws of the State. The language of the acts of 1865 and 1869 means no more. The railroads of the State at that time were not taxed under the general revenue laws of the State, but were taxed specially at the rate of $20,000 per mile. Also, according to said decisions, each railroad in the State was regarded as an entirety, and was not subject to fragmentary taxation, unless such taxation was expressly authorized. It follows that the railroads of the State, according to said decisions, were not subject to local taxation by implication. Therefore, the legislature, by an act approved March 17th, 1876, recognizing the fact that the railroads in this State, by reason of said decisions were not subject to local ad valorem taxation, expressly subjected them to such taxation.

From what has been said it follows that neither the act of 1865 nor the act of 1869 expressly includes the appellee's road.

Therefore, still adhering to the views expressed in the case of Franklin County v. The L. & N. R. R. Co., 7 Ky. Law Rep., 810, we are constrained to hold that, under the law, as it was construed by this court in the 3 and 5 Bush cases, above referred to, the appellee's road should not be subjected to the appellant's taxes for the years 1866, 1867, 1870, 1871, 1872, 1873, 1874 and 1875.

The appellant also contends that the circuit court should have dismissed the appellee's appeal, on the ground that the decision of the county court was a ministeral, and not a judicial, act.

The power of the county court, in cases like this, are conferred by sections 14, 15, 16 and 22, article 6, chapter 92, General Statutes, and not by the auditor's agent act.

By said section 22 the county clerk, upon information filed by the sheriff, summons the supposed delinquent to appear and show cause why his property should not be taxed. The supposed delinquent may appear before the county court and show that his property was not subject to taxation, or may address any excuse or exonerating circumstance that he may have for not listing the same. All of which the appellee attempted in this case, and it was the duty of the county court to pass upon these questions, which it did. Also, if the respondent is found willfully delinquent, it is the duty of the court to impose a penalty upon him, upon which question the court passed in this case.

If the respondent is not found willfully delinquent, but it is found that his property is liable to the tax, the court directs the clerk to assess it; the court, in such case, simply passes upon the question as to whether the property is liable to be taxed.

In this proceeding by the court the first question is, is the property liable to taxation? If decided in the affirmative, the next question, was the owner willfully delinquent? If yea, the court may fine him, etc.; but the court does not make the assessment. It orders that it shall be done upon the finding of the fact that the property is liable to be assessed. In determining these matters the court acts judicially and not ministerially, hence an appeal from its decision lies to the circuit court.

The judgment is affirmed.

HITT v. PICKETT'S ADM'RS, &c.

(Filed February 23, 1893.)

1. Lien—Purchase money—Limitation—P. agreed in writing to sell and convey by deed to R. twenty-nine acres of land when the said R. should pay the purchase price of said land, which was evidenced by two promissory notes executed to P. by R. Subsequently R., by executory contract in writing, sold to appellant this parcel of land, together with other land, aggregating seventy-three acres, payable in three installments. Shortly after the last installment fell due, appellant executed to R. his promissory note for $339.46, which covered the entire balance of the purchase money due on the land. Some time after the execution of this note R. surrendered to P. the two notes held by him for the purchase money, and in lieu thereof received from R. the assignment of the note executed to R. by appellant, also a promissory note of R. for $161.51, as the balance due on said twenty nine acres of land. P. having died, his administrators brought this action to sell the land to satisfy the foregoing indebtedness, and the heirs of P. having tendered to R. a deed for said land, appellant resists the sale, relying upon the statute of limitations of fifteen years adverse possession as a bar to the action. Held—That the statute of limitation does not bar the action.

There is a substantial distinction between a vendor's security, where he retains the title in himself until the purchase price is paid, and where he passes the legal title to the vendee and only looks to the implied lien that equity raises upon it for the payment of the purchase price. In the former case the legal title is retained by the vendor as a pledge for the payment of the purchase price, and the vendee has only an equity of redemption, and can not compel the holder of the pledge to surrender it until the purchase money is paid. But when the vendor has passed the legal title to the vendee, looking only to the implied lien for the payment of the purchase price, the vendee may defeat the implied lien by conveying the land to a purchaser for value, without notice of the lien.

2. Waiver of lien—Novation—In this case the vendor holding the legal title as a pledge for the payment of the purchase money did not waive his lien by accepting new notes for the indebtedness.

W. W. Kimbrough and W. S. Bayne for appellant.

E. L. Worthington, T. C. Campbell and O. S. Deming for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Bennett.

B. O. Pickett, in 1867, agreed, in writing, to sell and convey by deed to Washington Reed, twenty-nine acres of land, when the said Reed should pay the purchase price of said land, which price was evidenced by two promissory notes, executed to said Pickett by said Reed.

In 1868 said Reed, by executory contract in writing, sold to the appellant this parcel of land, together with other land, aggregating in all seventy-three acres, for the price of $2,226.50, payable in three installments, the last installment falling due on the first day of March, 1870.

On the 20th of August, 1870, the appellant executed to said Reed his promissory note, due one day after date, for $339.46, which coverd the entire balance of the purchase money due on said land. This note was credited by the sum of $100, paid on the 3d of September, 1870, and $52 paid on the 20th of October, 1870.

On the 24th of August, 1871, said Reed was found to be indebted to B. O. Pickett, as the balance of the purchase money on said twenty-nine acres of land, as much as the balance due on said note and the further sum of $161.51; in consideration thereof he, on that day, assigned to said Pickett the above mentioned note, and executed to him his note for $161.51, and Pickett surrendered to him the two original notes for the price of the land.

In the appellees' petition in equity, as the administrators of said Pickett, to sell said land to satisfy the foregoing indebtedness, it was averred, and not denied, that Pickett reserved in himself the title to said land as security for the payment of its purchase price. It was also averred, and not denied, that Pickett, at the time he agreed to sell said land, had a fee simple title to it, and retained such title until his death, which descended to his children, who were made parties to the action and who tenderd to Reed a deed, duly acknowledged, to said land. The appellant, Hitt, in his answer, made no objection to this deed.

In his answer, which he made a cross-petition against Reed, he did not allege that Reed could not make him a perfect title to the land, nor did he allege that Reed was bound to make him a

'title before he had a right to demand the payment of the purchase money. He could not make such allegation, for the reason that the covenants of the bond, binding Reed to make a title to the land and binding the appellant to pay the purchase money, are independent covenants, and either can be enforced without a compliance with the other, unless there is some equitable reason showing why it should not be enforced until the other is complied with; which reason the appellant did not show. He only asked in his cross-petition that Reed be compelled to make him a clear title in fee to the land.

The deed from B. O. Pickett's children invested Reed with an absolute title to the land, subject to the purchase money due thereon, and subject to said sum the title inured to the benefit of the appellant; and upon the payment of the purchase money, by the sale of the land, the court would order a deed to be made to the purchaser, conveying Reed's title; or, if the appellant should pay the puchase money, the court would order such deed to be made to him. This is all that he, under the circumstances of this case, could require.

The appellant, in an amended answer, alleged that he had held the adverse possession of said land for fifteen years before the institution of this action, which he relied on as a statutory bar to the action.

The plea is not available, for the reason that the action was commenced within fifteen years from the date of the execution of the note sued on by the appellant to Reed, and within fifteen years from the date of the execution of the note sued on by Reed to Pickett.

There is a substantial distinction between a vendor's security, where he retains the title in himself until the purchase price is paid, and where he passes a fee to the land and only looks to the implied lien that equity raises upon it for the payment of the purchase price. In the former case the legal title remains in the vendor as a security for the payment of the purchase price, and the vendee has only an equity of redemption. The legal title is retained by the vendor as a pledge for the payment of the purchase price, and the vendee, having only the equity of redemption, must pay the purchase price before he can compel the vendor to surrender the pledge which he holds for its payment. When the vendor has passed the legal title to the vendee, looking only to the implied lien for the payment of the purchase price, the vendee may defeat the implied lien by conveying the land to a purchaser, for value, without notice of the implied lien. But when the vendor reserves in himself the title to the land until the purchase price is paid, he holds the title itself as security, or in pledge, for the payment of the purchase price, and the vendee can not defeat this security, or pledge, by transferring his equity of redemption to another, though such transfer be for value and without notice of the fact that the legal title is held in pledge for the payment of the purchase money due the vendor. As the purchaser of the equity of redemption, and standing in the shoes of his vendor, he can not force the holder of the legal title, who holds it as security for the payment of the purchase money due him by his vendee, to surrender the title to him unincumberd by the debt which the title was held to secure the payment of; and the holder of the legal title, as security for the payment of his debt, has the right to enforce such security as against his immediate vendee or the latter's vendee as long as he has the right to enforce the collection of his debt, and in this case the right to enforce the collection of the debt was not barred by time. (Jones on Mortgages, volume 1, section 225; B. Pomeroy's Equity Jurisprudence, section 1260.)

The appellant contends that B. O. Pickett waived his lien by giving up the original purchase money notes, and taking a new note for the balance of the purchase money.

As just said, Pickett had something more than an implied lien; he retained the legal title in himself as security for the payment of his debt. In other words, it was in the nature of a pledge, and it is well settled that where a person holds such security he may take additional security without waiving such security. So, the title being held by Pickett, as security for the payment of the purchase price of the land, we are at a loss to see upon what ground he should be held to surrender or wave his security by changing the evidence of the indebtedness. The indebtedness was not extinguished by taking a new note for it. The title was retained as a security for the payment of the indebtedness, not merely to secure the evidence of it. (Jones on Mortgages, volume 1, section 282.)

It is true that the appellant and Reed were not bound on the same debt, nor could judgment be rendered against each on the same debt; but the land in controversy was bound for the payment of both debts; therefore, it was not improper to join the appellant and Reed as defendants.

The allegations of the petition were sufficient to authorize a personal judgment against the appellant on the $339-note.

The judgment is affirmed.

ROGGE v. CASSIDY.

(Filed May 13, 1890—Not to be reported.)

1. Surety—Accommodation note—A joint and several promissory note having been signed by H. and R., payable to the German National Bank of Newport, negotiable and payable at its banking office in Newport, the proceeds, when discounted, to be placed to the credit of ———, and said bank having refused to discount it, it was discounted by H. to the appellee. In an action by the appellee on said note, Held—That the lower court improperly refused to allow to be filed the answer offered by R., denying that the note was executed for the purpose of discount; upon the contrary, averring that said bank held another note, upon which H., R. and one B. were joint obligors, and which was about due, and that the note sued on was executed by R., with the distinct agreement with H. that B. was also to execute it and that it was then to be delivered to the bank in renewal of that much of the debt to it, H. paying the balance; also that H. was then in failing circumstances, and that he did not and would not have signed it for discount, but only to extend the time of payment of the existing liability for H.; that he was, in fact, the surety of H. in the note sued on, and received no part of the proceeds of it. Said note was not negotiable paper, and the answer presented a good defense for R.

2. Parties to actions—Nominal payee—The German National Bank was not a necessary party to this action. It was a nominal payee merely, never having had any right to the note. The rule requiring the payee, who was holder of the legal title, to be made a party where transfer has been made by delivery merely, and not by indorsement, does not apply to a case like this.

C. J. Helm for appellant.

D. A. Glenn for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

The appellee, C. L. Cassidy, brought this action upon this note:

"Newport, Ky., Oct. 19, 1885.

"Ninety days after date we jointly and severally promise to pay to the German National Bank of Newport or order three hundred dollars, negotiable and payable at its banking office in Newport, Kentucky, for value recived, and we hereby direct the proceeds of this note, when discounted, to be placed to the credit of

"H. H. HELMAN,
"CHAS. H. ROGGE."

The petition avers, in substance, that it was executed by the obligors for the purpose of discount; that the German National Bank refused to discount it, and that Helman then, by his agent, for "the price agreed upon," discounted it to the appellee. There was no written assignment of it by any one to him.

A special demurrer was filed to the petition, the ground being that the German National Bank had not been made a party. The averments of the petition show, however, that it was a nominal payee merely, and that it never had any right or even claim to the note. These statements were admitted by the demurrer.

The fact, therefore, that the appellee held the note by delivery only from the maker, and not by an endorsement from the bank, did not require it to be a party. There was no necessity for it. The Code provides that every action shall be brought in the name of the real party in interest. The rule that where the payee transfers a note by delivery merely, and not by endorsement, the legal title, therefore, remaining in him, requiring him to be a party to an action upon it, does not apply in a case of this character.

A rule of law is not to be applied when there is no ground or reason for its application.

Upon the overruling of the demurrer a judgment was rendered. Two days after the appellant presented an answer, and moved to set aside the judgment and file the answer. The court refused to do so. Why, does not appear.

It was proper, however, to sustain the motion, provided the answer presented a valid defense. We will, therefore, assume, as is asserted in argument it did, that the lower court acted upon the belief that it was insufficient, and did not, in the exercise of its discretion, reject it upon the ground of delay in presenting it.

It denies that the note was executed for the purpose of discount; but, upon the contrary, avers that the German Bank held another note upon which Helman, Rogge and one Bockweg were joint obligors, and which was about due; that the note sued on was executed by the appellant with the distinct agreement with Helman that Bockweg was also to execute it, and it was then to be delivered to the bank in renewal of that much of the debt to it, Helman paying the balance; also that Helman was then in failing circumstances, and that he did not and would not have signed it for discount, but only to extend the time of payment of the existing liability for Helman; that he was, in fact, the surety of Helman in the note sued on, received no part of the proceeds of it, and has no knowledge or information sufficient to form a belief as to what the appellee paid for it.

The statements of the answers are to be taken as true in considering the motion to file it. So considering them, did it present a valid defense?

Counsel for the appellee appear to argue the case as if the note sued upon stood upon the footing of negotiable paper.

It is scarcely necessary to say that if it did, then any agree-

ment between the obligors to it, and which was unknown to the holder, could not affect him.

In such a case a total failure of consideration, or even fraud between the antecedent parties, constitutes no defense as to him, provided he obtained the paper for a valuable consideration before its maturity, and without notice of any infirmity connected with it.

It is true the answer does not aver that the appellee had notice of the agreement between the obligors, and of the circumstances attending its execution.

But it was not negotiable paper. It was so in form, but by our statute, although so in form, yet it could not, in fact, become so, unless it was negotiable in and by a chartered bank of this State.

Being a mere promissory note the assignee held it, subject to all proper defenses. (Civil Code, section 19.)

The appellee relies mainly upon the case of Ward, &c. v. Northern Bank, &c., 14 B. M., 283. It is not in point.

It was there decided if a note be executed by sureties to enable the principal to raise money of a bank to which it is made payable, and it be not there discounted, yet the sureties will be held liable to an individual who advances money upon it.

The case was made to turn upon the fact that the sureties signed the note to give it credit; to enable the principal to raise money upon it; and it was, therefore, immaterial to them whether the money was advanced by the payee named in it or by another party. It was intended for circulation; the sureties, by indorsing it, gave it credit for that purpose, and could not, therefore, be allowed to escape responsibility.

The object they had in view in endorsing the paper had been accomplished, and they were, therefore, requird to answer to the party who had done what they desired.

The note in that case was used for the very purpose for which it was made, while here the intention in executing the note, instead of being carried out, was defeated.

The grounds upon which that case was decided are fully discussed in the case of Russell v. Ballard, 16 B. M., 201; and are sustained in Daniel on Negotiable Instruments, volume 1, page 742. That author says: "It is immaterial that paper executed or endorsed defer: accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. * * * The accommodation party must have some interest in the application of the money, otherwise he is in no condition to complain there has been a misapplication of it, or of the security on which it has to be raised."

Upon the other hand, the appellant relies upon the case of Russell v. Ballard, supra.

It is not altogether in point either. There the surety in a note, payable to a bank, became such under an express agreement that money was to be obtained for a certain purpose. The principal, however, without the assent of the surety, passed it off to the holder, not for money, as was the case here probably, but in payment of a pre-exisitng debt; and the surety was exempted from liability.

The fact that no money was raised upon it was evidently considered material by the court. The opinion alludes especially to this fact. The holder of it really parted with nothing of value in exchange for it. The surety not being held bound, left him as he was before he obtained the note. He still had his debt upon the principal.

In this case, however, the appellee saw, before he obtained the note, that it was payable to the bank, and he knew it was not, and apparently had never been, the holder of it.

In fact, his petition shows that he knew Helman was still the holder of it. Under these circumstances he could easily have protected himself by inquiry, and his complaint that the appellee, by his conduct, put it in the power of the principal to delude him, does not, therefore, entitle him to advanced equitable consideration.

The appellant had not, according to his answer, executed the note for discount merely, or to enable his principal to borrow money. He had an interest in the application of the paper. It was to be applied in renewal of an existing debt upon which he was surety. He had a right to demand that this be done, and being negotiable paper, he has the right to still insist upon it.

Judgment reversed and cause remanded, with directions to permit the answer to be filed, and for further proceedings consistent with this opinion.

SCOTT v. PROCTOR.

(Filed May 15, 1890.—Not to be reported.)

Life estate—Trusts—G. being the owner of land, slaves and personalty, by his last will, devised to his wife for life said property. G. died leaving children by her and a former wife surviving. After the death of the widow one of her children claimed an interest in the lands possessed by G. at his death, basing her title upon a deed from the widow, conveying title received by compromise with claimants of land possessed by G. Held—That the title received by the widow from the claimants did not invest her with title in her own right, as the proof shows that she used the money belonging to the estate in effecting the compromise, and will be regarded as a trustee holding the property for the benefit of the children.

H. D. Allen for appellant.

Appeal from Union Circuit Court.

Opinion of the court by Judge Pryor.

Lewis Greenwell died in the county of Union, in the year 1842, the owner, or at least in the possession, claiming to be the owner, of a tract of about 300 acres of land lying in that county. He left surviving him several children by his last wife, and two children by his first wife. By his will he gave to his wife the control of his estate for life, including the land, a number of slaves and considerable personalty.

His widow survived him for many years, dying in the year 1883. After her death Martha A. Scott, one of Greenwell's children by her, brought this action against Proctor, the appellee, for an interest in 126 acres of the land left by her father.

Her claim rests upon the fact that she obtained this interest by a conveyance from her mother, and that her father never owned it. Before the death of Lewis Greenwell, the heirs of one Belmain set up claim to that part of the tract now in controversy, but no adjustment of the matter was made during the life of Greenwell. He had lived on this part of the land; erected his dwelling upon it, and regarded it as a part of the main farm.

When he died his widow compromised with the heirs of

Belmain, paying them $250, and took a deed passing to her the fee in so far as they could pass it. She then (the widow) made a deed to her children, passing to them the fee after her death, and this is the land that Mrs. Scott claims an interest.

In the year 1859, and about twenty-six years before this suit was instituted, Mrs. Scott sold all of her interest in the land and personalty, owned and left by her father, to one Buckman, who had married one of the children of Greenwell by his first wife, and made him, in conjunction with her husband, a deed therefor. The entire tract of land was regarded as belonging to the estate. Was owned and claimed by Greenwell, who was in the actual possession at his death. Must have been considered and regarded as a part of the puchase by Buckman, and the conveyance to the widow, while it passed the title of the adverse claimants, was simply a holding by her in trust for the children. There is proof conducing to show that she paid it out of her father's estate, or out of her interest in that estate; still she held in her hands the money and personalty of her husband, and could not convert the estate to her own use by compromising with adverse claimants and taking a deed in her own right.

Besides, it is apparent that since the death of Greenwell the whole tract was regarded as belonging to the estate, and the sweeping conveyance made by Mrs. Scott and her husband shows a purpose to pass all of her interest of every kind and description.

The judgment below is, therefore, affirmed.

WARD v. SMALL'S ADM'R.

(Filed May 15, 1890.)

1. Acceptance of deed—Appellant having had possession and control of a tract of land for the years 1882 to 1886, inclusive, which had been conveyed in 1875 by deed from T. to S., appellant, at the time of taking possession, assuming to act for S. and representing himself as his agent. In an action by the administrator of S. to recover the value of the use and occupation of said land for the years named, appellant insists that no proof of the acceptance of said deed by S. was shown. Held—That the demand made by S. of appellant of rent, together with proof that the deed was delivered to one who was considered as an agent of S., sufficiently shows an acceptance of the deed. The acceptance of a deed may be presumed from conduct. The delivery and acceptance may be by doing something and saying nothing, or by speech without act, or by both.

2. Privity of contract—Appellant having informed S. that he had been renting and controlling the land prior to the time for which rent or the value of its use and occupation is claimed, and having then offered to buy it, a privity of contract was created, which will uphold the action.

3. Landlord and tenant—If one takes possession of land as agent and uses or controls it, the relation of landlord and tenant arises.

John Young Brown and Vance & Vance for appellant.

R. H. Cunningham for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

The petition in this case avers, in substance, that R. A. Small

being the owner of a certain tract of land under a deed made to him in 1875 by W. G. Taylor, the appellant, Thomas E. Ward, being aware of such ownership, took possession of it, and assuming to act for Small, and representing himself as his agent, rented it out for the years from 1882 to 1886, inclusive; that its rental value was $100 per year; that Ward, by himself and tenants, used it during the years named, he promising Small to pay him the rent he received, but failed to do so, and wrongfully transferred the rent bond for 1886, as well as surrendered the possession of the land to another person.

It appears that for the first three years the rent was paid in improvements upon the land. The rent received by Ward for 1885 was $50, and the rental bond for 1886, disposed of by him, was for $60.

The jury returned a verdict for these two sums only. The two grounds mainly relied upon for a reversal are, first, that it was not shown that Small was the owner of the land, because he never accepted the deed from Taylor; second, that Ward was not the tenant of Small, and, therefore, could not be sued by him in assumpsit for the use of the premises. It is requisite to every deed that it be delivered; and aslo that it be accepted. Kent says: "Delivery is another incident essential to the due execution of a deed, for it takes effect only from delivery."

This does not mean that there must be a manual delivery to the grantee. It may be delivered to his agent; also a delivery to the recording officer or stranger will be valid, and the acceptance by the grantor presumed from his conduct without an express acceptance.

The delivery and acceptance may be by doing something and saying nothing, or by speech without act, or by both. They may, of course, be found to have taken place from conduct alone. The conveyance is not binding, however, upon the grantee, unless he has in some way assented to it. He can not be made the purchaser without his knowledge or consent.

Its acceptance, especially as it is for his benefit, may be presumed from his conduct, but this presumption is not a conclusive one, and it in itself shows that an acceptance is essential. Mr. Washburn says: "The better opinion seems to be that no deed can take effect as having been delivered until such act of delivery has been assented to by the grantee, and he shall have done something equivalent to an actual 'acceptance of it.'" (2 Washburn on Real Property, 581.)

The prevailing doctrine appears to be that a deed, to become effective, must be either delivered to the grantee or his agent, or such circumstances be shown as will raise a reasonable presumption of its acceptance by him. He certainly may decline to accept it prior to the doing of an act equivalent to an acceptance, although by legal fiction the presumption of an actual acceptance by him exists for his benefit as against the grantor and his heirs or devisees from the time the grantor delivers it to any one for the benefit of the grantee.

These views, we think, are supported by many cases, among which are Jackson v. Phipps, 12 John. 418; Thompson's Heirs, &c. v. Jackson, 10 Bush, 424, and Bell v. Farmers' Bank, &c., 11 Bush, 34.

In this instance it appears that the deed was delivered by Taylor to one Atkinson, who had no express authority from Small to receive it, and was not empowered to act as his general agent. He had, however, for many years been attending to various matters for Small, who lived remotely, and of this Taylor

was aware. Atkinson testifies that he can not say how long before the reception of the deed he had attended to any thing for Small; says it may have been two and it may have been ten years; and although he had no communication with Small as to the deed, yet he would not have received it and had it recorded, as he did, unless he had thought he had the authority to do so.

We are incined to the opinion that he was so far Small's agent as to render a delivery of the deed to him for Small effective; but even if not, yet Small certainly knew of it subsequently and ratified it. The appellant himself testifies that prior to the year 1885 he applied to him to purchase the land, telling him he had been renting it out, and that Small declined to confer with him upon the subject, saying he had not authorized the renting.

Moreover, before the bringing of this suit he demanded the rent of the apellant. All this shows plainly that Small knew of the existence of the deed, and had accepted it. It is also proven that Taylor, prior to his death, told at least two parties that he had sold the land to Small.

It is true that assumpsit does not lie for the use and occupation of premises, unless the relation of landlord and tenant exits by virtue of express or implied contract.

Waiving the question whether this is such an action, or merely one to recover from the appellant money collected by him for Smalll, yet the verdict only embraces the rent for the years 1885 and 1886, and the appellant knew of the existence of the Taylor deed prior to 1885, and in person informed Small that he had been renting the land, and applied to him to buy it. He informed the owner of what he had been doing with his land, and tried to purchase it from him.

Most assuredly a privity then arose between them, and appellant from that time, at least, controlled the land as belonging to Small, and by his sufferance. This being so, even the action of assumpsit for use and occupation would lie against the appellant.

He took possession of the land as agent. He rented it at the outset, styling himself as "agent," but without naming his principal in the lease. It is somewhat curious that he is unable to say as agent for whom; but it is evident that at least from some time prior to 1885 he recognized Small as the owner of the land.

Even if one takes possession of land as agent, and uses or controls it, the relation of landlord and tenant arises. (Farrow's Heirs v. Edmondson, &c., 4 B. M., 605.) Upon the appellant's own evidence we think it apparent that he was holding the land for Small, and he has, by the verdict, been made liable only for what he actually rented the land for after a time when he unquestionably recognized Small's claim to it. Certainly the judgment is as favorable to him as he had any good reason to expect.

The instuctions given to the jury conformed to the views above expressed. Those asked by the appellant, so far as they embraced correctly the law of the case, were comprehended by those given by the court. There is a cross-appeal. The ground of it does not clearly appear. The appellee excepted to the repetition of certain testimony offered by him, and we infer the object of the cross appeal is to test the correctness of the ruling of the lower court in this respect. The conclusion we have reached to the main appeal renders it unnecessary to consider the cross-appeal, and it is, therefore, dismissed.

Judgment affirmed.

SLAUGHTER, &c. v. CITY OF LOUISVILLE.

GODA v. SAME.

MILLER v. SAME.

(Filed June 12, 1888—Not to be reported.)

1. Municipal government—Taxation—The act of legislature, approved February 17, 1866, requiring notice of the sitting of the board of tax commissioners for Louisville, provided for by said act, to be given by them by public advertisement, was not complied with by the newspaper publication of a notice signed by the assessor alone, although he was ex-officio a member of the board, and, therefore, assessment of appellants' property in the city of Louisville for ad valorem taxes for 1877 and 1881, inclusive, was void. The levy of ad valorem taxes for 1882 was invalid, because no meeting of the board was had at the time stated in the notice. The act of March 29, 1882, directed the city assessor to reassess any real estate in Louisville upon which taxes had not been paid, also to assess all property not previously assessed. This act provided for a board of commissioners to be in continuous session to hear complaints of taxpayers, but the board never met or organized. The act of April 8, 1882, directed the city assessor to reassess any real estate that had been erroneously assessed, this reassessment to be made as of the 1st day of September in each year, and after written notice given by mail by the assessor to the person whose property he proposed to reassess. No reassessment was attempted to be made of appellants' property under this act for 1882. The act of April 8, 1882, also regulated assessments made after its passage. These assessments were required to be made on the 1st day of September, 1882, and annually thereafter, the assessment books were required to remain open in the office of the assessor from the 15th to the 30th day of November in each year, during which time any dissatisfied taxpayer might file his complaint with the assessor. This act provided for a board of equalization, to be appointed by the mayor, by and with the advice and consent of the board of aldermen, in September of each year. The board was appointed in November, 1882, without the advice and consent of the board of councilmen; the same objection existed to the appointment of the board in 1883, therefore, the assessments for 1883 and 1884 were void. By an act of April 19, 1884, the acts of the mayor in appointing said board were attempted to be legalized, directing said board to remain in session during the months of June and July, 1884, to correct unpaid assessments for the years 1883 and 1884 upon petition of any complaining taxpayer. Said board did not meet until June 10, 1884, and their action was not, therefore, a compliance with the law. The act of April 28, 1884, which was amended by act of May 12, 1884, provided that the inoperative and void assessments of property from 1876 to 1882, inclusive, be now assessed at the valuation appearing on the assessor's books for those years. Said assessment made by the legislature was void and unconstitutional.

2. Constitutional law—An act of the legislature attempting to assess property for ad valorem taxation at a certain value is an attempt by the legislative body to perform a ministerial act, and is, therefore, unconstitutional. The legislature may, by an act, cure a defective act of a ministerial officer, but it can not aid a void act of such officer.

3. Pleading—Petition—A petition alleging that a certain assessment is defective, without alleging some fact showing why it is defective, is insufficient.

Dodd & Dodd, Lane & Burnett and R. W. Woolley for appellants.

L. N. Nembitz for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

As these cases involve the same questions they, by agreement, are to be heard together. They will be disposed of in the order in which they stand.

Slaughter, &c. v. The City of Louisville—The appellee, by its action in the Louisville Law and Equity Court, sought to subject the real estate, situated in the city of Louisville, belonging to the appellant, Mrs. Slaughter, to the payment of ad valorem taxes, alleged to have been assessed against the same by the appellee for the years 1877 to 1885, inclusive. The appellant resisted the appellee's right to recover these taxes, upon the ground that there was no assessment for any of said years, and upon the ground of errors committed in the election, organization and official transactions of the various boards, provided by law for the hearing of appeals from the alleged assessments.

By an act, approved February 17, 1868, a board of tax commissioners was provided for, whose duty it was to hear the taxpayer's complaints of improper assessments, etc. This board was required to give notice of its sittings by public advertisement.

In the case of Ormsby v. The City of Louisville, decided by this court in 1880, it was held that the publication of this notice was a condition precedent to the city's right to collect ad valorem taxes.

In the case of Dumesnil v. The City of Louisville, decided by this court in 1882, it was held that a newspaper advertisement, signed by the city assessor, he being ex-officio a member of the board, was not a notice published by the board.

The appellee fails to show publication of notice in any other way; it, therefore, fails to manifest a right to recover of the appellee any of the taxes that might have been assessed prior to 1882.

The notice for 1882 appears to have been in due form; but the board failed to meet at the time fixed by law for its meeting; therefore, the levy of 1882 was invalidated.

By an act, approved March 29, 1882, the city assessor was directed to reassess any real estate upon which taxes had not been paid, and to assess all property not previously assessed. This act also provides a board of commissioners, consisting of the auditor, treasurer and chairman of the committee on assessments, whose duty it shall be to be in continuous session for the purpose of hearing appeals, etc. This board never met or organized. According to the decisions of this court, the failure of said board to organize and meet, the reassessments, if any there were, fell to the ground.

By an act, approved April 8, 1882, it was made the duty of the assessor to reassess any real estate that had been erroneously assessed. This reassessment was required to be made as of the first day of September in each year. But the assessor was required to give written notice by mail to each person whose property he proposed to assess before making the assessment. It is not contended that any reassessment, as required by this act, was made, or attempted to be made. Therefore, the appellee still shows no right to collect taxes from the appellee up to and including 1882.

The act of April 8, 1882, also regulated the assessments made after its date. These assessments were required to be made on the first day of September, 1882, and annually thereafter. The assessment books were required to remain open in the office of the assessor from the 15th to the 30th day of November in each year, during which time any taxpayer, dissatisfied with his assessment, might file his complaint with the assessor.

This act abolished the board of commissioners, and in its stead provided for the appointment of a board of equalization, whose

duty it was to hear appeals, etc. This board was to be appointed by the mayor, by and with the consent of the board of aldermen. The act provided for the appointment of this board in September, 1882, but it was not appointed until November of that year, and the appointment was made without the consent and approval of the board of aldermen. The sittings of this board of equalization, in November, 1882 and 1883, were, therefore, without authority. Hence the taxpayers were not called upon to file any complaint with the assessor in reference to erroneous assessments, for the reason that there was no legally appointed board to act upon them. This defect was fatal to the taxes of 1883 and 1884.

By act, approved April 19, 1884, it was attempted to legalize the act of the mayor in appointing the board of equalization, without the consent and approval of the board of aldermen. This act attempts to validate the acts of said board. This act also provides that said board "shall have full power during the months of June and July, 1884, to correct, increase or reduce any unpaid assessment for the years 1883 and 1884, and any taxpayer delinquent for said years may appear before said board of equalization by petition in writing for correction of his tax-bill, as in said act provided."

We construe this act to mean that the taxpayer, in order to entitle him to a hearing before said board, was required to file a petition before it, setting forth his complaint; and that it was the duty of said board to be in session during the months of June and July, in order to afford the taxpayer the entire two months in which to file his petition; also, that the session, in order to be legal and valid, should have commenced on the first day of June and continued until the last day of July. The board was created for a special purpose. Its life was fixed for two months, commencing on the first day of June, during which time the taxpayer had the right to file his petition, setting forth his complaint, and a failure of the board to begin its session on the first day of June was equivalent to a notice to the taxpayers that the members of it had declined to act as such, and a subsequent meeting of the board, to wit, on the 10th of June, was not a compliance with the terms of the act, and the taxpayer was not required to take notice of it.

By an act approved April 28, 1884, which was amended and reenacted by an act approved May 12, 1884, it is enacted by the third article of the latter act, that all persons whose property was attempted to be assessed for the years from 1876 to 1882, inclusive, in the sense that assessments against them were extended upon the assessor's books, and who have not paid those assessments, are, as far as such prior levies or assessments were inoperative and void, assessed now upon the extended value of such property as appearing on said books at the following rates, etc.

The act, supra, does not attempt to cure merely defective assessments. The appellee's petition does not disclose that the alleged assessments for the years from 1876 to 1882, inclusive, were merely defective and irregular. Its petition alleges that said alleged assessments were defective, but no fact alleged showing that they were merely defective. It is settled beyond question that where assessments are merely defective by reason of some mistake or omission of the officer, such defects may be cured by subsequent legislation. If the appellee wished to maintain his action, upon the ground that the alleged assessments were merely defective and not void, it was incumbent upon it to allege such facts, in connection with the assessments, as would

show that they were merely irregular and defective, and not void. The simple allegation that the assessments were defective is not sufficient.

The third article of the act of the 12th of May, 1884, does not attempt to validate assessments that were merely defective, for it expressly declares that in said assessments, in so far as they were inoperative and void, are now assessed. It is also to be observed that said act recites no fact that shows that said assessments were merey defective, and not void. So if the appellee can maintain its action at all, it must be upon the ground that the assessments extended in the assessor's book for said years were inoperative and void, and that the legislature made the assessments for those years, and authorized an action upon them. So the question to be decided is, whether the legislature has the constitutional power to assess ad valorem taxes?

By the Constitution of this State the powers of the State are divided into three distinct departments—the legislative, executive and judicial. It is a fundamental principle that neither department can execrise the powers belonging to the other. It is well settled that the valuation of property for the purpose of ad valorem taxation is in its character, a judicial act. (Cooley on Taxation, page 288.) But by the division of the powers of the government in this State it belongs to the ministerial class of duties. Pennington v. Woolfolk, 79 Ky., 13, and C. N. O. & T. P. Ry. Co. v. Commonwealth, 81 Ky., 497. In the case of Hagar v. Reclamation District, 111 U. S., 711, it is said: "But where a tax is levied on property not specific, but according to its value to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially." This court, as the foregoing extract shows, classes it among the judicial powers of the State, and in California the power is held to belong to the ministerial department of government. The valuation or assessment of property in this State, not only belong to the ministerial department of the government, but is an indispensable act, in order to levy ad valorem taxes upon it. In the nature of the thing, there must be an assessment. On this subject Cooley, in his Work on Taxation, page 259, says: "Of the necessity of an assessment no question can be made. Taxes by valuation can not be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. It is, therefore, not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity."

Can the legislature, in order to authorize the collection of the ad valorem taxes, fix the valuation upon the property to be taxed? It seems to be well settled that the legislature, as the lawmaking department of the State government, has no constitutional power to fix the valuation of property, which is to be taxed upon ad valorem principles. The reason for this rule is, that the legislative department has no judicial, executive or ministerial powers, and, as the valuation in this State belongs to the ministerial powers of a government, it follows that the legislature has no constitutional power to make the valuation. Taxes are not debts. Debts are obligations founded upon contracts, express or implied. But taxes are impositions levied for the support of the State government, or for county or city purposes; they are imposed by authority; they operate on the taxpayer "invitum." When they take the form of a per centum, they must be a valuation as a basis of the power to levy and col-

lect them. The taxpayer is entitled to be heard in fixing the valuation. The basis of the right to collect taxes from him consists in the valuation of his property, and to deny him the right to be heard in making this valuation would be the taxing of his property without due process of law. The valuation is the due process of law, by which the right to take his property for taxes is begun; and the legislature having no judicial, executive or ministerial power, it can not make the valuation; but the valuation must be made by some person authorized to exercise in this State ministerial power, and such person is the assessor. But it is said that an assessment had been made by an assessor; if so, the act says, that such assessment was "inoperative and void." Therefore, it was not merely defective, but was an absolute nullity. It had not the shadow of an existence. It was treated by the act as if no assessment whatever had been made. In such state of case the legislature had no constitutional power to make the assessment, not even as a curative act; for, as the assessment was void, there was nothing to cure.

In the case of The People v. Hastings, 29 Cal., 456, where the assessor for the city of Sacramento had made a void assessment of property, and the legislature, by its own act, made an ad valorem assessment, taking as a basis said assessor's attempted assessment, the court said: "By recurring to the act of 1858 to incorporate the city and county of Sacramento, it will be seen that the assessor who made the assessment for the year 1860 was elected by the qualified electors of the city and county of Sacramento, which is in a different district from that of the city of Sacramento. The insufficiency of that assessment as the basis for taxation for the year 1863 is apparent on several grounds; it was not made by the assessor elected by the qualified electors of the district in which the property to be taxed was situated, the city and county of Sacramento not being the same district as that of the city of Sacramento. The making of the certified copy of the assessment roll for the year 1862, so as to include property within the city of Sacramento, can not be regarded in any sense as the making of an assessment of such property by the assessor. The copying by one officer of a valuation made by another officer is not a valuation made by the first officer. If it is a valuation, in any sense, for the year 1863, it is a valuation made by the legislature; and in view of the division of the powers of the government into three departments, the legislaitve, executive and judicial, it will not be claimed that the legislative department was competent to perfom the purely executive functions of an assessor. The objection is not obviated by the finding that the assessment was duly and regularly made, in accordance with the statutes, for the only assessment that was provided for by the statutes was the adoption of a previous assessment; and if any other than such an assessment had been made, the valuation would not have been ascertained, as directed by law."

In the case of The People v. S. V. Savings Union, 31 Cal., 138, it was held: "A valuation is the very foundation of proceedings for apportioning and collecting a tax upon property. It is essential to the validity of a property tax. If the assessor has failed to make an intelligible valuation, that duty can not be performed or the defects remedied by the auditor; nor can the legislature make the valuation.

Where an assessment has been, in fact, made by the assessor, which assessment, by reason of some irregularity in his proceedings, is merely defective, but not void, such defects may be cured by legislation. In such case the curative statute relates

back to the assessment, and makes it sufficient for the purpose of collection by virtue of said assessment. The power of the legislature to pass a valid curative act consists in the fact that there was an assessment having elements of vitality, to which more strength may be given for the purpose of making it enforcible. The assessment must have some vitality in order to give the legislature jurisdiction of it. If it has no vitality, but is void, the legislature has no jurisdiction of it. In the nature of things there can be no jurisdiction over a thing that does not exist, and an act that is void has no legal existence whatever. The assessment being void, the legislature had no jurisdiction over it. It could not cure the act of assessment, because there was nothing to be cured. All it could do was to provide for a reassessment and its collection. The act, in so far as it attempted to assess the appellants' property, is without constitutional authority, and is, therefore, void.

Miller, &c. v. City of Louisville—The appellant sought in this action to recover back taxes for the year 1880. The principles announced in the case of Slaughter, &c. v. The Appellee, supra, apply to this case.

Goda v. City of Louisville—The appellee sought in this action to recover of the appellant taxes for the years 1882, 1883 and 1884. The principles announced in the case of Slaughter, &c. v. The Appellee, supar, in reference to the taxes for those years, apply to this case.

The judgment of the lower court in each of the above named cases is reversed, with directions to dismiss them.

MILLER v. CARLISLE.

(Filed May 15, 1890.)

Construction of will—"Heirs"—C. died, leaving six children surviving him, and by his last will and testament he devised separately to each of them certain lots of land, and his or her heirs further declaring that "none of the above lands described are to be sold during the life time of the devisees either by the devisees or any other authority whatever, for the debts of any husband or wife that any of the legatees now have or may hereafter have, but to remain, as above stated, and if any one of said heirs of mine should die leaving no child or children, then the one so dying, their shares or shares to be equally divided amongst the survivors."

To the sixth child, a daughter, he then devised certain described property to be "under the same restrictions as for the other heirs."

This daughter, at the date of the will, had living a daughter who married and died before her mother, leaving a son surviving, being a great-grandchild of the testator, he survived his grandmother, who devised to him the estate received from her father. In an action by the two sons of the original devisor claiming this property as survivors of their sister, Held—That the grandson of the testator is entitled to the share devised to his grandmother under a fair and reasonable construction of the will. The words "child or children," used in the clause providing for survivorship, were evidently used as synonymous with "heirs," and the testator clearly intended that if his children died without some one to take from them by descent, they should have no power to pass their estate from their surviving brothers and sisters.

Winslow & Winslow and W. P. D. Bush for appellant.

J. A. Donaldson for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Pryor.

The will of Samuel Carlisle is before us for construction.

He died leaving six children surviving him, and made, after providing for his wife, the following disposition of his property: "I give to my son, James A. Carlisle, and his heirs, lot No. 1," describing it.

"I give to my daughter, Anna H. Carlisle, and her heirs, lot No. 2," describing it.

"I give to my daughter, Mary A. Carlisle, and her heirs, lot No. 3, " describing it.

"I give to my son, Samuel, and his heirs, lots 4 and 5," describing them.

"I give to my daughter, Sophia, and her heirs, lot No. 6," describing it.

"And I do hereby declare that none of the above lands described are to be sold during the life time of the devisees, either by the devisees or any other authority whatever, for the debts of any husband or wife that any of the legatees now have or may hereafter have, but to remain as above stated; and if any one of said heirs of mine should die, leaving no child or children, then the one so dying, their share or shares to be equally divided amongst the survivors."

The testator then proceeds to make a devise to his daughter, Mrs. Flynt, as follows:

"And to my daughter, Malvina F. Flynt, I give all my houses and lots in Carrollton, which I purchased of one John Lageman, namely, two houses and eight half-acre lots, to be under the same restrictions as provided for the other heirs."

The daughter, Malvina Flynt, at the date of the will, was married, and had living a daughter. The daughter married, and died before her mother, leaving a child surviving her, named Dudley E. Miller.

The mother, Malvina Flynt, then died, leaving a will, by which she gave this property, that her father devised to her, to her grandson, Dudley E. Miller."

The two sons of the original devisor, Samuel Carlisle, claiming that under the will of their father, as their sister, Malvina Flynt, died without leaving a child or children surviving her, her portion of the estate passed to her brothers and sisters, and this action was instituted that the rights of the parties might be determined; and the chancellor below having adjudged that the great grandson of the original devisor, and the grandchild of his daughter, Malvina, took nothing, under either the will of Samuel Carlisle, his great grandfather, or under the will of his grandmother, that judgment is brought here for revision.

It is well settled by numerous authorities, embracing several decisions by this court, that the words child or children, when used as describing those who are to take under the will, do not embrace grandchildren, and the meaning of such words can not be extended, unless such was the plain intention of the testator gathered from the entire will; in fact the statute of this State provides that: "A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise." (General Statutes, article 2 of chapter 50.)

This statutory construction was not intended to control the intention of the testator where it appeared that a more extended

meaning was given such words by him, but was enacted as following the rule adopted or recognized by this court in the case of Churchill v. Churchill, 2 Metcalfe, 466, as well as in many other reported cases. Where there is no necessity for enlarging the meaning of the words child or children, or where no intention to do so by the testator appears on the face of the will, the chancellor is confined to the ordinary meaning of the words, and can not include grandchildren. Nor will the necessity for the chancellor's interference, and from the fact alone that injustice has been done by the testator, or by reason of the hardship of the devise, but it must be a necessity arising from a state of facts that compels the chancellor to extend the meaning of the words to include grandchildren, so as to make the will operative or effective; therefore, a plain devise to one's children will not include grandchildren, although they may have the same claims upon the testator's bounty.

The chancellor is left, however, to construe the entire will, with all its provisions, so as to arrive at the testator's intention.

In this case the devise to five of the testator's children is to each by name and to their heirs, but when he comes to make the devise to his daughter, Malvina Flynt, the word heirs is omitted, but with the further proviso that she takes "under the same restrictions as the other heirs."

It is argued by the appellant that the clause in reference to the restrictions, referred only to the inhibition of sale by any of the devisees, and had no reference to the question of survivorship, in the event that Mrs. Flynt died without children. We can not concur in such a conclusion, and after a careful consideration of the provisions of the paper, we must adjudge that the testator intended to place all his children on the same footing, and that the devise was to Malvina Flynt and her heirs of the Carrollton houses and lots; and if any of his heirs died without child or children, then their share or shares to go to the survivors. The question is, what meaning the testator attached to the words child or children? In each devise to his five children he used the word heirs—to my son and his heirs, to my daughter and her heirs, evidently meaning those who would take by descent in a direct line from those, whether children or grandchildren, and, in determining the question of survivorship, he used the words child or children, as meaning the same thing, and, it seems to us, it is a plain perversion of the meaning and intention of the devisor to say that he intended the children only of his children to take, and that if they all died but one, leaving grandchildren, and no children surviving them, that the survivor of the original devisees took the entire estate. The word children was used as synonymous with heirs, the purpose of the testator being that if they died without some one to take from them by descent, they should have no power to pass their estate from their surviving brothers and sisters. There is a clause in the will that doubtless controlled the chancellor in his decision below. The testator says "that upon consultation with legal counsel, having used the word heir and heirs in the will he had written, he had erased those words and inserted child and children, but that those 'alterations were not made to denote any change of purpose or intention, but simply to carry out the previous intentions in legal form and phrase.'"

What advice counsel gave him does not appear, but it is apparent that the use of the word heir or heirs might be construed as passing to each child the absolute fee by which the estate could be disposed of by the devisee contrary to the intent of the testa-

tor, and for that reason the words child or children were substituted; but whether so or not, the devise to his children and their heirs points clearly to the intention of the testator, and leaves no doubt of his desire to have the estate pass from the child to its offspring, including children and grandchildren, and when the contingency happened that no one could take from the original devisee, his or her part then passed to the survivor. It is, therefore, needless to discuss the nature of the estate that vested in Mrs. Flynt, whether a defeasible fee or a life estate, or whether the case is like that of Wills v. Wills, 85 Ky., 486, the tilte is now in the appellant, Dudley Miller.

The judgment below is therefore reversed and remanded, with directions to overrule the demurrer and for further proceedings consistent herewith.

ALVES, TRUSTEE, &c. v. HENDERSON NATIONAL BANK

(Filed October 30, 1888.)

Usury—Forfeiture of interest—The appellee having instituted suit on notes executed by B. to the bank and discounted by it, the trustee of B., by his answer, alleged that the notes were executed for money borrowed by B. from the bank, and that at the respective times the money was borrowed the appellee, by agreement with B., put so much of it to his credit and retained the balance as interest for the next four months—the time each note was to run; that the sum so retained out of each loan amounted to more than the legal interest thereon for the four months that each note was to run. The lower court abated the face of each note by the sum that the appellee retained thereon as interest, upon the ground that the same was more than the legal rate, and by reason thereof said sum was forfeited. But the court gave judgment for the interest on each note at the rate of 6 per cent. per annum from the maturity of the note until judgment was rendered. Held—That under section 30 of the National Currency Act of Congress of the 3d of June, 1864, taking usurious interest by a national bank forfeits the entire interest that may accrue on said notes, including iuterest up to the maturity of the notes, and that which may accrue thereon after maturity, regardless as to whether said interest accrues by contract or by operation of law, and it is immaterial whether the agreement for illegal interest is contained in the notes or in a separate paper.

Clay & Banks and John Young Brown for appellants.

Yeaman & Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Bennett.

To the appellee's, Henderson National Bank, action against Bentlinger and others on six promissory notes, each due and payable four months from its date, and each executed by said Bentlinger and others to the appellee, the appellant, W. S. Alves, as trustee of said Bentlinger, &c., filed his answer, in which it was alleged, in substance, that said notes were executed for borrowed money; that at the respective times said money was borrowed, the appellee, by an agreement with Bentlinger, &c., put so much of it to their credit, and retained the balance as interest for the next four months—the time each note was to run; that the sum so retained out of each loan amounted to more than the legal interest thereon for the four months that each note was to run.

The reply of the appellee denied that it retained as much as the alleged sums as interest; but it did not deny that the respective sums were retained out of each loan.

The bank, doubtless, drawing a distinction between discount and interest, called these sums discount, and, therefore, denied that said sums were retained as interest; but the fact, nevertheless, exists that the sums were retained as compensation for the use of the money that it loaned to Bentlinger, &c., and which, under the law, constituted interest. A simple calculation will show that each sum so retained amounted to a greater rate of interest than six per cent. on the sum from which it was retained.

The answer also alleges that after the maturity of said notes Bentlinger, &c., agreed to pay to the bank eight per cent. interest on each note from its maturity until paid.

After the maturity of the notes Bentlinger, &c., executed to the bank a mortgage on some real estate to secure the payment of them; in said mortgage it was expressly agreed that eight per cent. interest was to be paid on each note (the note itself being silent as to interest) from its maturity until paid; and the mortgage secures the payment of said sum.

The lower court abated the face of each note by the sum that the appellee retained thereon as interest, upon the ground the sum so retained amounted to more than the legal rate of interest, and, by reason thereof, said sum was forfeited. But the court gave judgment for the interest on each note, at the rate of six per cent. per annum from the maturity of the note until judgment was rendered thereon.

From the latter part of the judgment Alves has appealed to this court; from the former part of the judgment the bank has taken a cross-appeal.

The conclusion is irresistible that the sum retained by the appellee out of each note amounted to more than six per cent. interest, which is the legal rate of interst in this State, both in reference to individuals and State banks, for the period from the ate of the note until its maturity. It is clear that the excess over six per cent. was usurious; and that the appellee knew it.

Section 30 of the National Currency act of Congress of the 3d of June, 1864, after prescribing that the national banks created under said act shall not charge a greater rate of interest than that allowed by the laws of the State or territory where the bank is located, declares:

"And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged to be a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

It is held in the cases of Tiffany v. National Bank of Missouri, 18 Wallace, 409; Farmers' and Mechanics' National Bank v. Dearing, 1 Otto, 29; Barnet v. National Bank, 8 Otto, 555; Driesbach v. National Bank, 14 Otto, 52, that, under the act of Congress, supra, if a national bank knowingly takes, receives, reserves or charges a greater rate of interest than allowed by the laws of the State or territory in which the bank is located, such conduct shall be held and adjudged a forfeiture of the entire interest

which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon, etc.

The perspicuity and directness of the clauses of said sections leave no room to doubt as to their meaning. The courts that have passed upon them have had but little else to do, in order to evolve their meaning, than to recall and repeat their language.

Having determined that the sum retained as interest on each note for the period of four months amounted to more than six per cent. for that period, and, by the laws of this State, the contract was usurious, it follows that the interest for said period, at least, was forfeited, and that the judgment of the lower court, deducting the sum so retained from each note, must be affirmed on cross-appeal.

But the appellee, the bank, contends that as each note was silent as to interest from and after its maturity, the six per cent. interest that the same bore after maturity was by virtue of the law, and not by contract; therefore, the usurious interest that said notes bore from their respective dates until maturity did not, under said act, forfeit the interest arising on the notes after maturity, by virtue of the law, and not by contract. The appellant, Alves, contends for the reverse of this proposition.

A scrutiny of the clauses of the section, supra, will show that the appellant's contention is correct.

To knowingly take, receive, reserve or charge a rate of interest greater than that allowed by the State law, shall be held and adjudged to be a forfeiture of the entire interest which the note, bill or other evidence of debt "carries with it, or which has been agreed to be paid thereon."

The expression "carries with it," means any interest that the note, bill or other evidence of debt may carry by operation of law; for the next succeeding clause, to wit: "Or which has been agreed to be paid thereon," leaves no doubt as to the meaning of said expression. In many States of the Union, as was the case in this State one time, there was at the time of the passage of said act of Congress a fixed rate of interest to be charged in the absence of contract; and by contract a greater rate of interest might be charged; it seems clear, therefore, that the expression, "carries with it," refers to such interest as the note, etc., may carry, without reference to any agreement, and that the succeeding clause refers to such conventional legal rate of interest as the parties may have agreed on, both of which shall be forfeited if any usurious interest has been taken, received, reserved or charged.

Also the language clearly means that if usury has been agreed to be paid for any part of the time that the note is entitled to run, or that it may by indulgence run, such agreement forfeits the entire interest that the note or bill carries with it, or if the note or bill bears a conventional rate of interest, such as some States allow, and in addition thereto usury has been charged for any part of the time, such conventional rate of interest is thereby forfeited. The framers of the act of Congress, under consideration, doubtless understood that much of the business of the banks enacted by the act would consist to lending money, secured by notes, etc., made due and payable not exceeding four months from date, and, if need be, renewed from time to time; that the usurious contract would relate to the time such notes were to run, and, in case of their renewal, so also would the usurious contracts be renewed. Hence the act provides, in substance, that in case usury is taken, received, reserved or charged, the entire interest that the note carries, or that may exist by agreement, shall be forfeited.

The foregoing views accord with the case of First National Bank v. Stauffer, U. S. C. C., 1 Federal Reporter, 1879.

In that case the bank had received usurious interest for the time that the note was maturing; the question was, did that fact forfeit the interest accruing on the note after its maturity? Judge McKennon, delivering the opinion of the court, held, in substance, that according to the clause, supra, declaring the taking of usury a forfeiture of the entire interest that the note carries with it, the taking of usurious interest during the maturity of the note, forfeited the interest accruing thereon after its maturity, as well as that accruing before its maturity.

But if we are mistaken in reference to the forfeiture of the interest that accrued upon these notes, by virtue of the law, after their maturity, nevertheless, the question is put at rest by the fact that it is expressly stipulated in the mortgage given to the appellee by Bentlinger, &c., to secure these notes, that eight per cent. interest was to be paid thereon from the maturity of such notes until paid. The bank accepted this agreement, which, under the laws of the State, leaving out of view the act of Congress, supra, was valid and upon a sufficient consideration, except two per cent. thereof, which was usurious and invalid.

But under the said act of Congress it is not necessary, in order to effect a forfeiture of the entire interest, that the agreement to pay usury should appear in the note, or that the agreement should be made simultaneously with the agreement to lend the money; were the law so construed the effect would be to enable the bank to evade the law every day by reducing the usurious contract to writing on a separate piece of paper, or by making it after the contract to loan the money was entered into. So the agreement set forth in the mortgage to pay usurious interest, being, as contended by counsel, collateral, and, having been made after the maturity of the notes, does not affect the question; for the agreement to pay a legal rate of interest was as binding as the agreement to additionally secure the debt itself, and the fact that the agreement was collateral did change the agreed interest into principal; it was accruing every day as interest on the principal, and was, in fact and in law, interest, although expressed in the mortgage and not in the note, and as the agreement included usurious interest, it comes within the act of Congress, which forfeits the entire interest.

The judgment of the lower court is affirmed on the cross-appeal of the bank, and the judgment on the appeal of Alves, trustee, is reversed, and the case is remanded, with directions to disallow the interest on each note from its maturity until the judgment was rendered thereon.

MATTINGLY v. STONE.

(Filed November 23, 1889—Not to be reported.)

1. Rescission of contract—Whisky brand—Appellee owned and operated a distillery until 1876, branding the product "W. S. Stone Old-fashioned Hand-made Fire Copper Sour-mash Whisky," which brand became valuable. In 1876 he sold the distillery to appellant, Mattingly, and one Lancaster. They used the Stone brand, by consent of Stone, until 1880, with the addition of their names as makers. In 1880 Mattingly, having purchased the interest of Lancaster, used a different brand.

In November, 1880, appellee gave to the Owensboro Distilling Co. the sole

and exclusive right to use his name as a brand on all or any whisky thereafter manufactured by said company for a period of three years from the 1st day of December, 1880.

In 1882 appellee, by written contract, in consideration of a one-eighth interest in two distilleries received from appellant, sold to appellant the exclusive use of his whisky brand from and after "the —— day of September, 1883." By this contract it was agreed that appellant was to take charge of one of the distilleries as manager, while appellee was to become manager of the other, each to receive out of the profits of the business for his services $100 per month. In an action by appellee to recover a balance due him under the last cited clause of the contract, appellant asked a rescission of the contract and a recovery of amount paid to the appellee as profits of the venture, alleging, as grounds for rescission, first, mistake of his legal rights; second, that the right to use the name of appellee as a brand upon the whisky that might be made passed to Mattingly & Lancaster by the purchase from appellee in 1876, and that the contract of sale made in 1882 was without consideration; third, that appellee, prior to the making of the contract with appellant in 1882, became a bankrupt, and that the right to use the name of appellee as a whisky brand passed to his assignee; fourth, that the Owensboro Distilling Co., under its contract with appellee, had the exclusive use of appellee's name as a brand until December 1, 1883. Held—That the evidence as to the use of appellee's name having been transferred to Mattingly & Lancaster with the distillery, being conflicting, and the chancellor having found in favor of appellee, his finding will not be disturbed. It also appears that the time of the beginning of the use of appellee's name was fixed on —— day of September, 1883, by mutual mistake, and that appellant was not prejudiced thereby. The words composing the brand, save the name of appellee, are those of common use, and the right of using his name was a personal one to the appellee, and did not pass to his assignee.

2. Trade-mark—There is a distinction between a trade-mark and the use of a person's name merely. A trade mark is a subject of commerce, and passes to the assignee of a bankrupt owner, while the use of a person's name merely may be valuable on account of his honesty or skill, and the right to its use can not be taken from him by a judicial proceeding.

Weir, Weir & Walker for appellant.

Geo. W. Jolly, Goe. W. Williams & Son, W. T. Ellis and Wm. Lindsay for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

In 1871 the appellee, W. S. Stone, became the sole owner of a distillery, which he operated until 1876, branding the product "W. S. Stone, Old Fashined Hand-made, Fire Copper, Sour-Mash Whisky."

He then, together with one Perkins, who had acquired a joint interest in the distillery, sold it to the appellant, Mattingly, and one Lancaster. Perkins did not unite in the deed as the title to the property was in the appellee, Stone.

Mattingly & Lancaster operated it until 1880, when the latter sold his interest to the appellant.

They used the Stone brand, with the addition of their names, as the makers.

After he became the sole owner Mattingly used this brand: "Old W. S. Stone Distillery, M. P. M., Distiller, Hand-made Sour mash Whisky."

The brand became valuable, and on November 8, 1880, Stone,

in consideration of a certain quantity of stock in the Owensboro Distilling Company, and a certain royalty to be paid to him upon each barrel of whisky, entered into a written contract with the company by which he gave to it "the sole and exclusive right to use my name as a brand on all or any whisky thereafter manufactured by said company for a period of three years from the 1st day of December, 1880."

March 10, 1882, the appellant, Mattingly, and Stone entered into a written contract, which recites that W. S. Stone has heretofore sold the use of his whisky brand to the Owensboro Distilling Company for a term, which will expire on the — day of September, 1883;" and by which Stone became the owner of a one-eighth interest in the "Old W. S. Stone Distillery," and also in another distillery owned by Mattingly, known as the "Daviess County Club Distillery," and in the profits of both from the — day of September, 1883, in proportion to his interest, Mattingly to have the remainder.

The recited consideration for this transfer was "the use in the said two distilleries of the exclusive right to use the whisky brand of said W. S. Stone from and after the — day of September, 1883;" and the contract further provides that "the said William S. Stone hereby sells and conveys to said Miles P. Mattingly, for the exclusive use of himself and his successors in said Daviess County Club Distillery, and said Old W. S. Stone Distillery, his whisky brand, and agrees that the same shall not, after said date of September, 1883, be used by any other person or corporation, if within his power to prevent it."

By their agreement the appellant, Mattingly, was to have the general control, financially, and in all other respects, of the business, so long as he remained the principal owner of the property, and it was further provided that "from and after the 1st day of September, 1883, W. S. Stone is to take charge of one of said distilleries as its manager, and that Miles P. Mattingly shall, from said date, have charge of the other distillery as its manager, and that out of the proceeds of said business each party shall be entitled to $100 per month for his services in said business."

This action was brought in ordinary by the appellee, Stone, claiming a balance as due him for services, under the clause of the contract last cited. The petition sought this relief only.

An amended petition was tendered during the progress of the case asking a settlement of the entire business; but the court refused to permit it to be filed.

The appellant, Mattingly, by proper pleading, sought a rescission of the contract of March 10, 1882, and the recovery of the amount he claimed to have paid the appellee as profits of the venture.

Upon the coming in of the answer the action was transferred to equity, and upon final hearing, the relief sought by each party was refused.

The rescission of the contract was asked by the appellant, first, upon the ground that he had entered into it under a mistake of his legal rights; that the right to use the name of the appellee, as a brand upon the whisky that might be made, passed to Mattingly & Lancaster by the purchase from him in 1876; that he, therefore, did not have it to sell on March 10, 1882, and there was no consideration for the contract then made.

The deed to the property made in 1876 makes no mention of the whisky brand.

The appellant and Lancaster state, substantially, that it was a part of the contract of sale that they thereby became the own-

ers of the right to use it. This is substantially contradicted by the appellee and Perkins. They are strongly fortified in their statement by the fact that subsequent to the sale Lancaster tried to buy the right to use Stone's name as a brand upon their whisky, and that subsequently Mattingly did purchase it by the contract of March 10, 1882.

Moreover, it had acquired a considerable value, and appellee appears to have been offered for it more than the entire price paid by Mattingly & Lancaster for the distillery.

In any event the testimony as to whether it was included in their purchase is conflicting, and the chancellor, upon this question of fact, found in favor of the appellee, Stone, and his conclusion will not, in view of the state of the testimony, be disturbed.

It is next contended that by the contract of March 10, 1882, Mattingly was to have the right to the exclusive use of Stone's name as a part of the whisky brand from and after the — day of September, 1883, when, in point of fact, Stone had already parted with it to the Owensboro Distilling Company until December 1, 1883.

It is shown that when the contract of March 10, 1882, was prepared, the one with the Owensboro Distilling Company was not at hand to inform the draftsman of its terms, or to refresh the recollection of the appellee.

It is quite evident that it was not then known to any of the parties then present when it did expire, save that it was at some time during 1883. The contract between the appellant and appellee shows that the day of the month when the expiration would occur was not deemed material, as it was omitted.

It is evident from the entire testimony that while the contract fixed the time as being in September, that yet this was done through an honest mistake, without any fraudulent intention upon Stone's part, and that the parties to the contract had in view the understanding that it ended some time during the year 1883. Its expiration at some time during that year was all that the contracting parties had in contemplation in making their contract as material to it.

Moreover, it is shown beyond question that the Owensboro Distilling Company made no whisky in 1883, and the appellant says that he used the Stone brand all the time.

The mistaken recitation in the contract bewteen the appellant and the appellee as to when the right of the Owensboro Distilling Company to use Stone's name expired is not, for the reasons recited, ground for its rescission.

In our opinion the contract with the Owensboro Distilling Company gave to it the right to use Stone's name as a brand upon its whisky, even after the expiration of the three years named in its contract, provided it was made during that period; and a fair and reasonable interpretation of the contract of March 10, 1882, between the appellant and appellee recognizes such right, and there is, in our opinion, no conflict between the two contracts in this respect.

Between the time of the sale of the distillery by Stone to Mattingly & Lancaster and the making of the contract of March 10, 1882, Stone became a bankrupt. It is, therefore, urged that if the right to use his name as a part of the whisky brand did not pass with the sale of the distillery, that then it passed to his assignee in bankruptcy, and there was, therefore, no consideration for the contract of March 10, 1882.

It will be noticed that the words composing the brand, save the name of the appellee, are those of common use; and the

right of using his name merely was a personal one to the appellee, and did not, therefore, pass to his assignee any more than would the skill acquired by a merchant from experience in his business. (Helmbold v. Helmbold Manufacturing Company, 17 Am. Law Reg. (U. S.), 169.)

Nearly three years elapsed before the appellant sought a rescission of the contract, and the grounds upon which he now does so are insufficient to authorize such relief.

Whether the appellee was entitled to any relief, or whether the court below erred in passing upon any question looking to it, can not be considered by us, as there is no cross-appeal.

The opinion of the lower court in discussing the case takes a wide range.

We must not be understood by this decision as affirming or disaffirming what is said by the lower court as to what would be proper in another suit.

The only question presented by this appeal is the right of the appellant to a decision of the contract, and it alone is, therefore, determined.

The judgment upon his appeal is affirmed.

(Response to petition for rehearing—Filed June 21, 1890.)

Counsel insist, in an elaborate petition for rehearing, that if the right to the use of Stone's name in branding whisky did not pass with the sale of the distillery to Mattingly & Lancaster, then, by ceasing for a time to use his name in branding whisky, Stone lost the right to so use it; and further, if this be not true, but Stone still had such right, then it passed to his assignee in bankruptcy. We can not assent to either proposition. There is testimony tending to show that when the sale was made, Stone consented that the purchasers might use his name in branding the whisky they might manufacture for the next two or three years as he did not, during that time, expect to follow the business in that locality.

It was at most a temporary suspension of use by him, and it was, moreover, personal to him, being the use of his name merely.

A trade-mark proper is of value and a subject of commerce. It, therefore, passes to the assignee of a bankrupt owner; but a distinction is to be taken, it seems to us, between such a case and the use of a person's name merely, which may be valuable on account of his honesty or skill. He may, by voluntary sale or transfer, assign the right to use his knowledge or name, but we are at a loss to know how his right to use them can be taken from him by a judicial proceeding. They remain to the bankrupt as his capital for a new beginning.

When the distillery was sold to Mattinlgy & Lancaster, Stone, as the lower court found, did not sell with it the right to use his name in the future conduct of his business. Such a use would really have been an imposition upon the public. When, however, he transferred the right to do so to the Owensboro Distilling Company for a limited time, he became a stockholder and an owner in the company, and when he subsequently did so, as to the two Mattingly distilleries, he, by the contract, became an interested party in them.

We are asked to construe the contract between the parties. As this record stands, however, we can only consider the appellant's claim to a rescission of it.

Petition overruled.

CITY OF HENDERSON v. McCULLAGH.

(Filed January 18, 1890.)

Taxation—Exemption—Private school property—General Statutes of Kentucky (Ed. 1883), chapter 92, article 1, section 3, exempting from taxation "the real estate and investments devoted to public schools, seminaries, universities, colleges," etc., was not intended to embrace school property in use for private gain merely, and entirely devoid of a public or charitable character.

John L. Dorsey for appellant.

A. T. Dudley for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

The appellee, Mary L. McCullagh, resists the collection of city taxes by the appellant, the city of Henderson, assessed for the years 1884-5 upon certain real estate and personal property, which was used during those years by her, for school purposes. Such use began in 1878, and was continued until 1886. In 1880 the institution was incorporated as the "Henderson Female Seminary" by an act of the legislature. The appellee was, however, named therein as the owner of the property, and given the absolute control of the school. The charter shows that it was a private educational institution. The appellee was the sole owner and in control of it. She could select her patrons, and she alone received the benefits. The taxpayers had no voice in the control of the school. All or any of them could be excluded from its benefits, at her option. All this is clearly shown by her own testimony. It remained, therefore, after the incorporation, as it was before, essentially a select or private school. By the charter of the city of Henderson, passed in 1867, it was authorized to "levy a tax of not exceeding $1 on each $100 worth of property, upon all property within the city made taxable by law for State purposes." So much of the taxes enjoined as were for city purposes generally were levied under this provision of its charter. So much as were for the purpose of paying the interest on its indebtedness were assessed under an act of the legislature of 1878, directing the annual levy of a tax "upon all the real estate and personal property in said city subject to taxation under the revenue laws of this State." The school-tax portion, and which makes up the balance of the tax enjoined, was levied under the law providing for a system of public schools in the city of Henderson, enacted in 1869, and which authorizes an annual levy "of not exceeding 30 cents on each $100 worth of the same property that is now taxed by the State for common school purposes, situated in said city." The appellee contends that her property was exempted from State taxation under the law in force in 1884-85, and that it was, therefore, by reason of the several statutory provisions above cited, exempt from the tax now in question. This is denied by the appellant, who also insists that even if the appellee be correct in this contention, yet her property is certainly liable for the general city and school tax, because they were levied by virtue of laws enacted prior to the adoption of the General Statutes in 1873, and when the act of May 27, 1865, was in force, which forbade the exemption from taxation of "any lot or parcel of ground in any city or town, other than church property, on which any private school is taught;" and the city

school tax law says that the levy is to be upon the property "now taxed by the State for common school purposes, situated in said city." It is unnecessary to determine, however, whether the appellant is right in the last position. We will accept the view most favorable to the appellee, to wit, that the entire tax in question is to be tested by the law in force in 1884-85, relating to exemption from State taxation. It provides: "The property mentioned in this section shall be exempt from all taxation, viz: * * * The real estate and investments devoted to public schools, seminaries, universities, colleges, court-houses, clerk's offices, jails, public grave-yards, lunatic, orphan, and deaf and dumb asylums, hospitals, infirmaries, widows and orphans' asylums," etc. (General Statutes (Ed. 1883), chapter 92, article 1, section 3.)

Let us see if we can arrive at the legislative meaning of this provision. Its extent and scope is the question. It may now be regarded as an accepted rule that there can be no lawful tax unless it be laid for a public purpose; that it can only be used in aid of an object within the governmental purpose, and not to promote enterprises strictly private, and conducing essentially to private gain, even though they may collaterally benefit the public. A mere private purpose can not be thus aided. It may be difficult, and often is, to determine what falls within the one class or the other. Courts differ in this respect, but not as to the governing rule. It is also generally conceded that the taxing power should be held to be broad enough to provide liberally for all governmental purposes, such as providing roads, that the public may travel; public schools, that the people may become informed as to their governmental duties; for the police of the State and its courts, that crime may be punished and individual right protected; and for all other purposes which are fairly governmental, but no further. Let us also keep in mind that the exemption of property from taxation is but the imposition of increased taxation upon non-exempt property and that taxing is the rule and exemption the exception. The State must live. To do so, it must have its taxes. The legislature can not exempt property from taxation, save in consideration of public service, unless it be of a benevolent or charitable character. If the object directly promotes individual interest, and be essentially a private enterprise, then the exemption of its property from taxation by the legislature would be a constitutional violation, and, as such, it would be the duty of the courts to declare it invalid. (Lancaster v. Clayton, 86 Ky., 373, 5 S. W. Rep., 864.) Unquestionably the taxpayers of the city of Henderson could not have been taxed for the support of the appellee's school. It constituted no part of our system of common education. It was not open and free to the youth of the city of Henderson, who were of proper age and qualification, to attend it. It should not be presumed that the legislature, in enacting the provision above cited from the General Statutes, have violated the fundamental law. Such a construction should not be given to it, if it be susceptible of any other. It can hardly be supposed that it intended to, in effect, take the property of one individual and give it to another by exempting the property of one and adding an increased burden to that of the other; nor is this the necessary or reasonable construction to be given to the statute.

It is urged that, in using the term "seminaries," it must be held to mean those which are private as well as public; because the word "public" is used in connection with the word "schools," and subsequently with the word "grave-yards," showing that

where a public institution was intended it was expressly so denominated. A "seminary" is, however, defined by standard lexicographers to be an "institution of education; a school, academy, college or university, in which young persons are instructed in the several branches of learning which may qualitfy them for their future employments;" and it can hardly be supposed that the legislature, after limiting the exemption of school property to "public schools," intended, by the very next word, to extend it to schools, both public and private. Such a construction would be absurd, and the spirit of the statute must govern, even conceding that the letter of it is otherwise. Not only so, but if such construciton were adopted it would be saying that the legislature, instead of looking, as was undoubtedly the case, to the education of all our children, and to a system of common education, were favoring the private enterprises of the few at the expense of the many. We are unwilling to adopt such a view of the statute, and, to our minds, it is not only not required, but is not the fair and reasonable one. The case of Institution v. Commonwealth, 14 B. Mon., 214, arose under a different statute. Moreover, it related to an institution of a benevolent or charitable character, and the property belonged to the corporation. In our opinion the statute upon which the appellee relies for the exemption of her property from taxation was not intended to embrace school property in use for private gain merely, and entirely devoid of a public or charitable character.

The judgment is reversed, with directions to sustain the demurrer to the petition and dismiss the action.

FITCH, &c. v. THE POPLAR FLAT, INDIAN RUN AND SALT LICK T. P. CO.

(Filed May 17, 1890—Not to be reported.)

Question of fact—A turnpike company was, under its charter and amendment thereto, authorized to organize, when as much as $200 to any one mile was subscribed. In an action against a subscriber to recover the amount of his subscription, he relied upon the irregularity of organization as a defense, the company having organized when $250 was subscribed, without specifying the mile of road to which it should be applied. Held—That as the lower court decided the fact that no grounds of defense existed, the judgment will not be disturbed.

Cochran & Son for appellants.

Geo. T. Halbert for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Pryor.

This case presents only a question of fact, and we see no reason for disturbing the judgment below. By the terms of the original charter of the turnpike company the organization of the company was authorized when as much as $1,800 of stock had been subscribed. By an amendment the parties interested were permitted to organize when as much as $200 to any one mile was subscribed. The county aided in the construction of the roads by paying $1,000 to the mile, and the length of this turnpike was less than three miles. When $250 had been subscribed (certainly

$200) the parties organized by electing its president and directors, and then proceeded to carry out the purpose of the corporation. They are met with the objection by the taxpayer that the $200 had not been subscribed to the construction of any one mile, and, therefore, the organization is void, because the mile on which the money was to have been expended should have been designated by the subscription. There is nothing in such a defense. The money had been subscribed, and the directors had the right to apply it to any one mile of the road. It was a substantial compliance with the charter, even if there had been no testimony on the subject. It was understood by the directors and those subscribing that the money should be expended on the second mile, and if that had not been the case the defense is without merit, as the subscription authorized the organization.

Judgment affirmed.

WILSON v. JASPER.

(Filed May 20, 1890.)

Pleading—Answer—Mistake in deed—In an action by appellee to recover the value of trees cut by appellant and made into staves, appellant admitted in his answer that the trees cut were within the boundary lines of appellee's deed, but said boundary lines were known to appellee to be located as described in said deed by mistake, and said trees were actually located upon land belonging to appellant, and that neither appellant nor appellee knew of the mistake in appellee's deed until after institution of this suit, and prayed that the mistake be corrected. Held—That the answer presented a good defense, and the court should have corrected the mistake in the deed to prevent the perpetration of a fraud on appellant.

O. H. Waddel for appellant.

W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Bennett.

The appellee sued the appellant for the value of some trees, cut, as is alleged, on appellee's land, and made into staves. The appellant admitted cutting the trees on the particular piece of land mentioned, but denied that the appellee was the owner of said land, although the boundaries of his deed embraced said land. He alleged that said land belonged to him, and the boundaries contained in the appellee's deed, in so far as they embraced said land, was a mistake, and he asked that the mistake be corrected. The lower court refused to correct the mistake, and gave judgment for the appellee. The following facts are alleged in the appellant's answer, and are not denied:

That Deliah Wilson owned 355 acres of land; that the same, in an action by her administrator to settle her estate, was divided into two parcels; that the division was made by the surveyor of the county, who ran the dividing line from point twenty-one south nineteen east seventy poles to a rock corner; that the said line was also plainly marked; that in making out his plat he, by mistake, entered said line as running from point twenty-one south, twenty-nine west eighty poles to a rock; that there is no rock corner or marked line on this route; that the court adopted the

dividing line as thus reported, and the deed to the purchasers of the respective parcels recited the divison line, as thus reported. But the said parcels were, in fact, sold according to the dividing line as actually run by the surveyor, to wit: Running from point twenty-one south nineteen east seventy poles to a rock, and the purchaser of each parcel purchased it according to this division line; that the appellee, who was a transferee of the purchaser's bid at the commissioner's sale, and to whom the commissioner made a deed, knew that said land was sold according to the division line as actually made by the surveyor, and he took possession of said land and held and claimed it to said line until a short time before he brought this suit; that the appellant took the possession of the parcel purchased for him, and held and claimed it to said division line until after this suit was brought; that neither appellant or appellee knew that his deed as to said dividing line was not in accordance with the said line as actually run; but each believed that his deed was in accordance therewith; that the trees were cut on the appellant's side of said land. He asks the court to correct the mistake in the deed and establish said line as the true line.

The chancellor deemed the foregoing facts insufficient to constitute a defense or to correct the mistake in the deed. It is contended that as the appellee was not the purchaser at the commissioner's sale, and as the deed was made to him in accordance with the surveyor's plat and judgment of the court, and as the mistake was antecedent thereto, the appellee is not bound to correct the same. As the deed had been made to the appellee in accordance with the reported plat and judgment of court, he, as an innocent purchaser, would not be bound to correct any mistake that the surveyor might have made, and which did not appear in the record. In such case it would be a fraud upon him as an innocent purchaser to compel him to correct a mistake that he knew not of, or of which the record did not furnish information.

Also, the original purchaser, under like circumstances, would be protected. Each would have the right to rely upon the reported plat and the judgment of the court adopting the same, and the confirmation of the deed in accordance therewith, as protecting him against the antecedent verbal mistakes, which were unknown to him. Also, if such mistake was known to the first purchaser and not to his vendee, the latter would not be bound to correct it; but the first purchaser, knowing the truth, and knowing that the deed did not represent the truth, would be bound to correct it so as to make it conform to the truth. To deny the right to correct the mistake, under such circumstances, would be to practice a fraud upon the party injured by it; so also to correct the mistake to the prejudice of an innocent vendee —nothing appearing to put him upon inquiry—would be a fraud upon him; therefore, the law does not allow it. But if he, at the time he made the purchase, was apprised of the mistake theretofore committed, he would be as much bound to correct it as was his vendor. If it were otherwise, he would be allowed to practice a fraud, simply because he was a second purchaser. If the vendor, being apprised of the existence of the mistake, could convey to a third person, who also was apprised of the existence of the mistake, and thereby enable the latter to defeat the correction of the mistake, fraud would be licensed instead of condemned. In such case fair dealing demands that each party be placed upon the same footing.

The judgment is reversed and cause remanded, with directions for further proceedings consistent with this opinion.

JOHNSON v. MILLER.

(Filed May 22, 1890—Not to be reported.)

1. Failure to make title condition precedent—B. sold to J. twenty acres of land for $1,000, $400 of which was paid in cash, and two notes for $300 each were given, which were transferred, one to J. M. Baker and the other to Stewart Baker. Afterwards J. sold to M. the twenty acres purchased from B., together with an adjoining tract of thirty acres, for $1,900, M. agreeing to take up the two notes held by the Bakers in part consideration, and to pay $1,000 on March 1, 1886, or when possession should be given, and the balance in a year from the time of purchase, "a good and sufficient deed" to be made to M. on or before March 1, 1886. Possession of the land was given and M. paid off the two notes held by the Bakers, which were assigned to him. J. had previously executed to Stewart Baker his note for $426.88, the balance ascertained to be due on settlement of accounts. M. paid off this note and took an assignment of it. In an action by M. for personal judgment on the note for $426.88, and the enforcement of the lien on the twenty acres of land to satisfy the two notes for unpaid purchase money, which had been assigned to him, alleging that appellant was unable to make a title to the thirty acres, as it had been sold under a decree enforcing satisfaction of a mortgage executed by J. Held—That the lower court properly decided that the making of a deed to M. was a condition precedent to the payment of the money, and, as M. was willing to accept a deed to the twenty acre tract, he was properly charged with its value, according to the price agreed to be paid for the whole, and credited with the amounts paid to the Bakers for J.

2. Practice in civil cases—An amended answer refused by the lower court, and not made a part of the record, will not be considered on appeal.

S. W. Tolin for appellant.

Collins & Fenley & J. J. Landram for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Holt.

In 1883, J. T. Black conveyed to the appellant, J. L. Johnson, about twenty acres of land for $1,000, of which $400 was then paid, and for the remaining $600 Johnson executed his two notes for $300 each, the one payable to his vendor, and the other to the vendor's wife. The deed retained a lien for their payment. J. M. Baker became the owner of one of the notes, and the other was tansferred to Stewart Baker.

Johnson also owned about thirty acres of land adjoining the twenty acres, making about fifty acres in all, and in December, 1885, he sold it all by title bond to the appellee, W. R. Miller, for $1,900, the latter agreeing to take up the two notes held by the Bakers in part payment; also to pay $1,000 on March 1, 1886, or when possession should be given, and the balance in a year from the time of the purchase, "a good and sufficent deed" to be made to Miller on or before March 1, 1886. Possession of the land was given, and Miller paid off the Black notes.

Prior to doing so the appellant and Stewart Baker had a settlement, and, counting the Black note, the appellant fell in debt to him in the sum of $426.88, for which he executed his note to Baker, and as it was not secured by a lien, the latter continued to hold the Black note, it being agreed that when the new note should be paid both notes should be given up to the appellant.

The appellee paid, not merely the amount of the Black note held by Stewart Baker, but that of the new note, that had thus

been given to him by the appellant, and Baker assigned both notes of the appellee.

No deed being made or tendered to the appellee, and the Black note held by J. M. Baker having also been assigned to him, he brought an action against the appellant upon the two $300 notes to enforce their payment, claiming a lien upon the twenty acres of land, which Black had sold to the appellant.

He also brought an ordinary action against the appellant upon the $426.88 note, which, by consent, was transferred to equity.

The appellant also sued the appellee upon an account before a justice of the peace. A set-off in the form of an account was pleaded, and this action, after judgment by the justice, was appealed, and it by consent also was transferred to equity, and all three actions were consolidated and tried together.

The two first above named were defended, upon the ground that the appellee, in paying off the notes of the appellant, had merely paid that much upon the purchase of the land. The $1,000 purchase money was also asserted as a counter-claim. The appellee replied that prior to the sale to him the thirty-acre tract of land had been mortgaged by the appellant to three certain parties jointly for $3,000; that they by suit in 1886 enforced their mortgage, had the land sold, purchasing it themselves, and that it had been conveyed to them by the court.

All this is shown to be true.

The judgment below set aside the sale of the thirty-acre tract, because the appellant could not make title. It confirmed the purchase of the twenty acres, as the appellee was willing to take it; charged him with the price according to the price he had agreed to pay for the entire land, credited him by what he had paid to the Bakers for the appellant, adjusted the accounts between them, finding a balance due the appellee of $36.18, for which it rendered judgment in his favor, and Johnson has appealed.

His chief complaint is, that if the appellee had paid him the $1,000 upon the first of March, 1886, he would have released the mortgage lien, as the mortgeagees had agreed to accept it and release their lien upon the land sold the appellee, and that he could then have made him a good title.

It is conceded that no deed was ever tendered to the appellee. A part of the land being mortgaged, he could not make a good title, and this part of it had, in fact, been sold, and the title passed away from him by virtue of the mortgage.

It is urged, however, that the contract to pay the purchase money, and that to convey were mutual executory contracts, not dependent upon each other, and that a failure to comply with one by one party is not a defense to non-compliance with the other by the other party.

This argument is not, however, applicable to this case. Here the land has been, in fact, sold, and the title passed to another by virtue of a lien created by the appellant prior to the sale by him to the appellee.

The title bond given to the latter does not make the payment of the purchase money a precedent act to the conveyance of the land. When the time arrived, by virtue of its terms, to make the deed and also to pay the $1,000, the appellant could not, in fact, make a good title to the land. The purchaser was not required to pay and take the risk of the vendor discharging the lien, even if he could have done so.

The evidence shows, however, that while two of the mortgagees

were willing to take the $1,000 and release their lien upon the thirty acres of land, yet they had never agreed with the appellee to do so, and the third mortgagee refused to do so, unless their entire debt was paid.

Under the circumstances the claim by the appellant that the appellee can not rely upon his inability to make title, because of the non-payment of the $1,000 of purchase money, falls to the ground. Moreover, it appears that the thirty acres was also incumbered by a potential dower right.

As to the various accounts between the parties the evidence is conflicting. Their determination involves issues of fact and the judgment below will not, therefore, be disturbed.

It is at least so far sustained by the evidence as to forbid interference by us.

Complaint is made that the appellee had the use of the thirty acres of land during the year 1886, and that he should have been charged for it. An amended answer was tendered on April 18, 1889, setting up a claim for it. The lower court rejected this pleading, and we can not consider it, because it was in no way made a part of the record.

Judgment affirmed.

McCARTHY'S ADM'R v. WOOD & CO.

(Filed May 17, 1890—Not to be reported.)

Partnership—Settlements of accounts—M. and W., and a son of the latter, were partners running a tannery, but doing a losing business, and a few days before the death of M. they prepared articles of incorporation, under the provisions of chapter 56 of the General Statutes, which were not recorded until the day of M.'s death. In an action by the administrator of M. for a settlement of the partnership accounts, it appearing that after the death of M., W. and son took charge of the business and carried it on in good faith and attention to business, but were unsuccessful, and a settlement showing no profits realized having been fairly made by a commissioner, a recovery was properly refused.

G. A. Winston and Barnett, Miller & Barnett for appellant.

Bullitt & Shield for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The personal representative of John E. McCarthy instituted these actions in the court below to recover the balance due him as a partner of the firm of McCarthy & Wood.

The real question in the two cases involves the settlement of the partnership, with a view of ascertaining the interest of each partner. McCarthy, Wood and a son of the latter were engaged as partners in running a tannery in the city of Louisville, and were evidently, from the proof before us, losing money prior to the death of McCarthy. A few days prior to the latter's death the partners, for some reason, thought proper to change the partnership into a corporation by virtue of the statute, with the corporate name of D. M. Wood & Co., and for that purpose articles were drawn up and the property of the partnership transferred to the corporation. McCarthy's death took place before the arti-

cles of incorporation were recorded, and it is insisted for that reason the partnership remained to be wound up by the surviving partners, and ended the existence of the corporation. The articles of incorporation were recorded on the day of McCarthy's death, and the assets and control of all the firm property transferred to the new management. It is insisted that this was a conversion of the partnership effects by Wood and his son, who were alone interested as partners with McCarthy, and made them liable for the value of all the property belonging to the old firm, and fixed their liability at once to McCarthys' estate for his interest.

Whether they exceeded their legal rights by assuming to control the property, as belonging to the new corporation after McCarthy's death, is a question not necessary to be determined. It clearly appears that the appellees acted in the best of faith, and proceeded to the conduct of the business of the new firm, under the belief that this right was conferred by the articles of association.

They are willing, however, to stand by the original agreement of partnership, and to account, as surviving partners, to the personal representative of McCarthy. They had not converted the assets of the old firm so as to render it impossible or impracticable to ascertain what were the real assets on hand at the death of the partner. The testimony shows that the account presented to the appellant was not intended to be a statement of the amount due from the firm to the deceased partner, but merely to show the amount of capital each had paid into the concern, and this is confirmed by the subsequent settlement of the partnership showing its insolvency. The books of the firm were exhibited and appraisement had, and every opportunity offered the parties in interest and the commissioner to ascertain the true condition of the partnership, and the liability, if any, of the one to the other. There is evidence conducing to show that the appellee, after McCarthy's death, purchased some hides and expended other moneys in other ways in conducting the business, but not to such an extent as precluded or prevented the parties or the commissioner from ascertaining McCarthy's interest, either at his death or when this action was filed. The character of the business required that the stock on hand should be worked up, and the surviving partners had the right to proceed with their business by virtue of the original articles of partnership; and if it had been their duty to have ceased all operations, because the firm had been changed, there was no such conversion as made them liable.

The statute requires that the articles of incorporation shall be recorded before proceeding to conduct the business of the enterprises, but a failure to do so does not change the liability of the parties to the association, the one to the other, and it would be a harsh rule to require the appellees to account, as if they had been strangers, to the deceased partner, and with no interest in the property of the firm. It seems from the record before us, that the appellees have acted in the best of faith, and are not liable either on a stated account or by reason of their placing the assets of the old into the new corporation.

The venture resulted in the loss to all the partners, and we perceive no reason for fixing any greater liability on the surviving partners than is found in the settlment made by the commissioners.

The judgment is affirmed.

LAWRENCE v. CONNER.

(Filed May 17, 1890—Not to be reported.)

Infants—Service of process—A party died the owner of a house and lot, leaving surviving him his widow and one son, Frank M. Lawrence, aged ten years. The widow had living with her at the time William Lawrence, a son by a former husband, who was about eighteen years of age. The widow and children continued to occupy the upper story of the house as a homestead until her death. After her death her two sons continued in occupancy of the same, the older son having charge of the younger. In the meantime the administrator of the owner instituted suit to sell it to pay the debts of the decedent. The summons in this action was returned endorsed: "Executed on Frank Lawrence, William A. Lawrence, by delivering to each a copy of the within summons." The sale was made and confirmed, a homestead having been allowed the youngest son until he arrived at the age of twenty one years. Upon arrival at age he filed his action to set aside the sale, alleging that the court had no jurisdiction to decree the sale for the want of service of process upon him, as required by section 52 of the Civil Code of Practice. Held—That William Lawrence, having charge of Frank, and being a co-defendant and served with process in the action, was a substantial compliance with the requirements of the Code, and it is not required that a party having charge of an infant shall be twenty-one years of age before service of process upon him will bind the infant.

Sam Houston and Bullitt & Reeves for appellant.

Husbands & Husbands for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Holt.

George B. Lawrence died in 1877 the owner of a brick storehouse, in which he had kept a grocery, the upper story being used by him and his family as a residence.

He left a widow surviving him, also their son, who is the appellant, Frank M. Lawrence, and who was then about ten years old, and also a step-son, the child of his widow, by name William Lawrence, and who was then eighteen years old. After the father's death the step-son, who was a young man of sober and industrious habits carried on the grocery, the family still living over it. The widow died, however, in a few months after the husband, and thereafter the two sons staid in a room over the store, the balance of the upstairs portion of the house being occupied by a family, the matron of which furnished the two boys their food.

The evidence is satisfactory that from the time of the mother's death William cared for and controlled his half-brother, Frank.

The latter has not testified, but William has, and he says that he provided him with food and clothing; looked after him as a father would after a son; chastised him at times for misconduct, and tried to control him at all times, not always succeeding, however.

Matters went thus for two or three years, when William became his statutory guardian.

In the meantime, however, the administrator of the father had brought a suit to sell the property for the payment of the debts of the decedent, and to settle his estate. The two sons were made defendants, so named in the summons which issued in the case, as well as some of the creditors.

It was returned as to the son:

"Executed on Frank Lawrence, William A. Lawrence, by delivering to each a copy of the within summons."

Thereafter a guardian ad litem was appointed for them. He filed the usual answer. A judgment was rendered for the sale of the property, one Wilson becoming the purchaser. He transferred his bid to the appellee, Dennis C. Conner. The sale was confirmed; purchase money paid, and a deed made.

After the sale the guardian ad litem by a supplemental pleading, and which was made a cross-petition against the appellee, claimed a homestead right in the property, which was not worth $1,000.

The appellee answered, contesting the right to it.

The lower court rejected the claim. Upon appeal to this court it was allowed, and upon the return of the cause to the lower court the property was set apart to the sons as a homestead until the youngest one should become of age.

They received the benefit of this proceeding, and so used the property until about a year prior to the majority of the appellant, when the house was destroyed by fire. The appellee rebuilt it with the knowledge of both the sons, and without objection upon their part, the appellant being then about twenty-one years old. In fact the testimony shows that the elder son, and who was the guardian of the appellant, consented to the appellee doing so, it being necessary to the preservation of the walls of the burnt building. The testimony is conflicting whether the appellee was, or was not, to pay any rent until the appellant arrived at majority.

This is immaterial, however. The fact remains that the appellee improved the property with the knowledge and consent of the parties; and, while not decisive of this controversy, yet it addresses itself to the equitable consideration of the court.

Upon becoming of age the appellant brought this action to recover the property, upon the ground that he was not before the court in the action to settle the estate of his father, and that the judgment of sale was void for the want of jurisdiction.

This is denied by the appellee, who also claims that the steps taken by the guardian ad litem as to the homestead constitute a bar to the present suit.

It is undeniable that the interests of the appellant were well attended to in the suit to settle his father's estate. His rights were fully protected, and, so far as appears, all the relief to which he was entitled was therein given him. This fact does not, however, preclude this action. He was the owner of the property, subject to its liability for the debts of his deceased father.

It could not be taken from him without giving him his "day in court."

If he was not before the court in the suit to settle the estate, then, of course, no judgment rendered in it could divest him of his title.

It was coram non judice, and in such event the matter is not aided by the appointment of a guardian ad litem and a defense by them, however greatly it may have advanced the interest of the infant.

The appointment of a guardian ad litem for an infant before he is in court by proper summons is void. It can not operate, therefore, to bring him before the court. (Allsmiller v. Fretchenich, &c., 86 Ky., 198.)

The jurisdiction of courts of equity in this State over the real estate of infants is statutory. The legislature has provided when and how it may be sold, and it is necessary, therefore, to con-

form to the statute. (Walker, &c. v. Surger's Ex'ors, &c., 80 Ky., 620.)

The only question, therefore, in this case is, was the appellant before the court when the judgment was rendered to sell the property?

Section 52 of the Civil Code provides: "If the defendant be under the age of fourteen years, the summons must be served on his father; or, if he have no father, on his guardian; or, if he have no guardian, on his mother; or, if he have no mother, on the person having charge of him."

It is admitted that the appellant was at the time only about ten years old; that he then had no guardian, and that his father and mother were both dead.

His half-brother was a defendant in the suit; he was named as such, together with the appellant, in the summons, which was served upon both of them. It was unnecessary, under the present Code, to deliver a copy of it to the appellant, as he was then under fourteen years of age. The law presumes that owing to his tender years such an act would be useless. It, however, intends that one who is likely to feel an interest in his welfare, and who will probably look to the protection of his rights, shall be notified of the proceeding against him. The purpose of the provision is to give notice to such a person.

It is true the return of the officer, in this instance, upon the summons does show that he delivered a copy of it to the half-brother of the appellant, because he was in charge of him; but if in point of fact this were true, then as both were named in the summons, was not the object of the law accomplished? We think so. Notice was thereby brough to the person in charge of the infant that he was sued, and that his rights and interests might be in peril.

Where the spirit and reason of the law are fulfilled, its mere letter will not be allowed to control.

Under the former Code, where a defendant was an infant under fourteen years of age, the summons had to be served not only upon him, but upon his father or guardian; or if neither of these could be found, then upon his mother, or any other person having the care or control of him, or with whom he was living.

In the case of Cheatam, &c. v. Whitman, 86 Ky., 614, the proceeding under review was governed by this provision.

The father and his children were all parties to the suit. They were all named as defendants in the summons, and it was served upon all of them.

The return of the officer did not show, however, that it was served upon the father as such for the infant children; but it was held by this court that the service of a single copy of it upon him as a defendant, the infants being named in it as defendants also, was sufficient and a substantial compliance with the statute, without delivering to him a second copy as the father. The notice desired by the law was thereby given. Its purpose was accomplished, and a compliance with mere form was unnecessary.

So in the case now in hand, would the object of the statute have been any more fully accomplished by the delivery of a second copy of the summons to the half-brother of the appellee as the person in charge of him?

It is said, however, that he was also then under age. He had, however, come to years of discretion. The Code does not provide that the service must be upon the person in charge of the infant, if such person be of age.

Undoubtedly a proper construction of it requires that such person should be one of such an age as to have arrived at discretion.

He could not otherwise properly be regarded as in charge of the infant.

If the appellee was not in charge of his brother when the summons in the old suit was executed, he was certainly not in charge of any one. It is difficult to see how he could otherwise have been brought before the court. Aside from his brother there was no one who was likely to look to his interest.

The brother was, in fact, the only person who was caring for him, and, to any extent, controlling his actions and conduct.

Our conclusion is that the service of summons was sufficient, and the judgment to sell the propety was, therefore, not void. The equity of the case is manifestly in accord with this view, and it always should afford a court delight to arrive at it, while at the same time conforming to the law.

Judgment affirmed.

BELL, &c. v. MANSFIELD'S ASS'EE.

(Filed May 22, 1890—Not to be reported.)

1. Pleading—Petition—The petition upon a promissory note alleging that "the defendant, by his promissory note, filed herewith, agreed and promised to pay," includes all the essentials of a complete undertaking, and the filing of the note by the payee with the petition dispenses with an allegation of its delivery.

2. Specific attachment—Affidavit—Appellees having a mortgage lien upon a crop of tobacco, obtained a specific attachment, and alleging "that they have reasonable grounds to believe, and do believe, that unless prevented the tobacco will be sold or concealed by the defendant, that their claim is just," etc. Held—That this affidavit is sufficient under section 249 of the Civil Code of Practice.

3. Clerical misprision—The failure to enter a credit of $17.60 when giving judgment was a clerical misprision, which can be corrected in the lower court.

P. F. Edwards for appellants.

Lewis McQuown for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Pryor.

Curle, as assignee of John L. Mansfield and William Glenn, instituted this action on a note for $750, executed by Henry Bell to Glenn and Mansfield on the 6th of April, 1881, having endorsed upon it various credits paid by the obligor.

It is alleged that the defendant undertook and agreed to pay said sum, and the note evidencing the indebtedness is filed and made part of the petition. It is further alleged that Mansfield, one of the payees in the note, assigned all his estate to Curle, including the note sued on, for the benefit of creditors. That, by reason of the assignment, he, Curle, as assignee, was vested with all of Mansfield's interest. It is insisted that the petition is not sufficient, because it fails to allege that the note was delivered, and that no right to sue in the name of Curle appears from the petition. The promise to pay, with the note in the possession of the payees, is sufficient to show a complete obligation. That is, that the note was executed and delivered.

"The defendant, by his promissory note filed herewith, agreed

and promised to pay," includes all the essentials of a complete undertaking by the defendant, and the averment of the assignment for creditors by one of the payees vests in the latter the right to sue in conjunction with Glenn, one of the original payees.

There was an attachment obtained to subject property upon which the appellees had a lien by mortgage, and it is further contended by the appellant that the attachment should have been discharged for want of proper verification. The appellees state, "that they have reasonable grounds to believe, and do believe, that, unless prevented, the tobacco will be sold or concealed by the defendant; that their claim is just," etc.

Section 249 of the Code (Carroll's) provides expressly that in an action to enforce a lien, this affidavit is sufficient; it provides the language to be used, which seems to have been followed by the appellants in this case.

"If the plaintiff state on oath that he has reasonable cause to believe, and does believe, that, unless prevented by the court, the property will be sold, concealed or removed from the State, an attachment may be granted against the property."

The case of Williams v. Martin, 1 Met., 42, relied on by the appellant, was, under the law, applicable to general attachment. Nor is the affidavit defective, by reason of the failure of the appellees to state the amount they ought recover, aside from the facts stated in the petition. The amount of the debt, with the credits, is clearly set forth in the petition, and the statement that the claim is just, and a prayer for a judgment for the balance due. This is verified by the oath of the appellees that he believe the statements in the petition are true, which is a substantial compliance with the provisions of the Code.

The order of attachment follows section 254 of the Code, and the failure to enter one of the credits, amounting to $17.60, when giving judgment, was only a clerical misprision, and is no ground for reversal as the error can be corrected below, and no effort seems to have been made for that purpose.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

JUTKENHOFF v. LUTKENHOFF.

(Filed May 21, 1890.)

Supersedeas—Damages—An appeal having been prayed in the circuit court and not perfected by filing a transcript of the record in the office of the clerk of the Superior Court within twenty days before the second ensuing term of the court, after the expiration of that time appellant executed before the clerk of the circuit court a supersedeas bond, upon which the clerk issued a supersedeas. Upon motion to dismiss the appeal and discharge the supersedeas with damages, Held—That the clerk of the circuit court had no authority to issue said supersedeas, and no damages will be awarded, as the supersedeas was not regularly issued.

No damages could be awarded on the discharge of the supersedeas in this

case, as the judgment was not for the payment of money. (Section 7644, Civil Code, construed.)

J. P. Tarvin for appellant.

D. A. Glenn for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Ward.

On the 8th of February, 1889, the appellee recovered a judgment and order of sale for the satisfaction of a certain judgment, which she had theretofore recovered at law against appellant, and upon which there had been a return of no property before the institution of this suit. In other words there was a suit to enforce the satisfaction of a judgment at law, and judgment granting relief and ordering the sale of certain real estate in satisfaction was rendered. On the 18th of February, 1889, an appeal was granted in the court which rendered the judgment. That appeal was not perfected by filing a transcript of the record in the clerk's office of this court more than twenty days before the second ensuing term of this court.

On the 12th of February, 1890, the appellant executed a supersedeas bond, superseding the judgment above referred to, before the clerk of the court which rendered the judgment. And on the same day the clerk of said court issued a supersedeas.

A motion is now made to dismiss the appeal, and to discharge the supersedeas with damages. The supersedeas was void. The clerk of the circuit court, where the appeal is granted by that court, must take bond, but he has no right or authority to issue the supersedeas, unless the bond is executed before him before the time within which the record must be filed in the clerk's office of the Court of Appeals, as provided in section 738. (See section 749).

The reason for this is: That the time for filing the record in the clerk's office of the appellate court may be extended by that court, or if the record is not filed the appeal may be dismissed by that court. Of that court's records, in these particulars, the clerk of the circuit court could have no notice, therefore, to prevent confusion, when the time has elapsed within which the appellant could further prosecute his appeal, if he wants to supersede the judgment he must apply to the clerk of the court having control over the matter, and where records will show whether he is or not entitled to a supersedeas, as he clearly would not be after the time had elapsed within which he could prosecute the appeal, unless the time prescribed by law had been extended.

As it is not claimed that a supersedeas was issued by the clerk of the Court of Appeals, and as it is conceded that the time for perfecting the appeal was not extended, it would seem to follow that the clerk of that court not only did not issue a supersedeas, but had no authority to issue one.

No damages can be awarded, unless there is a valid supersedeas issued. That a valid supersedeas had been issued will be presumed when the bond is executed at such a time as would authorize one; but when the bond is executed out of time, as this one was, and when no valid supersedeas could issue, without extraneous facts authorized it, they should be made to appear.

Moreover, this was not a judgment for the payment of money, and no damages could be allowed, even had there been a valid supersedeas. (Section 764.)

The motion to dismiss the appeal granted in the lower court is sustained, the other motions are overruled.

SUPERIOR COURT ABSTRACTS.

RICHIE v. HERNDON.

Filed May 21, 1890. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Husband and wife—Evidence—In this action to recover the possession of a horse which plaintiff alleged defendant unlawfully held possession of, evidence tending to show that the title was in defendant's wife, was competent for the purpose of defeating the plaintiff, but the wife herself was not a competent witness for defendant. Had the wife's claim been asserted, as provided in section 29 of the Code, she would, upon this issue, have been competent as a witness for herself, but even then both she and her husband could not have testified in her behalf.

2. Reversible error—A reversal can not be had for error in giving or refusing instructions, unless all the instructions given and refused are included in the bill of exceptions, or made part of the record by an order of court.

3. Same—Burden of proof—The burden was upon the plaintiff, but even if not, an instruction given at defendant's instance having placed the burden upon the plaintiff, the defendant can not complain that the court gave the plaintiff the conclusion of the argument to the jury.

Kennedy & Son for appellant; John P. Norvell, Hanson Kennedy and Hargis & Eastin for appellee.

LEATHERS, &c. v. KELLINGS TRUSTEE.

Filed May 21, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Receivers—A receiver has no powers, except such as are conferred upon him by the order of his appointment, and the course and practice of the court. He has but little discretion allowed him, and must apply from time to time to the court for authority to do such act as may be beneficial to the estate.

2. Same—A receiver who was directed by order of court to sell property on credit having sold it for cash, at the instance of the parties in interest, the surety in his bond is not liable for the money which thus came into his hands. The act of the parties in procuring the receiver to sell the property for cash had the effect of constituting him their agent, and in making the sale and receiving the money he was acting under the agency, and not as the receiver of the court.

3. Same—A receiver directed to loan out money has no authority to collect it of the borrower until he is ordered by the court so to do, and if he collects the money without such authority his surety is not liable therefore.

Collins & Fenley for appellants; O'Hara & Bryan for appellee.

HERBST, &c. v. GÆRTNER.

Filed May 21, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Barbour, affirming.

Recovery of money paid on void obligation—One can not recover back money which he has voluntarily paid to another, upon the ground that the contract upon which it was paid was void as against public policy nor can he insist that it should be credited on other demands which the payee holds against him.

O'Neal, Jackson & Phelps for appellant; C. B. Seymour for appellee.

NORTHERN BANK OF KENTUCKY v. RILEY, &c.

Filed May 21, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, reversing.

Reversal of judgment—Measure of damages—Where a judgment under

which property has been sold is reversed, the measure of damages is the value of the property at the time of sale, less incumbrances, with or without interest, in the discretion of the jury. But the judgment defendant may take the sum for which the property sold, with interest, if he elects to do so. If, however, the sale was made to satisfy the claims of different creditors, and the judgment was reversed as to only one of them, the judgment defendant can not recover the value of the property, but is restricted to the sum realized by the plaintiff, whose judgment was reversed.

George R. McKee for appellant O'Hara & Bryan for appellees.

WALLINGFORD, &c. v. SECOND NATIONAL BANK OF INDIANA.

Filed May 21, 1890. Appeal from Harrison Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Practice—If there was error in the rejection of an amended answer it was cured by allowing a second amended answer not materially different from the first one.

2. Same—As the action of the court in giving instructions was not made one of the grounds for a new trial, there can be no reversal on that account.

3. Same—The evidence being conflicting, this court has not right to inquire which way it preponderated.

W. T. Lafferty for appellants; J. Irvine Blanton for appellee.

EDMONSON v. BAKER.

Filed April 23, 1890. Appeal from Fayette Circuit Court. Opinion of the court by Judge Ward, reversing on original and affirming on cross appeal.

1. Principal and agent—Where a real estate agent was acting under a contract with the owner of a lot, by which he was to receive a certain commission in the event he should sell the lot for not less than a certain sum, it was his duty before changing that contract for another more advantageous to him to impart to his principal all the information which he had, and especially to inform the principal of negotiations then pending for the sale of the lot, and his failure to do so was a fraud upon the principal's rights, and relieved the principal from all obligations to perform the new contract.

2. Pleading—Prayer for relief—As the agent sued the principal in equity for the specific enforcement of the new contract, whereby he claimed that he was entitled to the assignment and delivery of a note executed to defendant by the purchaser of the lot, the question as to the right of plaintiff to any other relief than that prayed for does not arise, and plaintiff not being entitled to the enforcement of the contract sued on, the petition should have been dismissed. If plaintiff was entitled to recover anything upon an implied contract he could only recover in an action at law, and he could not, by resting his claim upon an issue exclusively cognizable in equity, thereby deprive the defendant of the right of a trial at law on an issue which, when made, would be exclusively cognizable in a common law tribunal.

3. Failure to move to transfer to ordinary docket—Defendant did not waive any right by failing to move to transfer to the ordinary docket. The right to a transfer and the waiver of rights resulting from a failure to move to transfer at the proper time depend upon the issues presented by the pleadings, not upon other rights not put in issue.

4. Compensation for labor under fraudulent contract—It seems that one is not entitled to any compensation whatever for labor performed under a contract which he has procured by fraud, but that question is not decided, as it does not arise under the pleading.

Beck & Thornton for appellant; Z. Gibbons for appellee.

BERLING, &c. v. BIEDENHERN.

Filed April 28, 1890. Appeal from Kenton Chancery Court. Opinion of the court by Judge Ward, reversing.

Consideration for note—In this action upon a promissory note, in which the defense was that the note was executed without consideration, the evidence sustains the consideration alleged by plaintiff, which was that there was a substitutional arrangement by which a creditor of defendant released him from liability in consideration of his execution of the note sued on to plaintiff, who accepted the note in satisfaction of a claim he had against defendant's creditor.

William Goebel for appellants; O. P. Schmidt for appellee.

SUPREME COMMANDERY OF THE KNIGHTS OF THE GOLDEN RULE v. BARRETT, &c.

Filed April 23, 1890. Appeal from Livingston Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Benefit societies—A benefit society, by its certificate, obligated itself to pay to the beneficiaries $2,000 in the event the class of which the holder of the certificate was a member was full at the time of his death, and, if the class was not full, to pay $1 for each member of the class in good standing. In this action by the beneficiaries, alleging that at the time of the death of the holders of the certificate there were 2,000 members in good standing in the class of which he was a member, the defendant alleged in its answer that at the time of said member's death the class to which he belonged was not full, and that there was only collected from the assessment for his death from the members of said class $1,359, and that the same was paid over to plaintiffs, the petition admitting a credit for more than that amount. Held—That the answer is bad. The society obligated itself to pay so much for each member of the class in good standing, and not merely what it might collect. But even if its constitution can be so construed as meaning that it should only be responsible for what is actually paid to it by the members, yet the society owes the duty to the beneficiaries to make all reasonable efforts to collect the assessments; and it will be presumed that it did collect all, unless it avers that it made the effort and failed.

S. M. Bernard and D. M. Rodman for appellant; John K. Hendrick for appellees.

STRONG'S ADM'R, &c. v. SEWELL'S ADM'R.

Filed April 30, 1890. Appeal from Lee Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Suit on note—Non est factum—In this suit in equity, for the purpose of subjecting land to the payment of the judgment which might be obtained on promissory notes sued on as there was a plea of non est factum, and no evidence whatever that the obligor in the notes had ever executed or authorized any one for him to execute either of the notes, a judgment for plaintiff is reversed, with directions to dismiss the petition.

Riddell & Son and Irving Halsey for appellants; H. C. Lilly for appellee.

COMMONWEALTH FOR USE OF SALT WELL AND IRONSVILLE TURNPIKE ROAD CO. v. BAXTER.

Filed April 23, 1890. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Evidence—It was error to allow the defendant to testify as to transactions with a person who was of unsound mind at the time of trial, and, therefore, unable to testify. And though this evidence was, after repeated objections had been made and overruled, finally excluded, its introduction and the repeated refusal of the court to exclude it must have operated prejudicially to

the plaintiff's case. And that fact strengthens the court in its conclusion that the verdict is flagrantly against the evidence.

Hanson Kennedy for appellant; John P. Norvell and Kennedy & Son for appellee.

FIRST NATIONAL BANK OF CHATTANOOGA v. BEHAN, &c.

Filed April 28, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Banks—Recovery of money paid under mistake of fact—When money has been paid under mistake of fact, which the person to whom it was paid can not, with good conscience, retain, the mere fact that the party paying would not have made the mistake had he been more diligent, is no defense to an action to recover the money.

A draft drawn by appellees and deposited with a Covington bank for collection came to appellant for that purpose. Appellant sent it to a Knoxville bank, and was advised September 2 that it was credited to appellant subject to payment. Appellant hearing nothing further, and having waited until September 7, concluded the draft had been paid, and so in effect notified the bank which sent it, and the Covington bank, having such information, paid the amount to appellees. The draft was never paid by the drawee, and appellant, having to account for the amount paid by the Covington bank to appellees, sued appellees to recover that amount. Held—That appellant is entitled to recover.

W. K. Benton for appellant; William Goebel for appellees.

MULLINS, &c. v. BULLOCK, &c.

Filed April 30, 1890. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Ward, reversing.

Evidence—In this action, involving the title to personal property, one of the parties claimed under a contract which he said was in writing, but refused to produce the writing. The court refused to allow evidence as to the contents of the writing, but allowed the statement of the party that he was the owner of the property to go to the jury. Held—That the court should also have excluded this statement. The question whether the writing passed the title to the property was one of law to be determined by the court upon its inspection.

Collins & Fenley for appellants; L. T. Applegate for appellees.

BURGHER v. BURGHER, &c.

Filed April 30, 1890. Appeal from Logan Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming; Judge Bowden not sitting.

1. Partners are not entitled to interest on capital furnished by them to carry on a venture in which all are interested, unless there are peculiar circumstances showing that it was the intention that interest should be allowed, and a partner who uses the partnership funds for his own individual purposes should be charged with interest, unless the circumstances are such as to show that it was the intention of the partners that interest should not be charged.

2. Exceptions to a commissioner's report of settlement of accounts should be of such a character as to direct the attention of the court to the particular error complained of—the particular item of debit or credit which is objected to. It will not do to except generally, upon the ground that the amount reported in favor of one party, is too great or too small. Therefore, such an exception in this case is not sufficient to raise the question as to whether appellees are entitled to the interest allowed by the commissioner, or should be charged with interest with which they are not charged.

G. W. Merritt, Geo. S. Hardy and E. W. Hines for appellant.

HERNDON, &c. v. TERRELL.

Filed April 30, 1890. Appeal from Madison Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Partnership real estate—Real estate, bought with partnership means and used for partnership purposes, is impressed with all the qualities of partnership property, to the extent that its proceeds may be necessary to a settlement of partnership liabilities, including the adjustment of the accounts of the members of the firm.

That the real estate, a part of the proceeds of which are in controversy in this case, was so purchased, paid for and used, is fully established by the evidence.

2. A partner is not entitled to compensation for attending to the partnership business in the absence of a special agreement to that effect.

J. A. Sullivan and W. B. Smith for appellants; C. F. & A. R. Burnam. and C. H. Breck for appellee.

KLINGMAN v. SMITH.

Filed April 30, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Ward, reversing.

1. Damages for injuries inflicted by vicious dog—In an action under section 10 of chapter 9 of the General Statutes to recover damages for injuries inflicted by a vicious dog owned by defendant, the allegation that defendant's dog "came upon plaintiff's premises, and thereupon without fault of plaintiff the dog attacked and bit plaintiff severely," is sufficient to negative the exceptions named in the statute, as is also the allegation that at another time "plaintiff was walking along the public way and defendants' dog violently rushed upon and bit plaintiff."

2. Same—In order to maintain an action, independant of the statute, it must be alleged that the vicious habit or propensity of the dog was known to defendant.

3. Same—Punitive damages—The plaintiff in such an action is entitled to recover punitive damages, if it is alleged and proved that the dangerous propensity of the dog was known to defendant before the injury complained of.

4. Same—Peremptory instruction—As the evidence of defendant, as well as that of plaintiff, showed every fact necessary to entitle plaintiff to compensation for the injury sustained, as provided by the statute, there was no duty left for the jury, as to such damages, but to assess the amount. But the court, in giving a peremptory instruction as to such damages, should have clearly confined it to compensation, leaving it to the jury to say whether they would give punitive damages.

5. Same—The expression "that the defendant recklessly permitted a dangerous dog to run at large" is not the legal equivalent of the expression "that the defendant recklessly permitted a dangerous dog to run at large, knowing that the dog was a dangerous one;" and the jury might have believed the former without believing the latter.

O'Neal, Jackson & Phelps for appellant; Wilson & Thum for appellee.

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KENTUCKY COURT OF APPEALS.

RANKIN'S ADM'R, &c. v. WALLACE.

(Filed March 8, 1890—Not to be reported.)

Consideration—Undue influence—Mental capacity—In an action by appellants, as the administrator and heirs of R., to set aside a deed of conveyance made to appellee for the recited consideration of $2,000, alleging no consideration and undue influence by the vendee over the mind of the vendor, appellee, for defense, states that the true consideration for the conveyance was the undertaking by appellee to maintain and support the vendor and his wife during life, and to pay numerous debts owing by the vendor, and that at the time of drafting the deed, the vendor supposing his debts to amount to about $2,000, recited that amount as the consideration for the deed, and appellee alleges, further, that he had paid debts for the vendor amounting to about $1,500; had supported the vendor until his death and was continuing to support his wife. Held—That the consideration for the conveyance was fair and adequate and no undue influence over the vendor's mind appears to have been exercised by appellant; on the contrary the arrangement entered into by the vendor appears to have been wise and fair.

Carroll & Jackson for appellants.

Jno. D. Carroll and W. M. Cravens for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Bennett.

The administrator and heirs of Septimus Rankin brought this action against the appellee for the purpose of setting aside a deed of conveyance of 195 acres of land, which was made by Septimus Rankin, upon the ground that the conveyance was procured by fraud and undue influence, and was without any consideration.

The deed recites a consideration of $2,000. But it is alleged and proven by the appellee that the said sum was not the spe-

cific consideration agreed upon; that the true consideration was the agreement to pay Septimus Rankin's debts, and to board and care for him and his wife during their respective lives; that he has complied with the agreement in so far as to pay said Rankin's debts, and care for him during his life, which occurred in 1887, the contract having been made in 1882, and the deed having been made in 1884; and since said Rankin's death he has supported and cared for his widow, and is now doing so.

There is no disagreement about the foregoing being the true consideration for the agreement, and that the appellee has honestly and faithfully performed it, and is now doing so. But it is said that the proof of this consideration contradicts the consideration mentioned in the deed, and is, therefore, incompetent.

The appellee says that Mr. Rankin estimated his indebtedness to be about $1,500, and in having the deed drawn he desired the sum of $2,000 to be put in the deed as the consideration, supposing that said sum would certainly cover the amount of indebtedness.

With this explanation we fail to see the inconsistency, and the matter of boarding and caring for these two old people is an additional consideration, and not a contradictory one.

It is also contended that this consideration was inadequate, therefore, evidenced fraud or undue influence on the part of a shrewd and designing man over a weak and feeble old man, who was dominated by the former.

The proof by the appellants' witnesses, all of whom are related to the appellants, save one or two, put the value of the land at not less than $4,000; some of them put it at a greater sum. The appellee has a greater number of witnesses, none of whom are related to him, save one or two, and they put the value of the land at about $3,000. This valuation, as we think, is about correct.

The uncontradicted proof is that the appellee paid for said Rankin, and let him have money on account of the land transaction, amounting to at least $1,500, and boarded, clothed and cared for said Rankin during his life and has done the same for his widow, and is now doing so, and may have to continue to do so several years longer. We think this additional consideration made the entire consideration adequate. It seems that Mr. Rankin and his wife were old, and his children by his first wife were grown and had gone to themselves, save one, and he was heavily in debt for a man of his means; he was unable, by reason of age, to make money enough on his farm to pay his debts and support his family; the farm was heavily mortgaged, and would have to be sold, perhaps, at a sacrifice, and him and family deprived of a home unless some arrangement was made to pay the debts and save something to live on, so he proposed to his stepson, the appellee, take the farm and pay his debts, and support and care for him and his wife during their respective lives.

We think that this arrangement, under the circumstances, was prudent. Was said Rankin competent to make it? We think that it is abundantly shown by the proof that he was. Was he unduly influenced to make it? We think that the proof clearly shows that he was not.

As to the first proposition the proof is overwhelming that said Rankin was, at the time he made the verbal contract, and at the time the same was reduced to writing, a stout, healthy and sensible old man; that he was physically and mentally enfeebled by age, but his will power was strong, and he retained his mental faculties to a remarkable degree.

As to the second proposition the proof is clear that the ap-

pellee did not influence, nor attempt to influence, him to make the contract. The only three circumstances proven that would tend, in connection with other circumstances, if proven, to show that Rankin was unduly influenced are: First. The declaration of the appellee that he intended to get the place for a song, and sing it himself. Second. His assertion, after the place was conveyed to him, that Rankin owned it. Third. His being the stepson of Rankin, and living with him and having his confidence. But the witnesses who testified to the first and second facts are flatly contradicted by the appellee. The veracity of the witness swearing to the first named fact is impeached by the appellee, and the appellants do not come to his support. As between this and the witness the lower court gave credit to the appellee, which, under all the circumstances, was justifiable.

As to the third proposition there is no proof that the appellee took any undue advantage whatever of his relations with Rankin.

The judgment is affirmed.

APPERSON'S ADM'R v. TRIPLETT.

(Filed May 20, 1890—Not to be reported.)

1. Trespass—Partition fence—Damages—In an action on purchase money notes appellee alleged as a defense a counterclaim for damages that appellant tore away the partition fence and exposed appellee's crops to trespass by stock, and was allowed $107 damages. Held—That said defense was properly allowed, and the damages recovered were not excessive.

2. Pleadings—Rejoinder—The court properly struck out of the rejoinder all matters constituting a counterclaim, as the answer should have presented such defense.

Alexander Lackey for appellant.

Wm. M. Fulkerson for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Bennett.

The appellant sued the appellee on three promissory notes, executed to the appellant as administrator, with the will annexed, for the price of thirty acres of land.

The appellee relied upon the defenses that the appellant, by a writ of possession, had wrongfully ejected him from the possession of fifteen acres of this land, and had wrongfully torn down his fence and stock had entered upon his land and destroyed his crop.

The proof is that only two acres and a fraction of an acre of land belonging to the appellee was included in said writ.

For tearing away the partition fence and the damage done to appellee, in consequence thereof, the court allowed the appellee one hundred and seven dollars and——cents.

The writ of possession was executed, and the fence was torn down on the 11th day of May, 1887. Shortly thereafter the appellee reset the fence (inferentially) by the permission of Auxier, who was in possession of the land described in the writ. The resetting of the fence protected the appellee against trespasses by stock. Thereafter some one tore down the fence again, and exposed the appellee's crop, etc., to trespasses by stock, and the principal damage was done the appellee by this second tear-

ing down the fence. No one intimates that the appellant had anything to do, by advice or otherwise, with this tearing down the fence. His connection with the writ of possession had long since ceased. It follows that he is not responsible for this second act. For the first act of tearing down the fence, under the allegations, he is responsible, for which the court assessed damages. We think that the damages thus assessed were reasonable. The striking from the rejoinder all matter in reference to the counterclaim was correct, as that matter should have been set up in the answer. There is no brief on file for the appellant.

The judgment is affirmed. But as the appellee is the real appellant, he should pay the costs of the appeal.

JUMP v. JOHNSON.

(Filed May 22, 1888—Not to be reported.)

Lien—Contribution—Sureties—Usury—J. and B., as principals, and M. as surety, executed to Johnson their promissory note for $1,000, bearing 10 per cent. interest from date until paid, J. and B. mortgaging their lands to M. as indemnity, the note and mortgage both bearing date of August 29, 1876. In an action, in 1884, to enforce satisfaction of said note by a sale of said lands, J. alleging in his answer that he had paid an amount equal to one-half of the indebtedness as agreed between him and B., asked that the lands of B. be first sold and that his lands only be sold, if necessary, to pay the balance of the debt. B. consenting to this in his pleadings the court ordered that the lands of B. be first sold to satisfy the debt. The lands of B. were sold for an amount supposed to be the balance of the debt, but which proved to be an error, lacking $250 of satisfying the debt. The lands so sold having passed by transfer to J., and B. being dead and his estate insolvent, the case was redocketed and a sale of the land ordered to satisfy the balance of the debt. J. objected to said order on the ground that he was only liable for one half of the debt, and further, that as the money was actually paid on the second day of September, 1876, 4 per cent. interest thereon was usurious and that a credit of same on the note would satisfy the debt. Held—That the contract was completed on the 29th day of August, 1876, and the rate of interest agreed on was not usurious; also that J. and B. were both principals to Johnson for the payment of the whole amount of money, and Johnson having no knowledge of any private arrangements between J. and B. as to the portion of the money each should pay, was not affected thereby.

Jas. Montgomery for appellant.

J. P. Hobson and Brown & Haycraft for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Henry Jump, and William Bird, as principal, and Eliza S. Monin, as surety, executed their note to the appellee for $2,000 borrowed money, which note was made due and payable twelve months after date, and bore ten per cent. interest from date until paid. The note bore date the 29th day of August, 1876. The appellant and Bird mortgaged their respective lands to Eliza S. Monin to secure her as their surety on said note.

The mortgage was dated and acknowledged on the 29th day of August, 1876. The appellee, in the spring of 1884, recovered judgment for the balance due on this note, and for the enforcement of Eliza S. Monin's mortgage lien to satisfy said judgment. There was no defense to this proceeding. The appellant, however, plead that he had paid half of the note, including interest, which, by arrangement between him and Bird, was all, as between them, he should pay, and he asked the court to order Bird's land to be first sold to satisfy the balance of the debt, interest and costs. To this Bird, by his answer, assented. Accordingly, the court ordered the land of Bird to be first sold, and if it did not bring enough to satisfy said balance, etc., then the appellant's land was to be sold to satisfy the deficiency. Bird's land was first sold, and it brought an amount supposed to be sufficient, according to the calculation of the commissioner making the sale, to satisfy said balance and costs. Bird himself bought the land, and the appellant was one of his sureties on the sale bond. After the confirmation of the sale and collection of the purchase money it was ascertained that the commissioner, by a miscalculation, fell short of the correct balance due by about $251, consequently Bird's land did not sell for enough to satisfy said balance by that sum. Bird being dead and his estate being insolvent, and said land having been sold by his heirs and purchased by the appellant, the appellee, upon notice, the case still being upon the docket, moved the court to order the sale of so much of the appellant's land as would satisfy said balance. The court, notwithstanding the objections of the appellant, made said order. The first objection is that, as the borrowed money was received on the 2d day of September, 1876, the ten per cent. interest law having expired on the 31st of August preceding, the agreement to pay four per cent. in excess of six per cent. interest was usurious, and the payment of said usury more than extinguished the balance that the appellee claimed to be due.

It is to be observed that the appellant does not claim that the agreement was made after the 31st of August, and that the note and mortgage were antedated to make it appear that the contract was made before the expiration of the ten per cent. law. It is alleged that the money was not received until after that time. It is certain, from the proof, that the contract was made on the 27th of August, and the note and mortgage were given on that day, and the latter was acknowledged on that day, and a check for the money was executed and received on that day. In a word, the contract was, in each essential, completed on that day, and the mere fact that the money was not received on the check until the 2d day of September did not impress the contract to pay ten per cent. as usurious.

The second objection is that the appellant was only bound for one-half of the note as principal, and stood in the relation as surety for Bird for the other half, and conduct of the commissioner acquiesced in by the appellee in selling Bird's land apparently for the full amount of the alleged balance, thereby causing the appellant to believe that the whole amount of the debt had been paid, and causing him to take no steps to secure himself against loss by reason of said balance being unpaid, he was released from the payment of the same. It is clear, from the proof, that the appellant and Bird were co-principals to the appellee for the whole amount of said note, and the arrangement between themselves, to the effect that they would divide the money borrowed equally between them, was a mere agreement between themselves, which in nowise entered into the contract with the appellee. If each one had, without any express agree-

ment, taken half of the money, an equity would have arisen between them to be, as between themselves, responsible for one-half each. But this would not have entered into a contract, expressed or implied, with the appellee that each was to be surety of the other for one-half of the debt. This collateral agreement of theirs to divide the money between themselves stands in precisely the same attitude as would the case just supposed, and the appellee not having, expressly or impliedly, entered into it, was not bound by the rule that governs principal and surety in such cases.

The judgment is affirmed.

WASHINGTON COUNTY COURT v. McKEE.

(Filed May 24, 1890—Not to be reported.)

Attorney's fee—Interest—The county court of Washington county, under power granted to it by a special act of the legislature, assumed the payment of an attorney's fee to Geo. R. McKee and others, incurred at the instance of taxpayers of said county, to the amount of $6,000. After a long delay the county court paid the principal, but refused payment of any interest on same, alleging that as it came under the same rule as ordinary appropriations by the county court it bore no interest and that the court had not agreed to pay interest thereon. Held—That the voluntary assumption by the county of said debt and the release of solvent parties bound to McKee and others for same was a sufficient consideration for the undertaking to pay said debt, and the same justly bears interest from the date of its assumption by the county court.

C. C. McChord and Jno. W. Lewis for appellant.

W. P. D. Bush and W. B. Harrison for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

The county court of Washington county subscribed $300,000 to the capital stock of the Cumberland and Ohio Railroad Company. After this subscription was made John W. Burton and others, taxpayers of that county, for themselves and the taxpayers generally, instituted proceedings assailing the validity of the subscription, and succeeded in defeating the collection of the tax. They employed George R. McKee and other counsel in the case, and agreed to pay McKee, the attorney, the sum of $6,000 for his services. This liability having been incurred for the benefit of all the taxpayers, the legislature authorized the county court to pay the indebtedness, or rather to assume the liability, and to impose a tax on the people for that purpose, the tax debt not to exceed ten cents on the $100, and to be levied annually until paid. The county court was also empowered, if it saw proper, to pay the debt out of the funds then on hand, or with the consent of the attorneys to issue its bonds, payable to them with interest from date, the interest not to exceed seven per cent. The county court saw proper to make the levy, instead of issuing the bonds, or of paying the debt out of the funds then in the county treasury; and if the views of counsel representing the court are to prevail, it was better to make the levy, as in that event the county could postpone payment without any liability for interest upon the debt. The county paid the principal after a certain lapse of time, but declined to pay the interest,

amounting to several hundred dollars, upon the ground that it was an ordinary appropriation by the county in the discharge of its governmental or ministerial duty, and no interest could be collected.

The ordinary appropriations for working road, supporting the poor, etc., and such as arise from no contract, but by reason of the control of the county over its funds, and the subject to which they are to be applied, bear no interest, but the case before us is entirely dissimilar.

The county court in this instance made an order assuming the liability of Burton and others to George R. McKee for six thousand dollars, and in doing so assumed to pay the principal and interest. It was a debt the county felt it should assume as an act of justice to the taxpayers, who had made themselves individually liable to the attorney, and when agreeing to pay this debt, the mere fact that it had failed to agree to pay interest is no reason why interest should not accrue. If the county court, under legislative enactment, had agreed to pay the $6,000 for the services at a certain date, can there be any reason why interest should not follow the debt from its maturity until paid? We can perceive none. The county court, through the people, had imposed upon it an act that was independent of such duties as ordinarily pertains to it, and required the county to become a stockholder in a railroad company, and in doing so it stood upon the same footing as other stockholders, if the subscription was binding, and when assuming to pay the debts of those incurred in defeating the subscription it became liable, just as the taxpayers were when they were released, and the county accepted in their stead, and the county is liable for the interest from the time the money was due and payable to McKee by those who had agreed to pay it. The assumption or agreement to pay the debt was voluntary on the part of the county, and there is no reason why McKee, who held the obligation of parties perfectly solvent, should release them and take the county for the principal, and abandoning his right to the interest.

The court below having given judgment for the interest, it is now affirmed.

GRAY, &c. v. MARSHALL.

(Filed June 3, 1890—Not to be reported.)

1. Husband and wife—Lien on wife's land for necessaries—In an action by appellants, as heirs of M., to recover of appellee a tract of land which had been conveyed to him by the wife, without her husband uniting with her in the deed, appellee set up the equitable defense that the consideration of said deed was the support and maintenance by appellee of M. and her husband for several years, and that appellee having erected necessary and valuable improvements, and paid taxes on said land, was entitled to a lien on said land, in the event of a cancellation of said deed, to reimburse him in the cost of maintenance and support of M. and husband; also the value of said improvements and taxes. Held—That the deed was invalid, but appellee was entitled to a lien for support and maintenance as necessaries for the family, under section 2, article 2, chapter 52, General Statutes. The signing and acknowledgment of the deed by the married woman was sufficient to charge her land under said section, and the chancellor having adjusted the taxes, rents and value of improvements, which were proven to be necessary and valuable, and charged the balance due appellee on the land, the judgment is affirmed.

2. Decedent's estate—Affidavit—A failure to object to a claim against de-

cedent's estate for want of affidavit and proof, until after judgment, was a waiver of the objection.

3. Transfer of action—Upon filing of a purely equitable defense it was proper to transfer the action to equity.

R. S. Friend, R. H. Weddington and J. C. Wickliffe for appellants.

Thomas H. Hines and James Goble for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellants, heirs at law of Polly Ann Meadows, brought this action to recover of appellee a tract of land, which the decedent attempted in 1877 to convey to him, while a married woman, her husband not uniting in the deed.

As defense appellee stated in his answer the deed was made in consideration of his agreement to take care of and support her as long as she staid at his house, and such was, in substance, the consideration recited in the instrument. That she and her husband, both being helpless, had been supported by him about one year previous to date of the deed, and continued afterwards to be so taken care of and supported at his residence, she for six and he for two years. He alleged that he had erected lasting and valuable improvements on the land, and also paid taxes assessed against it.

The lower court correctly adjudged the deed did not have the effect to divest her of the legal title, but that appellee was entitled to recover for supporting her five and her husband two years; and also $140 value of improvements and $38 taxes, making $773, from which was deducted $351.31 for rents, and $50 for coal taken off the land, leaving $371.77, for which, with interest, it was adjudged a lien existed on the land, and sale thereof was directed.

If the alleged indebtedness to appellee by Polly Ann Meadows be a charge on the tract of land, an equitable defense to the action was clearly presented in the answer, and it was not error to transfer the action to equity, where alone could the relief sought be afforded. Section 2, article 2, chapter 52, General Statutes, provides that real estate of the wife shall be liable for such debt or responsibility contracted by her after marriage on account of necessaries for herself, or any member of her family, her husband included, as shall be evidenced by writing signed by her.

We do not see to what the term "necessaries" can, in legal contemplation, be more appropriately applied than to the actual sustenance, sheltering and clothing received by Polly Ann Meadows and her husband from appellee. Nor do we see how better evidence in writing of such debt or responsibility could be afforded than is done by the deed, which she signed and acknowledged. The improvements seem to have been necessary, increased the vendible value of the land, and having been made apparently in good faith, and with the knowledge and consent of both husband and wife, must, in accordance with former rulings of this court, be likewise considered a charge upon the land, as also taxes paid by the appellee. (Thomas v. Thomas, 11 B. M., 400; Hawkins v. Brown, 10 Bush, 186.) To allow appellants to receive the land under the circumstances of this case, free from any charge for support of the decedent when she was in a helpless condition, or for cost of valuable improvements or taxes

paid, would be not merely inequitable, but contrary to the reason of the statute as heretofore interpreted by this court.

The relief asked by appellee did not involve a settlement of the estate of the decedent, and even if he could have been required to make affidavit and proof of his demands, appellants, by failing to apply for a rule at the proper time, must be regarded as having waived the right, and can not now defeat recovery upon such ground.

We think appellee held and was entitled to enforcement of a lien on the land for the amount allowed by the lower court, and judgment directing a sale for that purpose is affirmed.

JONES v. WORDEN, RICHIE & HANFORD.

(Filed June 3, 1890.)

1. Husband and wife—Agency—A husband permitted his wife to carry on the business of a milliner, without her being empowered to trade as a feme sole. During the course of the business she contracted debts which the husband sought to avoid the payment of, alleging want of authority on the part of the wife to contract, and no promise or ratification on his part. Held—That as the lower court, after consideration of much conflicting testimony, decided against the husband, its finding will not be disturbed. The law implies, from the mere relation of husband and wife, that the wife is the agent of the husband to purchase such things as are necessary for the family, but to hold the husband liable for debts contracted by the wife in carrying on a separate business from her husband the law does not imply such agency merely from the relation of husband and wife, therefore, his consent and authority to the wife must be proven in such case, and the facts and circumstances evidencing such authority are deemed sufficient in this case.

2. New trial—That "the verdict is contrary to law" is too general and indefinite as a ground for a new trial.

Fontaine T. Fox for appellant.

A. E. Willson for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

No exception was taken by the appellant, Arthur Jones, to the instructions given to the jury, nor to the refusal of the court to give those asked by him.

The only grounds upon which a new trial was asked are: First. The verdict is not sustained by sufficient evidence. Second. The verdict is contrary to law.

This court has repeatedly decided that a mere statement that the finding is contrary to law is too general to admit of consideration. It calls the attention of the court to no particular error; and the lower court should not be required, upon such an indefinite statement, to spend its time and possibly exhaust its patience in reviewing its action during the entire trial to see if any step has been taken in the wrong direction. Fairness to it, as well as the interest of litigants and the public, requires that the complaining party should indicate, at least with such certainty as is reasonably calculated to call the attention of the court to it, the particular error upon which he bases his complaint.

The single question, therefore, presented by this record upon this appeal is whether there is any evidence to support the verdict.

The petition is in form assumpsit for the balance of the price of a bill of merchandise sold the appellant by the appellees.

It avers that it was sold and delivered at his request, and that he promised to pay for it.

The evidence discloses that the goods were delivered to the wife of the appellant for sale and use in a millinery store, conducted by her. The answer of the appellant contains a denial of the averments of the petition, and then avers, in substance, that the goods were sold to his wife without his knowledge or consent; that they were not necessaries for her or the family, that the credit was given to her, and that he was in no way interested in the purchase, and derived no benefit from it.

The reply denies these averments, and in a second paragraph avers that the appellant knew his wife was carrying on the millinery business; that he, at times, advanced money therefor, and was informed of the purchases by her from the appellees after they were made, ratified them, and promised to pay the debt. The lower court sustained a demurrer to this portion of the reply upon the ground that it was a departure from the appellee's original pleading. Whether it did so properly, or upon the proper ground, it is unnecessary to determine. It seems to us, however, the real objection to this paragraph of the reply is that it details what the pleader expected would be shown by the evidence.

Upon the trial a disinterested witness testified that the appellant had promised to pay the account. It is urged that this evidence was admissible, inasmuch as the court had rejected the second paragraph of the reply; and that it was in any event unavailing, as if true, it was a promise to pay the debt of the wife, another party, and not being in writing was within the statute of frauds, and not binding upon the appellant.

The averment of the petition, that the appellant had promised to pay the account, made this testimony competent. No further pleading was necessary to render it admissible. Whether it was his debt was the issue. This was affirmed upon the one side, and denied upon the other. This testimony elucidated this issue. It tended to show how the parties to the suit had regarded it.

It is true the appellant testified that he had never made any such promise. The relative weight, however, to be given to these two witnesses was a matter for the jury. The counsel for the appellant contends that the question at issue is whether a husband is liable for a debt made by the wife, when trading as a milliner with her own means and against the will of her husband, she not having been made a feme sole, as authorized by the statute.

In the discussion of this question he has cited many decisions, and supported the negative view of the question with many reasons, which evince both careful research and consideration.

In doing so it is improperly assumed, however, that the case is entirely one-sided as to the facts. It is assumed that the evidence of the appellant is absolutely true in all respects, and that there is no contradictory evidence and no counter circumstances which, to any extent, support the finding of the jury. Herein consists, in our opinion, the mistake of counsel.

Undoubtedly the power of the wife to bind the husband rests upon the ground of agency, either express or implied.

As to the purchase of necessaries for the family, and in matters relating to the household, such a power or agency is implied

from the relation of husband and wife merely. To this extent she is ipso facto his agent, because she is his wife. Thus far the authority is presumed from their relation to each other. The power is limited, however, to the duties and necessaries of this relation. When this boundary is passed an agency upon her part for him must be shown in order to bind him, just as if she did not occupy the relation of wife to him. Such an agency may, however, be shown by express authority, or it may, of course, be implied from his acts and conduct. It is true the appellant testifies that his wife was carrying on the business with her own means, and against his will; that he had notified those with whom she dealt, so far as they were known to him, that he would not be responsible for the debts she might create; that he had not so notified the appellees, as he did not know that she was dealing with them; that he never put any means into the business, and derived no benefit from it, and that its being carried on was not necessary to the support of his family. Upon the other hand it appears, however, that he gave to his wife a house and lot; that he united with her in a mortgage of it to obtain the means to buy the millinery establishment; that he received the money so obtained, placed it in bank to his own credit, and then checked it out and gave it to her to purchase the store. It also appears that the wife, who was not a feme sole, had carried on the business for nearly two years and perhaps longer, the family in the meantime living over the store, and that the appellees knew she was a married woman, because one of the firm had met her husband. Moreover, as already stated, there was testimony tending to show that he had promised to pay the debt. The wife could incur no personal liability by contract, as she was not a feme sole. It was a question of fact whether he had assented to her carrying on the business, thus making it, in fact, his own; and whether the purchases, although made through her, were, in fact, his own by reason of his authorizing her by his conduct to make them. There was evidence pro et con upon the question. In determining it the jury had a right to consider not only the appellant's testimony, but any counter circumstances. The pleadings are sufficient to support the verdict; and, upon the state of case above indicated, the only question presented being whether the evidence authorized the verdict, the judgment must be, and it is, affirmed.

ALEXANDER v. THE WOODFORD SPRING LAKE FISH COMPANY, &c.

(Filed May 24, 1890.)

Easement—Estoppel—Injunction—The appellee purchased from Charles Alexander and wife and one Hunter a site for a dam and fish pond, the vendors and their wives joining in the conveyances. Upon said site appellant company constructed and maintained a large pond, and stocked it with fish, which was used for years by the members of the company, including appellant's and Hunter's families in fishing and boating, the said Alexander and Hunter were made members of the corporation and relieved of payment of subscription as part of consideration for the conveyances. James Alexander, the father of Charles Alexander, was a member of Charles Alexander's family, and enjoyed the benefits of said pond, and was also the owner of a portion of the land overflowed by the erection of the dam, but this fact was unknown to the company until several years after the con-

struction of said pond, and said James Alexander was present at the construction of said dam and gave advice and made suggestions as to said construction. Several years after its construction and use the dam because leaky, and the company being about to repair same, James Alexander obtained a temporary injunction restraining said company from entering upon his land or overflowing same in making said repairs. Said James Alexander having died pending the action, his devisee, the wife of Charles Alexander, became a party to the suit and prosecutes this appeal from the judgment of the lower court dissolving the injunction. Held—That James Alexander and the appellant, as his devisee, are estopped by their conduct from disturbing the easement acquired by the company over the land by the silence and acquiescence of said parties, as such conduct and silence created a belief that the company had acquired the right to enter and overflow said land from the proper owners of same, and it would be unconscionable to permit the disturbance of rights acquired under such relief.

W. S. Barbour and Wm. Lindsay for appellant.

D. L. Thornton, T. P. Porter, H. M. McLeod and E. M. Wallace for appellees.

Appeal from Woodford Court of Common Pleas.

Opinion of the court by Judge Pryor.

A number of citizens living in or near the town of Versailles formed themselves into a joint stock company, with a view of constructing a pond and stocking it with fish. The corporation was known as the Woodford Spring Lake Company, with a capital stock of $2,500, in shares of $50 each. It purchased, through its chief officer, a site for the dam from Charles Alexander and A. C. Hunter, obtaining deeds that were duly executed and recorded, with the relinquishment on the part of the wife of each grantor, and granting the use of their land to be covered by the water when the dam was raised to a certain height, with the right of ingress and egress to and from the improvement. The company proceeded to construct the dam and to stock it with fish, and after propagating the fish, in great numbers, enjoyed the use of the lake for the purpose of fishing, boating, etc., for several years, when a leak was found in the dam, or a part of it washed off, so as to threaten the entire destruction of the enterprise. The company had expended in the construction of the improvement, and in other respects, for the purpose of making the dam secure, a sum exceeding $1,500.

When the company began to repair their dam, or talked of doing so, James Alexander, the father of Charles Alexander, filed his petition in equity, seeking an injunction preventing the company from repairing the break in the dam, for the reason that when repaired it would back the water to such a distance as would cause it to flow back upon his land, and there remain permanently, to his great and irreparable injury.

A temporary injunction was granted that was dissolved by the final judgment. The plaintiff, James Alexander, died during the progress of the action, and having left a last will, by which that part of the land over which the water would extend, if the dam was repaired, was devised to the wife of his son, Charles Alexander. She was made a party defendant, and is now the appellant in this court.

When this corporation was formed, and while the dam was being constructed, James Alexander and his son, Charles Alex-

ander, lived in the same dwelling, within a few hundred yards of the lake, where they continued to reside to the death of James, and here wthe appellant now resides. The family of Charles Alexander, including his father, James Alexander, enjoyed the benefits resulting from the construction of the dam, and the formation of this lake, by fishing and boating in and upon it, exercising the same rights and privileges in that respect with all the members of the corporation. This, in fact, was both tacitly and expressly agreed upon between the members of the corporation and Charles Alexander when the contract, under which the company entered, was made.

Charles Alexander and Hunter were made members of the corporation, and relieved from the payment of stock, by reason of their conveyance and, as an additional consideration, were permitted, with their families and friends, to enjoy the rights and privileges that the other members had in this lake. It clearly appears that Charles Alexander and his family, including the father, the original plaintiff in this action, enjoyed and exercised the privilege of fishing in the same manner the other members did, and this enjoyment continued until the break in the dam occurred, and the attempt to repair was made, when James Alexander, for the first time, objected to the repair, because the water overflowed his land. The elevation of the dam was twelve feet, as originally made, or at least as authorized by the conveyance from Charles Alexander and Hunter to the appellees. There is no pretense that the repairing of the dam would cause the water to overflow the appellant's land to a greater extent than before the break was made. The fact also appears that the corporation and its members, except Charles Alexander, were ignorant of the fact that James Alexander owned any part of the land covered by the lake, and, in pursuance of their belief that their right of entry was fully justified when obtaining the deed from Charles, the son of James, went upon the land and made this large expenditure for the use and enjoyment of all interested, and were not apprised of the title of James until several years after their claim of right began, and the lake had been made. By the repair the water covers the same land of the appellant that it did before, and no more. James Alexander knew of his title when the dam was being constructed. The appellees were ignorant of his claim. He permitted this expenditure to be made when he knew the water, by reason of the dam, would overflow the land. He was present, or living within 300 yards of the dam when the survey was made. He saw, or was in a condition to see, the work as it progressed from day to day. He consulted with Judge Graves and others as to its construction and made suggestions that were followed when the dam was being built. He was a member of the family of his son Charles, and, as such, enjoyed the use of the lake in conjunction with Judge Graves, who devoted his time and labor to the success of the undertaking. Under such circumstances will the appellant, as a purchaser from James Alexander, with a knowledge of all the facts, be permitted to cause the loss of the expenditure, and deprive the company of its right to repair?

It is contended for the appellant that as the company had all the means of acquiring knowledge as to the title of James Alexander, the latter had the right to remain silent, and to reclaim or assert his right to the possession of this land at any time not exceeding the statutory bar. The right to the easement in this case is not made to depend upon the question as to whether or not the title in James Alexander might or not have been ascertained by the corporation. The question at issue is not affected by the rule contended for by the appellant. Silence, when one

ought to speak, may, and often does, work an estoppel, although there is no actual fraud or a purpose to deceive.

There is nothing in this record showing that James Alexander intended to deceive or defraud this company, but, on the contrary, it is manifest that he consented to the erection of this dam, with a full knowledge that it would overflow his land. His silence gave this consent, and his participation in the enjoyment of the use of the lake for years gave further and stronger proof of his consent. There was no reason for making any inquiry as to the condition of the title of James Alexander. The son, who owned the land when the dam was built, was supposed to own it. as far as the water would be thrown back, and the appellant, by his silence, acquiescence and active participation in the use of the thing constructed, has said that this right of entry belonged to the son.

Suppose this strip of land had been surveyed, and a deed made to the company by the son in the presence of the father, and the money paid, would it then be contended that the father could assert his claim, for the reason that by a survey or examination of the records the company could have ascertained that the title was in the father, and not the son? We think not. The acts of James Alexander in this case were equivalent to saying that this easement, or the right to confer it, is with my son; make your expenditure and I will enjoy its fruits.

It is plain that a freehold or easement can not be created without a conveyance. This is the recognized doctrine, but there may be an equitable estoppel, such as to prevent the real owner from interfering with an easement created by an entry and an expenditure of money, by reason of the owner's silence or consent, and when the party entering has no other means of redress. If one stands by and sees another build a house on his land, the latter acting in good faith, and believing that it belongs to him, will the real owner be permitted to stand by and see the house erected, and then assert his title for the first time? Equity will prevent him from speaking, when, as a conscientious man, he should remain silent.

Mr. Herman on Estoppel says: "When a man, with full knowledge, or at least with notice or means of knowledge, of his rights, and of the material circumstances of the case, freely and advisedly does anything, which amounts to a recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and permits, knowingly and deliberately, another to deal with property, or incur expense, under the belief that the transaction has been recognized, the transaction, although originally unimpeachable in a court of equity."

It is true that the appellant, by permitting an entry on his land that has been abandoned, does not thereby consent that another entry of a like character shall be made, but the facts here present no such case.

There has been no abandonment or destruction of the rights of the appellees. The dam or lake is, or may be, worthless in its present condition, but with an expenditure for repairs it becomes as valuable as ever. The possession for the uses contemplated is with the appellees. They have never surrendered it, and the rights of the company or the appellant in the lake can not be measured by the rise and fall of the water. The right to maintain the dam at the height provided by the deed is a right of property that is valuable to this corporation, and the question is whether it shall be deprived altogether of its expenditure, or

the appellant required to abide by an act that he not only acquiesced in, but sanctioned. In 2 Smith's Leading Cases, 737, 7 Am. Ed., in a note is said: "It has, in like manner, been long and well established equity, and is now held in courts of law, that every one who encourages or stands by and sanctions the acquisition of land by another, will not only be estopped from invalidating the interest thus acquired by the subsequent assertion of title, but may be compelled to execute a conveyance to the purchaser." While this doctrine may be regarded as extreme, it is well settled that where one, with full knowledge of his title, sees another ignorant of the fact, purchasing and paying for that which belongs to him, and says nothing, he will be precluded thereafter from setting up title.

In Anderson v. Hubble, 93 Ind., 570, it is said that positive fraud is not required to be shown in order to work an equitable estoppel on the part of one asserting title. "If his silence or conduct creates a belief of the existence of a state of facts, it would be unconscionable to deny it creates an equitable estoppel." This is the doctrine applicable to the present case, and a court of equity should not hesitate to apply it.

It is argued that when the dam was being constructed the son, Charles, had the fee, and there was no reason for his father to interpose any objection. The use of the land covered by the elevation of the dam was equally as necessary as the dam itself, for without it no lake could be made. This the plaintiff knew, and he also knew that the right to use this land by the company was a right that he alone could confer, and with this knowledge stood by and saw the expenditure made by the company, and his land applied to its use under the deed from his son, and made no objection whatever, but availed himself of all the privileges conferred by the company on his son's family, he being a member, by the deed evidencing the company's right of entry, and now is asserting a right that, if enforced, must destroy the entire corporation property.

The chancellor below refused to perpetuate the injunction, and in this we concur.

Judgment affirmed.

(Sale v. Crutchfield, 8 Bush, 636; Foster v. Shreve, 6 Bush, 519; Ringo v. Warder, 6 B. M., 514; Phillips v. Clark, 4 Met., 348.)

WELLS v. COMMONWEALTH.

(Filed June 5, 1890—Not to be reported.)

Continuance—Absent witness—Counter-affidavits—The appellant having committed a homicide on April 6, 1890, and being indicted on April 14, 1890, and trial set for April 19, 1890, in calling the case for trial appellant moved for a continuance, his counsel objecting to a trial at the same term he was indicted, which being overruled appellant filed his affidavit stating the absence of a witness, whose testimony would contradict the testimony of the only witness for the Commonwealth who saw the difficulty, the attorney for the Commonwealth refused to permit the affidavit to be read as evidence, and the court overruled the motion for a continuance, and a trial was had, which resulted in a conviction, from which this appeal is prosecuted. Held —The refusal to grant appellant a continuance was prejudicial. It is not error to try a defendant at the same term at which the indictment is found, but the affidavit disclosed facts material to the defense. No counter-affidavit can be read on a motion for continuance.

John Young Brown for appellant.

P. W. Hardin for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

The appellant, James Wells, who is but sixteen years old, has, upon the charge of murder, been convicted of manslaughter, for the killing of Eugene Connell, who was five years his senior, and his punishment fixed at twelve years' confinement in the penitentiary.

The trouble occurred over a ring which the deceased had given to a young lady, and which she had loaned to the accused.

The killing took place on April 6, 1890. He was indicted on April 14, 1890; brought into court from the jail to answer the charge on that day, and the case set for trial on April 19, 1890, he being remanded to jail in the meantime.

Upon the last named day his counsel asked a continuance of the case upon the ground that he had been constantly confined in jail, and indicted at that term of the court, and that the principal witness for the Commonwealth had refused to talk with him.

The court informed them that these reasons were insufficient; and they recognizing, doubtless, that they could not successfully complain of its opinion, then, and without objection to its being filed, offered the affidavit of the accused and again asked a continuance.

It states: "Hillery Moffett is not present. Subpœna was issued for this witness and placed in the hands of the sheriff of Henderson county yesterday, as soon as it was learned by appellant, or his attorneys, what could be proved by him. He is a resident of Daviess county, Kentucky, but has been in Henderson for several weeks, and is now in said county, as affiant verily believes. The subpœna is returned not found. The witness is not absent by consent or procurement of affiant. Affiant says that he can prove by said witness that he had a conversation with Geo. Howard, who is the principal witness for the prosecution, and who was present and saw the difficulty between affiant and Connell, after the coroner's inquest was held, and said Howard stated that affiant did not draw his pistol until after Connell had told affiant that he had to fight and had struck him with part of a barrel head, knocking his hat off and badly cutting his head, and that then, and not till then, did affiant draw and fire his pistol at Connell. Affiant says that what he can prove by said witness is true. Affiant says the witness, Howard, has persistently refused to talk with his attorneys, and that his said attorneys have had no opportunity to talk to the other witnesses for the Commonwealth. Affiant says that he can procure attendance of said witness at next term of this court, and this application is not for delay."

The court then inquired of the accused and his counsel if they could give any information of the whereabouts of the witness. There was no response.

Then the court inquired twice if there was any one in the court room who knew the witness or his whereabouts. No answer was returned.

The counsel for the accused, for the purpose, as they said, of removing suspicion, then asked a certain person if he knew the witness, and he replied that he did, and had seen him a few days before. The court then, over the objection of the appellants, swore this person, and he further stated he did not know where the witness lived.

At this point the State's attorney said that the witness, Howard, knew Moffett, but did not live near him, and had had no talk with him.

Howard repeated this, and the objection of the accused to the statements of both was sustained.

All this took place in open court, and in the presence of the regular panel of jurors.

The attorney for the Commonwealth declined to consent that the affidavit might be read as evidence upon the trial; and the court refused a continuance.

Whether this was error is the only question presented by the appeal.

The evidence introduced upon the trial shows that the only person immediately present at the difficulty, save the participants, was Geo. Howard. He was introduced upon the trial as a witness by the Commonwealth.

He testified: "Connell walked up to Wells and said: 'Hello, there, Jim; do you want to fight?' Wells replied: 'I don't care if I do.' Connell then called him a son-of-a-bitch. Wells drew his pistol, and presented it in Connell's face, and said: 'Don't you call me that. Don't you call me that.' Connell looked at him, stooped down and picked up a piece of barrel head and struck him; then immediately Wells fired two shots."

Manifestly this testimony was more unfavorable to the accused than the version of the affair, which, according to the affidavit for a continuance, had been given by the witness to the desired and absent wintess, Moffett. The evidence of the latter would, according to the affidavit, have been a contradiction of it.

A leading criminal author says:

"The general rule is that a continuance will be granted on an affidavit setting forth the absence of a material witness for the defense, and alleging that his attendance will be procured at the next court, and that due diligence has been used in attempting to procure his attendance." (3 Wharton's Crim. Law, section 3021.)

The affidavit of the accused disclosed diligence; the materiality of the testimony of the absent witness, and that his attendance could probably be obtained at the next term of the court.

It is true one accused of crime may be tried at the term of court when the indictment is found; but it has always been the practice, and it is one in the interest of justice and fairness, to then exercise greater liberality toward a party who asks a continuance than at subsequent terms of court, when he has certainly had ample opportunity to prepare for trial.

In this instance the accused did the best he could under the circumstances.

The tragedy had taken place but a few days previous to his trial. He had been confined in jail. It was impossible for him to ascertain what the testimony of the witness for the State would be; he had made an effort to ascertain, and the witness refused to talk; the accused knew he was a witness for the Commonwealth, and that his evidence would likely be material, as he was an eye witness to the difficulty.

He could not know what the witness would testify, and he, therefore, did all possible by stating in his affidavit for the continuance what the witness had told another party, and which was favorable to the accused.

The questions of the continuance was to be determined upon the affidavit of the appellant.

Counter-affidavits were inadmissible. It is true this ru e should not be so restricted as to prevent the trial judge, where he has reasonable ground from all the circumstances to believe that an imposition is being attempted, or a ruse being practiced, from ascertaining whether the belief is well founded.

In this case the circumstances did not reasonably warrant such a supposition, and, in our opinion, the appellant resented such a state of case as entitled him to a continuance.

An error of the lower court in this respect is, under our Code of Practice, ground for a reversal. (Morgan v. The Commonwealth, 14 Bush, 106.)

We have refrained from discussing the evidence in the case at length, as it is not necessary to a determination of the question involved, and would be improper, in view of the fact that there is to be a retrial of the case.

Judgment reversed and cause remanded for a new trial.

RAZOR v. DONAN.

(Filed June 5, 1890—Not to be reported.)

Acknowledgment—Officer's certificate—Homestead—In an action against husband and wife to enforce the collection of money secured by mortgage executed by both husband and wife, the wife, by her answer, sought to impeach the clerk's certificate of acknowledgment and set up her claim to homestead in the land. Held—That as there is no allegation that said certificate was made by fraud or mistake on the part of the officer it can not be impeached by showing that the wife did not, at the time of making her signature, understand the terms of the instrument. The body of the mortgage reciting the waiver and relinquishment of both dower and homestead right, the certificate of the clerk reciting a relinquishment of dower right only, did not limit the relinquishment to dower right only.

Clark & Saulsberry for appellant.

R. Gudgell for appellee.

Appeal from Rowan Circuit Court.

Opinion of the court by Chief Justice Lewis.

James W. Razor and E. J. Razor, being indebted to appellee, executed a mortgage on two tracts of land to secure payment, appellant, Mary S. Razor, wife of the first named, joining in the execution. But to the action brought after death of her husband to enforce the lien she filed answer claiming and asking set apart to her a homestead. And the only question now before us is whether the lower court erred in sustaining the general demurrer to it.

The answer does not, as her counsel argued, contain a denial of execution of the mortgage by her; for, although she alleges the object and purport of it was not at the time understood by her, she admits her signature thereto is genuine.

The other allegations relate to the examination of and acknowledgment by her required in such case, and being in conflict with the certificate of the county clerk appended to the mortgage, must, in the absence of a charge of fraud or mistake, be disregarded. For it is expressly provided in section 17, chapter 81, General Statutes, that "unless in a direct proceeding

against himself, or his sureties, no act officially stated by one officer in respect of a matter about which he is required by law to make a statement in writing * * * in the form of a certificate * * * shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

After making the statement in his certificate that the mortgage was produced to him and acknowledged by James Razor, Mary S. Razor and E. J. Razor to be their act and deed, the clerk further certifies that "the said Mary S. Razor, wife of James W. Razor, relinquished her right to dower to the above land."

According to former decisions of this court a certificate of that form would raise the implication that as only her right of dower was in terms relinquished, her homestead right was intended to be retained by her and not parted with. But in the body of the mortgage is the following stipulation: "And it is also distinctly understood by the party of the first part that all the rights to either, or both, homestead and dower in and to the above-described lands, which is hereby conveyed, is also waived." Consequently the mortgage, as thus written, having been duly acknowledged by appellant to be her act and deed, had the effect to divest her effectually of both homestead and dower right, independent and in spite of the formal statement in the latter part of the clerk's certificate she had relinquished her dower right merely.

Judgment affirmed.

KENTON INSURANCE COMPANY v. DOWNS, &c.

(Filed June 5, 1890.)

1. Insurance—Proofs of loss—Forfeiture—A policy of fire insurance provided that proofs of loss should be furnished the company within thirty days after the loss occurred, and that no action should be maintained against the company after the expiration of six months after a fire occurred. In an action on a policy the company relied for defense upon the failure of the insured to furnish proofs of loss within thirty days after the loss occurred. Held—Said provision does not forfeit or bar the action, but is a requirement to be complied with before an action can be maintained, and an action can be maintained if brought within six months after the loss occurs. The law does not favor forfeiture, and as the furnishing of proofs is not expressly made a ground of forfeiture, it will not be given that effect. "Conditions affecting the risk itself are more strictly enforced than those relating to the mode of establishing the loss."

2. Pleading—An objection that suit was instituted within sixty days after proofs of loss filed, was a matter in abatement, which was waived by a failure to plead.

3. Agents—The fact that a building is occupied as a store in which gunpowder is kept is no ground of defense to the company, if this was known to an agent of the company when the insurance was taken, as knowledge of the agent is notice to the company.

Brown, Humphrey & Davie and Collins & Fenley for appellant.

Hargis & Eastin and Henry L. Stone for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The Kenton Insurance Company, on the 26th of March, 1886, issued its policy of insurance to William Downs, on a two-story frame building, and the household furniture, $1,600 on the building and $200 on the furniture. The building was burned on the 7th of March, 1887.

The preliminary proofs of loss were furnished on the 16th of April, 1887, and additional proof on the 16th and 25th of May of the same year.

The judgment below was for the policy holder (Rebecca Downs, to whom it had been assigned), and from that judgment the company has appealed. The principal, and, in fact, the only question necessary to be considered, and the one upon which a reversal was had in the Superior Court, arises from the failure to furnish the company the proof of the loss within thirty days after the destruction of the property. It is maintained by the appellant that the provisions of the policy requiring this proof to be made and furnished within thirty days is a condition precedent to the liability on the part of the company, unless there is proof showing a waiver. On the other hand it is agreed by the appellee that this requirement is a condition precedent to the right to institute the action. There is some discussion in the briefs of counsel in regard to the question of waiver, but as the main question, and the one decisive of this case, must be considered, it is not deemed necessary to determine whether or not the company waived its right to have the proof of loss within the specified time. Where notice or proofs of loss are required to be made forthwith, or within a reasonable time, which, in effect, is the same, it becomes at once necessary to determine the question of diligence on the part of the insured, and if, under the circumstances of the particular case, he has used reasonable diligence in furnishing his proof, it is all that should be required. (Knickerbocker Ins. Co. v. McGinnis, 87 Illinois, 70; Phillips v. Protection Ins. Co., 14 Missouri, 220.

The policy before us, like many others, contains stipulation after stipulation, rendering the policy void, and forfeiting all claims on the part of the insured to a recovery.

These stipulations are formed under the heads, this company shall not be liable and general provisions, in which we find as many as fifteen or twenty states of case in which the company is released from all liability.

In this contract of insurance the causes of forfeiture are classified, and the attention of the insured called to all the clauses working a forfeiture of the policy, or releasing the company from all liability. The contract then proceeds to specify the manner in which the insured shall proceed in case of loss.

"Proceedings in case of loss—He shall forthwith give written notice of said loss or damage to this company, and shall, within thirty days, render a particular account of said loss or damage, signed and sworn to by them," etc. Under this heading it is further provided that either party may, after the proof has been furnished, claim, in writing, that the difference, if any, shall be referred to arbitration, with the option on the part of the company to repair or rebuild the property by giving notice of its intention to do so within sixty days after receipt of the proofs of the loss. It is further provided that the loss shall not be payable until sixty days after the proof of loss has been furnished. The contract then closes with the stipulation "that no suit or action for the recovery of any claim, by virtue of this policy, shall be commenced until after the amount of such claim has been ascertained by arbitration, as provided, nor until all the condi-

tions, provisions and requirements of this policy have been complied with by the assured; nor shall any suit or action be sustained in any court, unless such action shall be commenced within six months next after the fire shall occur; and should any action be commenced against the company after the expiration of six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, and an absolute bar to such action."

The peculiar verbiage of this contract, and the various classifications fixing the liability of the company, the causes of forfeiture, and the directions by which the assured is to proceed in case of loss, show conclusively the purpose of the company to postpone the right of action until the proof of loss is furnished, and by a statute of limitation, made part of the contract, was fixed the period when this liability terminates.

We are aware that case after case may be found involving similar questions under ordinary policies of insurance, where it has been held that the failure to furnish the proof in the time required is held to be a condition precedent to all liability on the part of the company, for the reason that the company, for its own protection, should at once be permitted to investigate the cause of the fire, and have at hand every opportunity for informing itself with reference to all the facts connected with the destruction of the property; but when the company, by its own contract, has prescribed the conditions upon which the contract is to end, and omits to make the failure to furnish the proof within the thirty days as a cause of forfeiture, and fixes a statute of limitation of six months, with a proviso that no action shall be commenced until the conditions of the contract have been complied with, it becomes apparent that no such construction should be placed upon the terms of the policy as would defeat the recovery, on the ground alone that the proof had not been furnished within the thirty days. Such a construction would fix the statute at thirty days, instead of six months, and inflict upon the assured a punishment, by way of forfeiting his right to recover, when, by either a strict or liberal construction of the policy, its plain meaning is that these proofs must be furnished before suit is brought, and that no action can be maintained after six months. Conditions affecting the risk itself are more strictly enforced than those relating to the mode of establishing the loss." (Phœnix Ins. Co. v. Spiers and Thomas, 87 Ky., 285.)

In Columbia Insurance Co. v. Lawrence, 10 Peters, 507, the insured, by the terms of the policy, was required, as soon as possible after the loss, to deliver an account of the loss and damage; and further, that said loss or damage was to be paid within sixty days after notice and proof.

It was held in that case that the delay was not injurious to the company, but the assured was deprived of the right to sue until the proof was procured.

In Weir v. The North Countries of England Ins. Co., 4 Law Rep., Ireland, 689, the policy provided: "On the happening of any loss or damage by fire, etc., the insured shall forthwith give notice in writing to the company, and within fifteen days, at latest, deliver to the company a particular account, etc. And in default thereof no claim in respect to such loss or damage shall be payable until such notice, account, proof, etc, are given and produced."

The court held in that case that the failure to deliver the account within the fifteen days was not a condition precedent to the right of recovery. While the cases are not exactly similar it is plain that the provision in this contract, by which no action

could be maintained until the conditions in regard to poof of loss had been complied with, enlarged the time for bringing the action, and particularly when the contract created a statute of six months operating as a complete bar to the recovery. Giving, therefore, this entire contract a just and proper interpretation, it must be held that the failure to produce the proof within the thirty days worked no forfeiture of the right to recover, and the instruction to that extent was proper.

Courts have so construed contracts of insurance as to fully protect companies against imposition and fraud on the part of the assured, and have required a strict compliance with that provision of the contract requiring the proof of loss to be furnished in a specified time, but where the company, by its own contract, has interposed a statute of limitation of such short duration as fully protects its rights in this particular, with the right to postpone the payment of the loss sixty days, which is to be included in the computation of time when applying this statute, and in the absence of any provision forfeiting the right of recovery on such a ground as the failure to furnish the proof, it obviates the necessity of establishing any rule in this regard, other than the contract itself, for the protection of insurance companies.

The appellant has made stipulations for its own protection, and this court will not imply a forfeiture or terminate the contract under such circumstances.

It is insisted by counsel for the appellant that, although the failure to take and present the proof may not have constituted a defense to the action, still, as the proof was presented in May, 1887, and this action instituted in the month of June following, no recovery should be allowed, because the policy provides, in stipulation No. 32, that the loss shall not be paid until sixty days after the proof of the loss has been furnished; that the action was premature, having been brought within thirty days after the proof had been made complete.

This defense is made alone by the brief filed, and no plea in abatement or demurrer interposed in the court below on such a ground, but, on the contrary, the appellant relied on various defenses to the action, all of which went to the merits of the controversy, and it is now too late to raise the question.

It is manifest from the testimony that the agent of the company was on the ground when the policy was issued. He knew the manner in which the building was used and occupied, and the representations, if false, came from the agent, and not the assured.

It appears that the agent charged more than is usual in ordinary risks, because a part of the building was used as a store, and the fact that there was gunpowder in the store in such quantities as is usually kept by country merchants constitutes no defense to the action.

The jury determined all the questions of fact that are now urged as grounds for a reversal, and, the evidence being conflicting, we have thought proper to decide only the legal questions involved.

The judgment is affirmed.

CASSILLY v. COCHRAN'S GD'N.

SAME v. WALKER.

COCHRAN'S GD'N, &c. v. COCHRAN, &c.

WALKERS GD'N, &c. v. SAME.

(Filed June 5, 1890—Not to be reported.)

Guardian and ward—Sureties—G. and D. were the sureties of C., who was statutory guardian of her infant children. The guardian deposited the funds belonging to her wards in bank to her individual credit. She kept no account at the bank as guardian. A portion of the funds so deposited she invested in bank stock in her individual name, and shortly thereafter G. and D. were released as sureties, and the guardian executed a new bond with Cassilly and Erskin as sureties. Afterwards the guardian converted to her own use the bank stock and money deposited in bank. In an action by the infants against Cassilly and Erskin, as sureties on said bond, they resist a recovery, alleging that the conversion occurred before they became sureties. Held—That the acts of the guardian in depositing the money in the bank and purchasing the bank stock in her own name were wrongful, but as the same belonged to the infants, and the identity of the funds could be traced when Cassilly and Erskin became sureties, they were responsible for its subsequent conversion by the guardian to her own use, and its loss to the infants.

Bullitt & Shield and Wm. B. Dixon for Cassilly.

John C. Russell, Dodd & Grubbs and J. C. Dodd for J. W. Cochran's guardian and K. A. Walker's guardian, &c.

Humphrey & Davie and John Barret for Green & Doll.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

Mrs. Cochran was the statutory guardian of her infant children, with Green & Doll as the sureties on her bond, and remained so until the 19th of July, 1880. On that day Green & Doll were released and a new bond executed, with Cassilly and Erskin as sureties. There was no provision in this last bond to indemnify the sureties on the former bond, and the money of the infants having been wasted by the guardian, the question arises as to which set of sureties is liable, the sureties on the first or on the second bond. The controversy is between the sureties, the infants being content with the judgment below making the sureties in the last bond liable.

The question then is: Did this loss or waste of the infants' money occur before July the 19th, 1880, the date when these last sureties signed the bond?

It is contended by counsel for Cassilly and Erskin that the loss of the money occurred before they executed the bond, and that at the date of its execution the guardian had no money belonging to her children. Green & Doll, the sureties in the first bond, were indebted to Mrs. Cochran in the sum of $4,626, for which she held their notes as guardian. On the 19th of April, 1880, they paid to her the amount of this note and interest, being $4,700. They had previously paid to Mrs. Cochran a considerable sum of money belonging to her, and both sums were deposited to her individual credit in the German Bank. She kept

no account as guardian. On the day the new bond was executed she had to her credit in this bank $2,870. In June preceding the guardian, under the advice of friends, had invested $2,000 of the ward's money in bank stock. The bank in which the stock was purchased, and the money deposited, was then, and is now, perfectly solvent. Having placed the money to her own credit, and purchased the stock in her own name, the loss, if the bank had proven insolvent, would have been her loss, and not that of the infants. There was, however, no loss by reason of the inability of the bank to meet its demands, but the money and stock remained subject to the order and disposition of the guardian, either for her own benefit or that of her wards. She could have used it for her own benefit, as she could the money, if in her pockets, in utter disregard of the rights of her children, as she seems to have done, by using the money and disposing of the bank stock after the last sureties had signed the bond.

It is improper for the guardian to mingle the funds of his ward with his own, and, contrary to law, to make investments in bank stock in his own name with the infant's money, but, if done, it nevertheless belongs to the infants, and no claim can be asserted by the guardian against the ward to the stock or the money, because invested or deposited in the wrong name. It may result in loss to the guardian, or the stock may be required to be held by him, and he compelled to pay the money in lieu of the stock. No such question arises in this case. A guardian with money belonging to his ward, although deposited to his individual credit, is liable for the money, and his sureties with him, who are on the bond when the money is wasted by the guardian, are placed beyond the reach of the infants.

When did the guardian withdraw this money from the bank and convert the bank stock to her own use?

It was disposed of after the new bond was executed and had been in the bank, and liable to be applied to the use of the wards for months after these appellants signed the bond. It was, in fact, the duty of the guardian to change the entry on the bank books in order to show to whom the fund belonged, and the conversion by the guardian, by a deposit of the wards' funds in her own name, or the investment in stocks, in nowise deprived the infants of the right to claim the fund and the investment as belonging to them.

It could be traced and identified as the property of the infants in the hands of the guardian, and not until there was a disposition of it by the guardian to others for her own use was this identity lost; and this occurring after the last bond was executed, the sureties upon it are liable. The manner of the holding by the guardian did not make the money hers, and while there may be doubt as to the liability of the first sureties to the infants, in the event the last sureties were insolvent, the fact of the manner of the holding when these appellants became bound can constitute no defense to a recovery by the infants. They had agreed, by the terms of the bond, to make themselves liable for the acts of the guardian from the date of its execution and acceptance by the county court. Besides, the facts of this record show that Green & Doll had proceeded to have themselves released, and they were released, in a few months after they had paid the money that was owing by the guardian, and these appellants must have been conversant with the facts, and knew with what amount the guardian stood charged, and to say that, because the deposit was in her name could release the sureties on her bond when the entire loss occurred after they signed it, would result in hazarding the rights of infants, and afford but little protection to those who were asking to be released as sureties, and others

substituted, as provided by the statute. We think the entire case, including the settlement with the guardian, of which the infants complain, was properly decided, and the judgment on all the appeals is affirmed.

KENTUCKY SUPERIOR COURT.

PEYTON v. MOORE, &c.

(Filed April 2, 1890.)

1. Liens—Time of trial—M. and S. brought separate suits against P., asking for personal judgments, and the enforcement of liens on land, in which suit they made H. a defendant, alleging that he held some claim upon the land, and calling upon him to set it up. Summons having been served upon all the defendants more than two months before the next term of court, and H. answering, by way of cross petition, setting up his claim, and P. failing to answer, personal judgments were rendered in favor of M. and S., and an order of sale of enough land to satisfy the judgments. On appeal appellant complains that the case did not stand for trial at the term of court to which he was summoned to appear. Held—That as petition of plaintiffs and the answer of H. presented all liens existing against the land, without raising any issue, the case properly stood for trial at the first term, under section 366, Civil Code of Practice, but the court erred in not ordering the sale to be made for enough to satisfy the lien of H. Service of process on the cross petition of H. was unnecessary to give the court jurisdiction to order a sale of enough of appellant's land to satisfy the lien of H., but no personal judgment could be rendered on such cross petition until service of process was had. Sections 692, 364 and 366, Civil Code of Practice, construed.

2. Clerical misprision—A failure to order a sale of enough land to satisfy a lien thereon is not a clerical misprision, as defined by section 517, Civil Code of Practice, and section 763, Civil Code of Practice, does not apply.

Frank Chinn for appellant.

Geo. C. Drane for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bowden.

The appellees, Moore and Smith, brought separate actions against Peyton to get personal judgments and enforce a vendor's *lien*, making Herndon a defendant and alleging, merely as to *him*, that he had some claim, and calling on him to assert it. The summons was served in the county where the action was brought more than two months before the next term of the court. Herndon answered, showing that he had a personal demand against Peyton, and a junior mortgage lien on the land described, and asking a personal judgment and an enforcement of his lien. The cases were consolidated, and at the same term, Peyton not having answered, and process on Herndon's cross petition not having been even issued, personal judgments were rendered

against him in favor of Moore and Smith, of which he does not complain, and a sale of enough of the land to pay these judgments was ordered, of which he does complain. Herndon's cross petition was continued.

The appellees move to dismiss the appeal on the ground that the supposed error was a clerical misprision, as defined by section 517 of the Civil Code, because the judgment was, as they claim, rendered before the action stood for trial; and there had been no motion in the lower court, under section 763, to set it aside. The case is submitted on this motion and on the merits.

"Sec. 366. The plaintiff shall be entitled to a trial in an equitable action at the first term after the summons has been served on all the defendants, as provided in section 102, if no issue of fact be made by the pleadings."

The summons had been so served, and no issue of fact was made. If tested by this section, the action clearly stood for trial. We know of no other provision of the Code relating to this matter.

The effect of section 692 is misconceived. It does not undertake to except the case there provided for out of the general rule given in section 366, or out of that given in section 364. It made it the duty of Moore and Smith to make Herndon a defendant, because he had a lien on the same land; but it did not require them to wait on Herndon's pleasure; they could have stated in their petitions the facts which showed he had a lien, and could have demanded a sale of the property to satisfy all the liens, even if he had not answered; he did not state such facts, and were, therefore, compelled to wait till he should state them in his answer; but when they were so stated the case stood just as if they had stated them. As it is the duty of the plaintiffs to make defendants all who hold liens, the debtor is thus notified that he may expect all such claims to be brought before the court; and as it is the duty of the court to order a sale sufficient to pay all such claims, he may expect that result, and, being a party, he is required to see that improper claims shall not remain undisputed; if he fails to do so, he can not complain that all the property was sold, because both claims were asserted, when a part only would have paid the plaintiff's demand; his only right is to resist the claimants' demand to have the proceeds of the sale paid over to them. So far as the plaintiffs are concerned, the mere undisputed assertion by them of facts showing the existence of a lien in favor of a defendant, or an assertion by the defendant of the same facts, is a sufficient basis for a judgment to sell property to pay all; but, so far as the debtor is concerned, the proceeds can not be withdrawn by the defendant until, by answer and cross petition he has shown his right. If the defendant asserts a lien merely, not claiming that the property holder is personally liable, a summons on the cross petition is not necessary; the case then stands exactly as if the plaintiffs had stated facts showing a lien in behalf of the defendant; in either case a sale for all will be ordered; but in either case the defendant must show his right by cross-petition before he can get any of the proceeds. These provisions are intended to protect the debtor from the injury that sales by piecemeal would inflict, and, by requiring him to see what claims are asserted, without the delay that a service of process would cause, to enable the plaintiffs to get justice without hindrance. The final provision of the section that summons is not necessary when a mere lien is asserted, consists with the general scheme which treats the debtor as in court with respect to the question: "How much land shall be sold?" If a personal judgment is asked by the defendant claim-

ant the debtor must be summoned, because the scheme does not treat him as in court with reference to the validity of the claim made against him only with reference to the validity of the claim against the property, and, in that case, only for the purpose of the sale, since he may afterwards dispute the claimant's right to the proceeds.

It was, therefore, the duty of the court to order a sale of the property to satisfy the liens set up by the plaintiffs, and by Herndon also, leaving for future litigation any dispute that might arise between Herndon and Peyton, in which the plaintiffs have no interest, and on account of which they should not be delayed. The judgment ordering a sale for the plaintiffs' debt, omitting Herndon's, is erroneous, and not a clerical misprision.

The judgment is reversed, and the cause is remanded for further proceedings.

[From Albany Law Journal.]

UNITED STATES SUPREME COURT.

LEISY & CO. v. HARDIN.

(Filed April 28, 1890.)

State legislation which prohibits the sale of intoxicating liquors is unconstitutional so far as it applies to liquors imported from another State for sale in the original packages.

Constitutional law—Interstate commerce—Intoxicating liquors—Original packages—Christiana Leisy, Edward Leisy, Lena and Albert Leisy, composing the firm of Gus. Leisy & Co., citizens of Illinois, brought their action of replevin against A. J. Hardin, the duly elected and qualified marshal of the city of Keokuk, Iowa, and ex-officio constable of Jackson township, Lee county, Iowa, in the Superior Court of Keokuk, in said county, to recover one hundred and twenty-two one-quarter barrels of beer, one hundred and seventy-one one-eighth barrels of beer, and eleven sealed cases of beer, which had been seized by him in a proceeding on behalf of the State of Iowa against said defendants, under certain provisions of the Code of the State of Iowa; and upon issue joined, a jury having been duly waived by the parties, the case was submitted to the court for trial, and having been tried, the court, after having taken the case under advisement, finally "rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to wit:

"1st. That plaintiffs, Gus. Leisy & Co., are a firm of that name and style, residing in the State of Illinois, with principal place of business at Peoria, Illinois; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as brewers in the manufacture of beer in the said city of Peoria, Illinois, selling same in the State of Illinois and Iowa.

"2d. That the property in question, to wit, one hundred and twenty-two one-quarter barrels of beer, of the value of $300, one hundred and seventy-one one-eighth barrels of beer, value $315, and eleven sealed cases of beer, value of $35, was all manufactured by said Leisy & Co., in the city of Peoria, Illinois, and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Illinois; that each of said kegs was sealed, and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said

cases were substantially made of wood, each one of them containing twenty-four quart bottles of beer, each bottle of beer corked and the cork fastened in with a metallic cap, sealed and covered with tin foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put into said kegs and cases as aforesaid by the manufacturers, to wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to be broken.

"8d. That the property herein described was transported by said Gus. Leisy & Co., from Peoria, Illinois, by means of railway, to Keokuk, Iowa, in said sealed kegs and cases, as same was manufactured and put up by them in the city of Peoria, Illinois.

"4th. That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case, as manufactured and put up by said Gus Leisy & Co., and imported by them into the State of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus Leisy & Co., residing in, and being a citizen of, Peoria, Illinois; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

"5th. That on the 30th day of June, 1888, the defendant, as constable of Jackson township, Lee county, Iowa, by virtue of a search warrant issued by J. G. Garretson, an acting justice of the peace of said Jackson township, upon an information filed charging that in premises occupied by said John Leisy there were certain intoxicating liquors, etc., seized the property therein described and took same into custody.

"6th. And the court finds that said intoxicating liquors thus seized by the defendant, in his official capacity as constable, were kept for sale in the premises described in the search warrant in Keokuk, Lee county, Iowa, and occupied by Gus. Leisy & Co., for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void, as herein stated.

"7th. That on the 2d day of July, 1888, plaintiffs filed in this court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law, under which said warrant was issued, was unconstitutional and void, being in violation of section 8 of article 1 of the Constitution of the United States, and having filed a proper bond, a writ of replevin issued and the possession of said property was given to plaintiffs.

"From the foregoing facts the court finds the following conclusions:

"That plaintiffs are the sole and unqualified owners of said property, and entitled to the possession of same, and judgment for $1 damages for their detention and costs of suit; that so much of chapter 6, title 11 of the Code of 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by plaintiffs is unconstitutional, being in contravention of section 8 of article 1 of the Constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this court, involving the same question, in the case of Collins v. Hills, decided prior to the commencement of this suit, and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted."

Judgment was thereupon rendered as follows:

"This cause coming on for hearing, plaintiffs appearing by Anderson & Davis, their attorneys, and the defendant by H. Scott Howell & Son and Wm. B. Collins, his attorneys, and the case coming on for final hearing on the pleadings on file and the evidence introduced, the court makes the special finding of facts and law, herewith ordered to be made of record, and finds that plaintiffs are the sole and unqualified owners, and entitled to possession of the following described personal property, to wit, 122 one-quarter (¼) barrels of beer, of the value of $300; 171 one-eighth (⅛) barrels of beer,

of the value of $315, and eleven (11) sealed cases of beer of the value of $25.

"That plaintiffs being in possession of said property, by virtue of a bond heretofore given, said possession in plaintiffs is confirmed. The court further finds that the writ by J. G. Garretson, a justice of the peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law of Iowa that are unconstitutional and void.

"That plaintiff is entitled to $1 damages for the wrongful detention of said property.

"It is, therefore, ordered and considered by the court that the plaintiffs have and recover of defendant the sum of $1 damages, and costs of this action, taxed at $——.

"To which findings, order and judgment of court, the defendant, at the time, excepts and asks until the 31st of October, 1888, to prepare and file his bill of exceptions, which request is granted and order hereby made."

A motion for new trial was made and overruled, and the cause taken to the Supreme Court of Iowa by appeal, and errors therein assigned as follows:

"I. The court erred in finding that the plaintiffs were the sole and unqualified owners and were entitled to the possession of the intoxicating liquors seized and held by appellant.

"II. In finding that the plaintiffs were entitled to $1 damages for their detention, and for costs of suit.

"III. The court erred in holding that the sales of beer in 'original packages,' by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful.

"IV. The court erred in its conclusions and finding that so much of the law of the State of Iowa, embraced in chapter 6, title 11, Code of 1878, and the amendments thereto, as prohibits such sales of beer in the State of Iowa, was unconstitutional, being in contravention of section 8, article 1 of the Constitution of the United States.

"V. The court erred in rendering a judgment for plaintiffs and awarding them the intoxicating liquors in question, and damages and costs against defendant.

"VI. The court erred in overruling the defendant's motion for a new trial."

The Supreme Court reversed the judgment of the Superior Court, and entered judgment against the plaintiffs and their sureties on the replevin bond in the amount of the value of the property, with costs. The judgment thus concluded: "And it is further certified by this court, and hereby made a part of the record, that in the decision of this suit there is drawn in question the validity of certain statutes of the State of Iowa, namely, chapter 6 of title 11 of the Code of Iowa of 1873, and the amendments thereto, on the ground of their being repugnant to, and in contravention of, section 8 of article 1 of the Constitution of the United States, said appellees, Gus. Leisy & Co., claiming such statutes of the State of Iowa are invalid, and the decision in this case is in favor of the validity of said statutes of the State of Iowa."

To review this judgment a writ of error was sued out from this court.

The opinion of the Supreme Court, not yet reported in the official series, will be found in 43 N. W. Rep., 188.

The seizure of the beer in question by the constable was made under the provisions of chapter 6, title 11 of the Code of 1873, and amendments thereto. (Code 1873, page 279; Laws 1884, chapter 8, page 8; chapter 148, page 146; Laws 1888, chapter 71, page 91; 1 McClain's Ann. Code, sections 2359-2431, page 603.)

Section 1538 of the Code is as follows:

"No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter

provided. And the keeping of intoxicating liquor, with the intent on the part of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this State contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided."

Chapter 71 of the Laws of the twenty-second general assembly is an act approved April 12, 1888 (Laws Iowa, 1888, page 91), of which the first section is as follows:

"That after this act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this act.

"Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue, unless revoked according to law, or until application for renewal is disposed of, if such application is made before the year expires.

"Provided, that renewals of permits may be annually granted upon written application by permit holders, who show to the satisfaction of the court or judge that they have, during the preceding year, complied with the provisions of this act, and execute a new bond, as in this act required to be originally given, but parties may appear and resist renewals the same as in applications for permits."

Section 2 provides for notice of application for permit, and section 3 reads thus:

"Applications for permits shall be made by petition signed and sworn to by the applicant, and filed in the office of the clerk of the district court of the proper county, at least ten days before the first day of the term, which petition shall state the applicant's name; place of residence; in what business he is then engaged, and in what business he has been engaged for two years previous to filing petition; the place, particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States, and of the State of Iowa; that he is a registered pharmacist, and now is, and for the last six months has been, lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not, within the last two years next preceding his application, been directly or indirectly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors; and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only."

Various sections follow, relating to giving bond; petition as to the good moral character of applicant; hearing on the application; oath upon the issuing of permit; keeping of record; punishment by fine, imprisonment, etc.

By section 20, sections 1524, 1526, and other sections of the Code were, in terms, repealed.

The Code provided for the seizure of intoxicating liquors unlawfully offered for sale, and no question in reference to that arises here, if the law in controversy be valid.

By section 1 of chapter 8 of the laws of 1884, page 8, ale, beer, wine, spirituous, vinous and malt liquors are defined to be intoxicating liquors.

Section 1524 of the Code of 1873, page 279, was as follows:

"Nothing in this chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors, and in accordance with such laws: Provided, That the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages, and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes."

This section is substantially identical with section 2 of chapter 45 of the acts of the fifth general assembly of Iowa, approved January 22, 1855 (Laws Iowa, 1855, page 59) and it was carried into the revision of 1860 as section 1560. (Revision 1860, chapter 64, page 259.) It was repealed by section 20 of the act of April 12, 1888, as before stated.

Section 1553 of the Code, as amended by the act of April 5, 1886 (Laws Iowa, 1886, page 83), forbade any common carrier to bring within the State of Iowa, for any person or persons, or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee, or person to whom such liquor was to be transported, conveyed or delivered, was authorized to sell intoxicating liquors in such county. This was held to be in contravention of the Federal Constitution, in Bowman v. Chicago and Northwestern Railway Co., 125 U. S., 465.

Opinion of the court by Chief Justice Fuller.

The power vested in congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and can not be stopped at the external boundary of a State, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. (Gibbons v. Ogden, 9 Wheat., 1; Brown v. Maryland, 12 Id., 419.)

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the Constitution, is not within the jurisdiction of the police power of the State, unless placed there by congressional action. (Henderson v. Mayor of New York, 92 U. S., 259; Railroad Co. v. Husen, 95 Id., 465; Walling v. Michigan, 116 Id., 446; Robbins v. Shelby Taxing District, 120 Id., 489.) The power to regulate commerce among the States is a unit, but if particlar subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances until congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to

bridges, ferries and highways belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in congress, and can not be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until, or, unless circumscribed by the action of congress in effectuation of the general power. (Cooley v. Port Wardens, 12 How., 299.)

It was stated in the thirty-second number of the Federalist that the States might exercise concurrent and independent powers in all cases but three: First, where the power was lodged exclusively in the Federal Constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the National government exclusively. But it is easy to see that congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which, and that possessed by the general government, no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it and congress remains silent, this is not only a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States can not be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as inter-State commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. (County of Mobile v. Trimble, 102 U. S., 691; Brown v. Houston, 114 Id., 622, 631; Wabash Railroad Co. v. Illinois, 118 Id., 557; Robbins v. Shelby Taxing District, 120 Id., 489, 493.)

That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress and the decisions of courts is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of congress, prohibit their importation from abroad or from a sister State? Or when imported, prohibit their sale by the importer? If the importation can not be prohibited without the consent of congress, when does property imported from abroad or from a sister State so become part of the common mass of property within a State as to be subject to its unimpeded control?

In Brown v. Maryland, supra, the act of the State legislature

drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate, who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax, which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with the mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the Federal government, contributed more to the great revolution which introduced the present sytem, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts, and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. (Story Const., section 1066.) And, although the precise question before us was not ruled in Gibbons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered and that this is demonstrated, among other cases, in Bowman v. Chicago and Northwestern Railway Co., 125 U. S., 465. In the latter case, section 1553 of the Code of the State of Iowa, as amended by chapter 143 of the acts of the twentieth general assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion of Mr. Justice Harlan on behalf of Mr. Chief Justice Waite, Mr. Justice Gray and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes, by necessary implication, the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was, in terms, reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we can not do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is, beyond all question, a constituent of commerce itself; that it was the prominent idea in the

minds of the framers of the Constitution, when to congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production, to the market was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws, alleged to be regulations of commerce among the States, have been sustained, they were laws which related to bridges or dams across streams wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is, in its nature, national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result, if one State could, directly or indirectly, tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the Federal government.

"If, in the present case," said Mr. Justice Matthews, "the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States," and he concludes that this must be so, though it applied only to one class of articles of a particular kind. The legislation of Congress on the subject of interstate commerce, by means of railroads, designed to remove trammels upon transportation between different States, and upon the subject of the transportation of passengers and merchandise, Revised Statutes, sections 4252 to 4289, inclusive, including the transportation of nitro-glycerine and other similar explosive substances, with the proviso that, as to them, "any State, Territory, district, city or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in, or transportation of, those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of congress that the transportation of commodities between the States shall be free, except where it is positively restricted by congress itself, or by States, in particular cases, by the express permission of congress. It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation; or, it may be, for domestic use." (Gibbons v. Ogden, 9 Wheat., 1203; Turner v. Maryland, 107 U. S., 38, 55.) Nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercise of power can not be considered a regulation of commerce, prohibited by the Constitution; and the observations of Mr. Justice Catron, in the License Cases, 5 How., 504, 599, are quoted, to the

effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to property, as malt liquors and the products of fruits, other than grapes, stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And Mr. Justice Matthews thus proceeds: "For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture, within its limits, of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even directly and remotely, to make the policy effective until it passes the line of power delegated to congress under the Constitution. It can not, without the consent of congress, express or implied, regulate commerce between its people and those of the other States of the Union, in order to effect its end, however desirable such a regulation might be. * * * Can it be supposed that by omitting any express declaration on the subject congress has intended to submit to the several States the decision of the question in each locality of what shall, and what shall not, be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State, and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it can not be supposed that the Constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several States."

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others the License Cases, 5 How., 504, wherein laws passed by Massachusetts, New Hampshire and Rhode Island, in reference to the sale of spirituous liquors, came under review and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them. That

of Pierce, &c. v. New Hampshire, is, perhaps, the most important to be referred to here. In that case the defendants had been fined for selling a barrel of gin in New Hampshire, which they had bought in Boston and brought coastwise to Portsmouth, and there sold in the same barrel, and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of Mr. Chief Justice Taney is in these words: Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one, for, although the gin sold was an import from another State, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

Referring to the cases of Massachusetts and Rhode Island, the chief justice, after saying that if the laws of those States came in collision with the laws of congress authorizing the importation of spirits and distilled liquors, it would be the duty of the court to declare them void, thus continues: It has, indeed, been suggested that if a Sate deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and traffic, like any other commodity in which a right of property exists. And congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted, and what excluded; and may, therefore, admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of congress authorize their importation, no State has a right to prohibit their introduction. * * * These State laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may indeed discourage import, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such laws may discourage importation or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent

it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

The New Hampshire case, the chief justice observed, differs from Brown v. Maryland, in that the latter was a case arising out of commerce with foreign nations, which congress had regulated by law; whereas, the case in hand was one of commerce between two States, in relation to which congress had not exercised its power. "But the law of New Hampshire acts directly on an import from one State to another, while in the hands of the importer for sale, and is, therefore, a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience and interest, and does not come in conflict with any law of congress. In other words, whether the grant of power to congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void." He declares it to appear to him very clear "that the mere grant of power to the general government can not, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is, undoubtedly, conferred upon congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of congress." He comments on the omission of any prohibition in terms, and concludes that if, as he thinks, "the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which congress, amid its great concerns, could never find time to consider and provide) intended merely to make the power of the Federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of congress, in cases of collision with State laws, is secured in the article which declares that the laws of congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate." And he considers that the legislation of congress and the States has conformed to this construction from the foundation of the government, as exemplified in State laws in relation to pilots and pilotage and health and quarantine laws.

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects, in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aid rather than regulations does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise

of power over commerce with foreign nations and among the States, and the exercise of power over purely local commerce and local concerns.

The authority of Pierce v. New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid, because congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman v. Chicago, &c., Ry. Co., 125 U. S., 507, "that where the subject upon which congress can act under its commercial powers is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulations, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, congress can alone act upon it and provide the needed regulations. The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce, with reference to any particular subject, is taken as a declaration that the importation of that article into the State shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with, and becomes a part of, the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States can not exercise that power without the assent of congress, and, in the absence of legislation, it is left to the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State, case of the State Freight Tax, 15 Wall., 232; a statute imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers, Henderson v. Mayor, &c., 92 U. S., 259; a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the 1st day of March and the 1st day of November in each year, Railroad Co. v. Husen, 95 U. S. 465; a statute requiring every auctioneer to collect and pay into the State treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, Cook v. Pennsylvania, 97 U. S., 566; a statute intended to regulate or tax or impose any other restrictions upon the transmission of persons or property, or telegraphic messages, from one State to another, Wabash, &c. Railway Co. v. Illinois, 118 U. S., 557; a statute levying a tax upon nonresident drummers offering for sale or selling goods, wares or merchandise, by sample, manufactured or belonging to citizens of other States, Robbins v. Shelby Taxing District, 120 U. S., 489.

On the other hand, we have decided, in County of Mobile v. Kimball, 102, U. S., 691, that a State statute providing for the improvement of the river, bay and harbor of Mobile, since what was authorized to be done was only a mere aid to commerce, was, in the absence of action by congress, not in conflict with the Constitution in Escanaba Co. v. Chicago, 107 U. S., 678, that the State of Illinois could lawfully authorize the city of Chicago to deepen, widen and change the channel of, and construct bridges over, the Chicago river; in Transportation Co. v. Parkersburg, 107 U. S., 678, that the jurisdiction and control of wharves properly belong to the States in which they are situated, unless otherwise provided; in Brown v. Houston, 114 U. S., 622, that a general State tax laid alike upon all property is not unconstitutional, because it happens to fall upon goods which, though not then intended for exportation, are subsequently exported; in Morgan's Steamship Company v. Louisiana Board of Health, 118 U. S., 455, that a State law requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition, and the ports from which she came, was a rightful exercise of police power; in Smith v. Alabama, 124 U. S., 465, and in Railway Co. v. Alabama, 128 Id., 96, that a State statute requiring locomotive engineers to be examined and obtain a license was not, in its nature, a regulation of commerce; and in Kimmish v. Ball, 129 U. S., 217, that a statute providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional.

We held also in Welton v. State of Missouri, 91 U. S., 275, that a State statute requiring the payment of a license tax from persons dealing in goods, wares and merchandise, which are not the growth, produce of manufacture of the State, by going from place to place to sell the same in the State, and requiring no such license tax from persons selling in a similar way goods which are the growth, produce or manufacture of the State, is an unconstitutional regulation; and to the same effect in Walling v. Michigan, 116 U. S., 446, in relation to a tax upon nonresident sellers of intoxicating liquors to be shipped into a State from places without it. But it was held in Patterson v. Kentucky, 97 U. S., 501, and in Webber v. Virignia, 103 Id., 344, that the right conferred by the patent laws of the United States did not remove the tangible property in which an invention might take form from the operation of the laws of the State, nor restrict the power of the latter to protect the community from direct danger inherent in particular articles.

In Mugler v. Kansas, 123 U. S.,623, it was adjudged that "State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendents thereto." And this was in accordance with our decisions in Bartemeyer v. Iowa, 18 Wall., 129; Beer Company v. Massachusetts, 97 U. S., 25, and Foster v. Kansas, 112 Id., 201. So in Kidd v. Pearson, 128 Id., 1, it was held that a State statute which provided (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State; and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culinary and sacramental purposes, but for no

other, not even for the purpose of transportation beyond the limits of the State, was not an undertaking to regulate commerce among the States. And in Eilenbecker v. District Court of Plymouth County, 134 U. S.,—, we affirmed the judgment of the Supreme Court of Iowa, sustaining the sentence of the district court of Plymouth in that State, imposing a fine of $500 and costs, and imprisonment in jail for three months, if the fine was not paid within thirty days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine and beer, in Plymouth county. Mr. Justice Miller there remarked: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors, which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law, and the powers of a court to prevent the evil, as to punish the offense as a crime after it has been committed."

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is, therefore, void.

In Mugler v. Kansas, supra, the court said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the legislature (of a State) the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of the question. * * * Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly it is for the legislative branch of the State governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for congress

to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and required such action.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in Pearson v. International Distillery, 72 Iowa, 354, to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in Brown v. Maryland, 12 Wheat., 419, and License Cases, 5 How., 504, so that the statute should not conflict with the laws and authority of the United States. But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine can not be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in Bowman v. Chicago, &c., Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain the character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in congress, and its possession by the latter was considered essential to the more perfect Union which the Constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of one government and the commercial powers of the other; but when that line is deter-

mined in the particular instance, accommodation to it without serious inconvenience may readily be found, to use the language of Mr. Justice Johnson in Gibbons v. Ogden, 9 Wheat., 1238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of article 1 of the Constitution of the United States, and, therefore, the judgment of the Supreme Court of Iowa is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

(Dissenting opinion will be published in the next number.)

SUPERIOR COURT ABSTRACTS.

GERMAN INSURANCE CO. v. MILLER.

Filed April 9, 1890. Appeal from Webster Circuit Court. Opinion of the court by Presiding Judge Barbour, overruling motion for damages.

Appeals—Damages on affirmance—The act of April 19, 1888, providing for damages upon the affirmance of a judgment against any insurance or railroad company or any foreign corporation, although such judgment has not been superseded, discriminates against such corporations in favor of all other classes of litigants, and is, therefore, unconstitutional.

D. S. Clay for appellant; Yeaman & Lockett for appellee.

RICHARDSON v. DORRIS.

Filed April 16, 1890. Appeal from Meade Circuit Court. Opinion of the court by Judge Ward, reversing.

Construction of lease—Pleading—By contract dated April 12, 1888, appellee granted to appellants the exclusive right and privilege of boring and sinking wells and otherwise developing the mineral products upon appellee's farm for a period of twenty years. Appellant agreed to begin work developing for said products within one year from the date of contract, and to pay $275 annually so long as they should continue to occupy any part of the land. It was further agreed that if appellants should begin work upon any similar grants within the same county within one year it should be a compliance with the agreement. In this action to recover rent for the year ending April 12, 1889, Held—That if appellants begun work on appellee's land within the year the rent began to accrue. If they began on another's land, then the year began at the end of which they must either surrender all rights in regard to the land or must pay $275 as rent in order to continue the option. If appellants began nowhere within the year appellee was free to make any other contract.

Fairleigh & Straus, Thos. B. Fairleigh and Wathen & Richardson for appellant; T. H. Hamilton and C. C. Fairleigh for appellee.

HODGE v. CONTINENTAL INSURANCE CO.

Filed April 16, 1890. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Ward, affirming.

Insurance—Forfeiture—A provision in a policy of fire insurance that the company shall not be liable for any loss or damage under the policy if de-

fault shall have been made in the payment of any installment of premium due by notes is valid, and will relieve the company of liability for any loss which may occur during the time of such default.

W. P. D. Bush, F. F. Bush and A. Duvall for appellant; J. W. Blue for appellee.

GALBREATH'S ADM'R v. GALBREATH.

Filed April 16, 1890. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Exceptions to award of arbitrators—The evidence fails to sustain exceptions to an award of arbitrators made under a submission by order of court.

J. G. Hickman and Cochran & Son for appellant; Wall & Worthington and Thomas R. Phister for appellee.

TALIAFERRO v. CITY OF DAYTON.

Filed April 16, 1890. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Defaulting city clerk—Presumption—In this action against the surety of a defaulting city clerk it must be presumed that the clerk collected the tax upon each of the licenses issued by him.

2. Res adjudicata—As it was held upon a former appeal in this case that the documentary evidence introduced by plaintiff was competent, that question is res adjudicata.

C. J. Helm for appellant; John S. Ducker for appellee.

McCORMICK HARVESTING MACHINE CO. v. DIESNEY.

Filed April 16, 1890. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Warranty—Verdict sustained by evidence—In this action upon a warranty of the suitableness, etc., of a mowing and reaping machine, a verdict for plaintiff for the amount he paid for the machine is not flagrantly against the evidence. If the machine was worthless, as was shown by plaintiff's testimony, he was entitled to recover the amount he paid for it.

John A. Murray for appellant; David R. Murray for appellee.

STEVENSON v. CUNNINGHAM.

Filed April 16, 1890. Appeal from Grant Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

Verdict supported by evidence—As the plaintiff's testimony was sufficient if believed by the jury to authorize the verdict in his favor, this court can not say that the verdict is not supported by the evidence.

H. Clay White and O'Hara & Bryan for appellant; DeJarnette & Dickerson for appellee.

PORTER, &c. v. ROWE, &c.

Filed April 16, 1890. Appeal from Ohio Circuit Court. Opinion of the court by Judge Bowden, affirming.

Fraud and mistake—Evidence must be satisfactory in a high degree to justify the court in adding to a writing on the ground of fraud and mistake.

In this case, in which the question litigated was whether, by fraud or mistake, there was omitted from a contract of lease a provision that the rent should cease in the event of the destruction of the building by fire, the evidence is sufficient to support the conclusion of the lower court that there was neither fraud nor mistake.

H. P. Taylor and Wm. Lindsay for appellants; W. F. Gregory, LeRoy Gregory and Guffy & Graves for appellees.

TRUSTEES COVINGTON RESERVOIR v. HOPP.

Filed April 16, 1890. Appeal from Campbell Circuit Court. Opinion of the court by Judge Bowden, reversing.

Turnpikes—Vindictive damages—A turnpike company having no right to dig up the soil of its road and displace the rocks, could not confer that right on another, nor could it require the owners of the soil to look to it for the damages thus done by another. It could only consent for itself to the use of its right of way.

A water company having dug up a turnpike for the purpose of laying its pipes under an authority attempted to be conferred upon it by the turnpike company, the owners of the soil can not recover from the water company vindictive damages, as it does not appear that defendant acted in bad faith or wantonly. Plaintiffs are entitled to recover just what should have been awarded on regular proceedings for condemnation, and no more. And in estimating the damages, the fact that the plaintiff's interest was subject to the right of way is to be considered.

J. O'Hara, W. W. Cleary and C. J. Helm for appellants; Raison & Ahlering for appellee.

JOHNSON'S ADM'R v. DRAPER.

Filed May 21, 1890. Appeal from Butler Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Vendor and vendee—In this suit on notes executed by defendant to plaintiff's wife, the petition alleged that the notes were given for land sold to the defendant by plaintiff and his wife, who "deeded the same to defendant or gave some writing evidencing the sale." Held—That this is not an allegation that plaintiff and his wife had conveyed, and as it was not alleged that a good title could be made, the petition was insufficient.

2. Same—Rescission—Upon a rescission of the contract for want of title, the wife's heirs and not the husband were entitled to rents, etc., after the wife's death, and allegations in the reply as to rents, waste, etc., covering the entire time after defendant bought were of no value.

B. L. D. Guffy and John L. Scott for appellant; W. A. Helm and E. W. Hines for appellee.

KOOKENDOFFER, &c. v. TRIMBLE.

Filed May 21, 1890. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Bowden, affirming.

Damages—In this action upon a note executed for the purchase price of hogs, in which the defendant was allowed damages on account of hogs which were diseased, the court can not say upon this appeal by defendant that the amount allowed was too small, as it can not be shown from the evidence what the market value of the hogs was.

Kennedy & Kennedy and H. Kennedy for appellants; B. H. Robinson and John P. Norvell for appellee.

WOODWARD v. NEWCOMB.

Filed June 4, 1890. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Sales of personal property—Equitable lien—Where personal property was sold under an agreement by which the purchase price was to be paid in monthly installments, and the title was to remain in the seller until the purchase price was paid, the effect of the agreement was to vest the title in the purchaser, and to give to the seller an equitable lien.

2. Transfer of suits—Equitable issue—In an action to enforce a mortgage lien on personal property the defendant answered, pleading partial payment and a counterclaim. A third party filed a petition claiming the mortgaged property as his under an agreement, which really gave him only an equi-

table lien. The mortgagor and the claimant of the mortgaged property moved the court to transfer the issues formed upon their pleadings to the common law docket for a trial by jury. The motion was sustained as to the plea of payment and the counterclaim, but denied as to the claim to the mortgaged property. Held—That this ruling was correct. The claimant of the property had only an equitable lien, and the question as to priority between him and plaintiff was purely of equitable cognizance.

3. Same—Where in an equitable action properly commenced as such one of the parties moves to have the case transferred to the ordinary docket for the trial of an issue, concerning which he is entitled to a jury trial, the other party can not require the equitable issues to be disposed of before such transfer, if the equitable issues depend upon the decision of the legal issues. The latter clause of section 12 of the Code does not apply in such a case.

It was error in this case to render judgment against the mortgagor, before the trial of the legal issues, for the amount of plaintiff's debts, less the payments pleaded, and to subject the proceeds of the mortgaged property to its payment, as upon the trial of the counterclaim, and an adjustment between the parties of their relative claims, the mortgagor may not owe the mortgagee anything.

4. Equities—The mortgagee is not affected by a prior equity which was kept secret until he had, upon the faith of the mortgage, parted with a valuable consideration.

John Young Brown and Robert D. Vance for appellant; Montgomery Merritt for appellee.

COMPTON v. GLAZEBROOK.

Filed June 4, 1890. Appeal from Allen Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Gratuitous bailee—Reward for stolen bonds—Where bonds were stolen from a gratuitous bailee without his fault, and it was probable that a large reward, payable in the event of the recovery of the bonds, offered at once and before he could have an opportunity to consult with the bailor, would result in their recovery, it was his duty to offer the reward; and the reward offered being the means of recovering the bonds, the bailor must pay the bailee the amount thus expended for her benefit. But as other bonds were stolen from the bailee at the same time, the bailee is liable only for such a proportion of the cost of recovering the bonds as her bonds bear to the whole number stolen.

2. Same—Verdict—In this action by the bailor to recover of the bailee one of her bonds which he refused to deliver, in which the defendant sought to recover of plaintiff the plaintiff's proportion of the cost of recovering the bonds, a verdict finding for defendant "the amount actually expended by him after being pro rated according to the amount of bonds stolen of defendant and plaintiff" was too uncertain to be made the basis of a judgment, as the pleadings did not state the exact amount of the bonds of each, and some of the alleged items of expense were denied.

Lewis McQuown for appellant; Thomas H. Hines for appellee.

CITY OF COVINGTON v. SMITH'S EX'OR.

Filed June 4, 1890. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, affirming.

Street improvements—A city must pay for work it procures to be done in improving its streets when its proceedings are so defective as not to secure a lien to the contractor, unless there be a provision of the city charter exempting it from liability in such an event.

W. A. Bryne for appellant; W. W. Cleary and M. T. Shine for appellee.

UNSELD v. HAYDEN'S ADM'R.

Filed June 4, 1890. Appeal from Nelson Circuit Court. Opinion of the court by Judge Bowden, affirming.

Recovery of money paid by administrators on fraudulent claim—In this action by administrators the petition alleges that defendant, intending to deceive and defraud the estate of plaintiff's intestate, presented to them a note duly verified by him, and that they relied on the false and fraudulent representations made by him that the note was genuine and a just obligation, and so relying they paid it. The petition then alleges that the note was a forgery and without consideration, and prays for the recovery of the amount paid. Held—That the facts alleged entitle plaintiffs to recover. It was not necessary to allege that defendant had not repaid the money thus fraudulently procured, nor was a demand necessary.

E. E. McKay for appellant; John A. Fulton for appellee.

DREXELIUS & CO. v. LEATHERS, &c.

Filed June 4, 1890. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, reversing.

Pleading—Consideration—When a particular consideration is alleged there is no presumption that there was a consideration; the matter stands on evidence.

In this attachment proceeding in which a third party is intervened, claiming a prior equity by reason of the assignment to him of the claim attached, the consideration alleged for the assignment was denied. Held—That in the absence of evidence sustaining the consideration alleged it should have been held that no equity was acquired by the assignee.

O. P. Schmidt for appellants; Hallam & Myers for appellees.

ARNOLD, &c. v. BROWNING.

Filed June 14, 1890. Appeal from Pendleton Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Instructions—There can be no reversal on account of the instruction complained of as no intelligent jury could have been misled by it. As the issues were simple, elaborate instructions would have been out of place.

J. T. Simons for appellants; L. T. Applegate for appellee.

LOUISVILLE, NEW ALBANY & CHICAGO R. R. CO. v. DAVIDSON.

Filed June 14, 1890. Appeal from Shelby Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Instructions—The refusal to give an instruction is not ground for reversal where the same idea is embodied in another instruction which was given.

2. Same—In criminal cases the court is required to give the whole law of the case to the jury. But in civil cases a party can not complain that the court failed to instruct a particular point unless the instruction was asked for by him.

Helm & Bruce, E. F. Trabue and L. C. Willis for appellant; W. H. Bickers, Pryor Foree and Gilbert & Foree for appellee.

DAWSON v. HARPER, &c.

Filed June 4, 1890. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Liability for maintenance of stepchildren—While one is bound to take care of the children of his wife by a former husband, yet if he takes such a child into his family the relation of parent and child is established, and the stepfather can not demand compensation for maintenance and education, and the child can not claim pay for services. Sometimes the parent will be permitted to assert claim for maintenance where the parent is poor and the

child has an estate better enabling it to support itself than the parent is to support it, but in this case the stepfather was amply able to support his stepchildren, while their estate was small.

George W. Craddock and John Donan for appellant: H. C Martin for appellees.

SPRINGFIELD FIRE INSURANCE CO. v. CROZIER.

Filed June 4, 1890. Appeal from Nelson Circuit Court. Opinion of the court y Judge Ward, affirming.

1. Fire insurance—A policy of insurance insuring "against loss or damage by fire to the amount of —— on horses and mules in barns or on the farm and against loss by lightning while at large or in use, not over $110 per head, $3,300," did not limit the risk to thirty-three head of stock, mules and horses, but it covered the horses and mules in a particular barn, each one of which was only insured to the extent of $110, the total value not to exceed $3,300. There is no ambiguity.

2. Same—Pleading—In an action upon such a policy in which it was alleged that the barn described in the policy was burned and a certain number of horses and mules destroyed, an answer denying that "the stock mentioned in the policy and assured thereby was either in whole or in part destroyed by said fire or otherwise" does not amount to a denial of the facts alleged in the petition, but is merely a denial of the destruction of the particular lot of mules which defendant claimed was covered by the policy.

3. Failure to give opportunity to amend answer—The fact that the case was withdrawn from the jury and judgment rendered against defendant without giving it an opportunity to amend its answer is not a ground for reversal, as it was not suggested in the lower court, and has not been suggested here, that defendant had any valid defense, or that it did not have ample opportunity to present any defense that it had.

4. Consolidation of suits—The insured having brought a separate action against each of several insurance companies in which his property was insured, the only one of the companies which made any defense was not prejudiced by the action of the court in consolidating the several actions, as there was no issue of fact, the only issue made being one of law.

E. E. McKay for appellant; John A. Fulton for appellee.

ROBERTS, &c. v. CLARK, &c.

Filed June 4, 1890. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Ward, affirming.

Pleading—Limitation—Deeds executed by a father to several of his children having been set aside for undue influence and fraud, two of the grantees filed an amended answer and counterclaim, alleging that their father had verbally promised to convey the land to them if they would assist in paying for it; that each of them had paid a certain sum on the land, for which they asked judgment. The answer, after denying the alleged agreement, and that any sum had been paid to the father, alleged that more than five and more than thirty years had elapsed after the alleged agreement and payment, if any there was, and relied on the statute of limitation. To this answer there was no reply. Held—That the answer presents a complete defense.

Thos. Z. Morrow and James Denton for appellants; O. H. Waddle for appellees.

WEDDINGTON, &c. v. McGUIRE, &c.

Filed June 5, 1890. Appeal from Elliott Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Indemnifying bonds—Where one's property has been wrongfully seized and sold under execution against another, he may maintain an action on an

indemnifying bond taken by the officer, provided the officer had the right to take the bond. If the officer had no such authority, the owner can maintain an action against those who aided the officer in the illegal act.

3. Parties to actions—In such an action the fact that some of the parties having an interest in the property are not properly before the court as plaintiffs is not ground for a general demurrer. The defect can be reached only by a special demurrer.

8. Joinder of actions—If property belonging to one or more persons is wrongfully taken under an execution, and other property belonging to other persons is wrongfully taken under the same execution, the owners of the separate parcels should sue separately for the injury sustained.

4. Next friend—A married woman can not act as next friend.

M. M. Redwine and Hargis & Eastin for appellants; John P. Salyer for appellees.

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KENTUCKY COURT OF APPEALS.

McCUTCHEN & CO., &c. v. CALDWELL & SON.

(Filed June 7, 1890.)

1. Fraudulent conveyances—Preference of creditors—Mortgages made by debtor to his creditors in contemplation of insolvency and with the design to prefer the mortgagees held to be in violation of section 1, article 2, chapter 44, General Statutes, but the mortgage executed to E.'s administrator for $500 is held valid as to $200 loaned simultaneously with the execution of the mortgage.

2. Delayed execution of mortgage according to promise made at any time of loan of money—C. and Son having accepted the note of W. for $1,800 for mules sold to W. and W. having failed to execute to them as security a mortgage upon a tract of land until six months after the execution of the note, and they having failed for the same time to demand said mortgage, Held—That said mortgage was in violation of the statute and it matters not that the debtor agreed to give the mortgage at the time of the sale of the mules and execution of the note.

3. Assignment for the benefit of creditors—Parties to action—The assignee for the benefit of creditors must be a party to the action before the deed of assignment can be set aside as null and void.

John S. Rhea, E. W. Hines and S. R. Crewdson for appellants.

Thos H. Hines and Browder & Edwards for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Lewis.

This appeal is from a judgment rendered in two actions consolidated and tried together. One of them was instituted October 11, 1886, by F. Raltz and others, creditors of W. H. Whitaker, against parties named, to whom he had executed mortgages, alleged in the petition to have been made by him in contempla-

tion of insolvency and with design to prefer the mortgagees to the exclusion in whole or part of others. The other was brought October 12, 1886, by I. B., M. L. & P. R. Whitaker, against W. H. Whitaker, G. S. Hardy, to whom a deed of assignment for benefit of creditors was made October 5, 1886, and others, in which the plaintiffs asked for enforcement of liens existing in virtue of two mortgages executed to them by W. H. Whitaker, September 30 and October 4, 1886, for settlement of the transactions of Hardy, trustee, and sale and distribution of proceeds of the property of the debtor according to rights of parties.

By the judgment two claims were allowed to attorneys, one of them for service in writing the deed of trust to Hardy, and the other for services rendered him in the two actions. The two mortgages executed to I. B., M. L. & P. R. Whitaker were each adjudged to have been made in violation of section 1, article 2, chapter 44, General Statutes. That for the same reason no lien existed in favor of Evans' administrator as to other creditors in virtue of the mortgage made to him October 4, 1886, xpcept to the extent of $200 of the debt of $500 attempted thereby to be secured.

It was further adjudged that by the mortgage made September 30, 1886, to R. H. Caldwell & Son, they acquired a lien on the tract of land mentioned, subordinate only to a mortgage lien on the same land, created in 1885, in favor of Evans' administrator for $2,171.

Hardy, trustee, was not made a party to the action of R. Raltz and others. Consequently, the chancellor did not formally adjudge the deed of assignment to be void and of no effect, as prayed by them; nor was the trustee deprived of possession of the property conveyed to him, though he was made subject to the jurisdiction and orders of the court. It thus resulted that the lower court was not authorized to wholly reject the claims mentioned; nor can this court reverse the judgment as to them, as there is nothing to show them unreasonable in amount.

It appears that $200 of the $500 for which W. H. Whitaker gave to Evans' administrator his note on October 4 was one that day loaned, the residue being a pre-existing debt.

It is expressly provided that the statute under consideration shall not vitiate or affect a mortgage made in good faith to secure a debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution. And in Farmer v. Hawkins, &c., 79 Ky., 184, it was held that although a mortgage may be within article 2, chapter 44, as to such part of a debt as previously existed, yet it is a security for so much as may be created simultaneously. The same doctrine was, in substance, settled in Whitaker v. Garrett, 3 Bush, 402. The chancellor did not, therefore, err in respect to the mortgage to Evans' administrator.

March 27, 1886, W. H. Whitaker purchased of R. H. Caldwell & Son mules, at the price of $1,800, for which he gave his note, payable in six months.

According to the statements of Caldwell & Son they did not then exact of Whitaker mortgage security, which he was willing and able to give, because they regarded the debt safe without, and, in fact, he was at the same time solvent, for, as shown by an exhibit he made, his assets were, in the language of R. H. Caldwell, twice as much as his debts.

But they plead and also testify to a verbal agreement then made that he was to give to them a mortgage on demand.

No demand was made for execution of the mortgage until September 30, three days after the note became due, and the natural conclusion is that it was then done because R. H. Caldwell &

Son had become convinced of the fact, about which there is now no controversy, their debt was insecure and in danger of being wholly or partially lost.

Of the three other mortgages, executed September 30 and October 4, two were adjudged by the lower court wholly within operation of the statute, and the third particularly so, of which action none of the mortgagees have complained, nor under the circumstances, can justly complain, for we think it manifest those mortgages were made by W. H. Whitaker in contemplation of insolvency, and with design to prefer. There is nothing to save the mortgage to Caldwell & Son from the same fate, if the verbal agreement mentioned be not sufficient for the purpose.

By its express terms the only condition in which operation of the statute can be limited or restricted is when a mortgage is made in good faith to secure a debt or liability created simultaneously with such mortgage. And it seems to us virtue can not be imparted to a mortage made months after the creation of the debt, so as to affect other creditors, without violating the express language used, and defeating the main purpose of the statute, for what protection can be afforded by it to other creditors of a debtor who has transferred his property in contemplation of insolvency, and with design to prefer, if vendees and mortgagees be allowed to found superior equitable liens upon the property sold or mortgaged, in vitrue of unenforcible verbal agreements, alleged to have been made months before, and never made known or attempted to be carried out until the debtor becomes insolvent?

The case of Brooks, Waterfield & Co. v. Staten's Adm'r, 89 Ky., 474, was where Brooks, Waterfield & Co., commission merchants, and as such dealers in leaf tobacco, advanced to Waterfield a certain sum of money, upon an agreement that Waterfield would purchase tobacco, prize and ship it to Brooks, Waterfield & Co., who were to sell the same on commission, and out of the proceeds indemnify themselves for advances. It was held that from the time the advances were made there was an inchoate right to the property on which they were made, which right became complete when the creditors, with reasonable diligence, reduced it to possession before other equites intervened.

In that case the agreement between the parties, being in writing, was definite to the property, as well as money advanced, unconditional and enforcible. In this case it was not contemplated by the parties the mules were to be retained by Whitaker to await the demand of Caldwell & Son for a mortgage on them, but he had the right to sell and dispose of them, as well as the land he subsequently mortgaged; and, besides, the agreement was not enforcible, but was executed by Whitaker vuluntarily, and with the design denounced by the statute, and preference was thereby obtained by Caldwell & Son, which they did not previously have, nor could coerce from Whitaker.

In the case of James v. Zeigler, 9 Ky. Law Rep., 869, it was held that although a debt was created upon the faith of the debtors' promise to transfer a certain claim to the creditor, yet as the promise could not have been specifically enforced, compliance after the debt was created was an act of preference, and operated as an assignment for benefit of all the creditors. That case is, we think, decisive of the question before us, and, in our opinion, the mortgage to Caldwell & Son operated in the same way, and the chancellor erred in sustaining it.

Wherefore, the judgment is affirmed, except as to the mortgage to Caldwell & Son, as to which it is reversed and remanded for further proceedings consistent with this opinion.

DANFORTH, &c. v. MOSS.

(Filed June 7, 1890.)

Judicial sales—Jurisdiction—Appellants, as heirs at law of S. instituted an action in McCracken Common Pleas Court for sale of land under subsection 2, section 490, Civil Code of Practice, for sale of land in McCracken county. After sale was had appellee filed exceptions to the commissioner's report of sale, alleging that the court had no jurisdiction to order the sale as an action had been previously instituted in the Jefferson Chancery Court, county of the residence of S. at time of his death, for the division of the lands left by him in that county amongst his heirs and allotment of dower to his widow, and the jurisdiction of this action was, therefore, in Jefferson Chancery Court. Held—That the provisions of chapter 15, title 10, Civil Code of Practice, does not embrace this action, but subsection 3, section 62, Civil Code of Practice, gives the jurisdiction of this action to courts in the county in which the land is situate, and, therefore, the McCracken Common Pleas Court had jurisdiction to order the sale.

Hargis & Eastin for appellants.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

Appellants, heirs at law of E. D. Standiford, instituted an action in the McCracken Court of Common Pleas for sale of certain land in that county, left by him at his death, for the causes and upon grounds provided in section 490, Civil Code; and all the provisions thereby required having been complied with judgment was rendered for the sale, which was in pursuance thereof made by commissioner of court, appellee, Thos. E. Moss, becoming the purchaser. But exceptions having been filed by him were, sustained by the court, the sale set aside and the sale bond quashed, upon the ground the court had no jurisdiction. It appears there had been previously instituted in the Jefferson Chancery Court, county of E. D. Standiford's residence at time of his death, an action for division of the lands left by him amongst his heirs, and allotment of dower to his widow; and by proceedings had in that action such division and allotment of dower was made of the lands lying in that county. But no disposition was made, nor judgment rendered in that action respecting the lands lying in McCracken county, the sale of which is sought in this action.

An action for division of land and allotment of dower, which are provided for in chapter 15, title 10, Civil Code, must be brought in the circuit or county court of the county in which the land, or greater part thereof, lies, and the court having acquired jurisdiction for the purpose, might divide or allot dower in lands lying in any other county. But division of land and allotment of dower provided for in chapter 15 does not involve, nor does an action brought for that purpose necessarily comprise, a sale of real property provided for in chapter 14, title 10. On the contrary, for the various causes and purposes mentioned in chapter 14, there may be sales of real property belonging to joint

owners, lying in even the same county, where other tracts are situated that they may, by a separate action, have divided.

Subsection 3, section 62, Civil Code, provides that actions must be brought in the county in which the subject of the action is situated, for sale of real property under title 10, chapter 14, except for debts of a decedent.

The sale in this action was not for debts of the decedent; nor did the widow have a claim to dower in the lands, but it was for the purpose of dividing the proceeds among joint owners, it not being practicable to divide the land without materially impairing its value.

We think the McCracken Court of Common Pleas had jurisdiction, and it was error to sustain exceptions as to the report of sale. Instead, the report ought to have been confirmed.

Wherefore, the judgment sustaining the exceptions is reversed and cause remanded for proceedings consistent with this opinion.

GARGILL v. COMMONWEALTH.

(Filed June 7, 1890—Not to be reported.)

1. Criminal law—Detaining a female against her will—Indictment—An indictment charging the accused with unlawfullydetaining a female against her will, with the intention to have carnal knowledge with her, is sufficient without stating the manner of the detention. The detention must be something more than mere persuasion, or an expression of desire to gratify the animal passions, but still the general charge of detention for the specific purpose to be accomplished by it is sufficient to apprise defendant of the offense.

2. Evidence—The prosecuting witness having stated that the accused had made frequent attempts to have intercourse with her, the counsel for the defense asked her why she had not sooner made known this conduct of the accused, to which she responded that it was because the wife of the accused, who was her aunt, had been troubled so much about her husband. This question was proper, but the attorney for the State having asked what it was that troubled the wife of the accused, the court erred to the prejudice of the accused in permitting the witness, over the objections of counsel for the accused, to detail the conduct of the accused with other women.

It was also prejudicial to permit the attorney for the State to propound to the accused on cross examination questions as to his having left the county on account of an indictment for detaining another woman and having paid money to another woman for detaining her daughter, and the refusal of the court to permit such questions to be answered did not remove their prejudicial effects from the jury.

3. Conduct of Commonwealth's atorney—It was prejudicial to permit the attorney for the Commonwealth in his closing argument to use blasphemous language to the jury.

Smith & Robbins and Dawson Smith for appellant.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted in the Graves Circuit Court, charged with the unlawful detention of Lillian Yarbroger, a female, against her will, with the intention to have carnal knowledge with her, etc. This is an offense created by statute,

and on a demurrer to the indictment it is contended by counsel for the defense that it was necessary to aver the manner of the detention so as to enable the accused to answer the charge; that without a specific statement of the facts, it is left with the pleader to determine, in his own mind, what amounts to a detention, and the accused left without information as to the essential requisite of the offense.

While, in some instances, it is not good pleading to follow the language of a statute that creates the offense, we are disposed to adjudge that the averments in the indictment that the woman was detained is the averment of a fact, and particularly when the gravamen of the offense is his purpose, against her will, to have sexual intercouse with her; that the detention must be something more than mere persuasion, or an expression of desire to gratify the animal passion, is evident, but still the general charge of detention for the specific purpose to be accomplished by it is sufficient to apprise the defendant of the offense, and the acts constituting it. The demurrer was, therefore, properly overruled.

It seems, from the testimony of the principal witness, that the defendant had made frequent attempts to have intercourse with her, running through a period of several months, and having been asked by counsel for the defense why she had not made known to her kindred this conduct on the part of the defendant sooner, she replied that it was because the wife of the defendant, who was her aunt, had been troubled so much about her husband. The attorney for the State then required the witness to state what it was that troubled the defendant's wife, and the witness over the objections of counsel for the defense, proceeded to detail the conduct of defendant with other women; that he had to leave the county, and his home was broken up, etc. The question propounded by the defense was entirely legitimate, and called for no statement in regard to the action of the defendant with other women, and while, if made in answer to the interrogatory propounded, its effect on the jury might have been attributed to the defense alone, but when no such response was made it was prejudicial to the accused, and not warranted by any act of his counsel to permit the attorney for the State to place before the jury the wrong, if any, the accused had perpetrated on other women. The question should not have been answered, but the objections made by the defense at once sustained.

The attorney for the State again proceeded to ask the witness if the defendant had not been indicted for detaining a woman by the name of Jones, and was compelled to flee the county on account of it. Before the question was fully propounded the counsel for the defense interposed his objection. The attorney for the State should have been at once stopped, and prevented from asking the question.

It had the effect to prejudice the jury, and must have been asked for that purpose, and the fact that the court refused to permit the question to be answered did not remove the effect it might, and probably did, have on their minds.

The court also permitted questions to be asked of the defendant as to his intercourse with other women, and the penalty imposed upon him for his action, but, at the same time, told the jury they were not to consider these collateral matters, and to the witness that he need not answer. The trial judge can not always determine the propriety of a question until it is fully propounded, but often when the attorney persists in asking questions that are clearly incompetent the court, before counsel has gone far enough to require the answer, or to produce the effect desired on the

jury, must see that the question is clearly incompetent, and should interpose that a fair, or, at least, a trial according to the forms of law may be had.

After permitting counsel for the State to ask the female witness a question with reference to the defendant's conduct with other women, as soon as the defendant was placed before him for cross-examination: "He asked him if he did not leave the county because he was indicted for detaining a woman by the name of Jones, and had to leave the county until he could buy off her father." This entire question was permitted to be propounded, although the defense was interposing to prevent it. The witness was again asked: "Did you not pay to Mrs. Johnson $300 for detaining her daughter?" This mode of conducting what was termed the cross-examination was allowed by the court, and the objection by the defense availed only to the extent of inducing the judge to say to the witness that he was not to answer the question.

Besides, in the bill of exceptions the conduct of the attorney for the State in his closing speech to the jury was of the most extraordinary and reprehensible character. His blasphemous language to the jury, in the presence of the judge, whose duty it was to see that the accused had a fair trial, blackens this record into which it is copied, conducing, evidently, to unnerve the judge and the jury, the entire trial being a mere travesty on the administration of justice. The accused had been taken into custody, and was held for trial by the strong arm of the law, and, although he may be a man of bad character, when entering the temple of justice to answer for the commission of the alleged offense, he was entitled to the protection of the law, and this means a fair and an impartial trial. This he has not had.

The judgment of conviction is, therefore, reversed, and the cause remanded for a new trial, and for proceedings consistent with this opinion.

THE BARDSTOWN AND GREEN RIVER TURNPIKE COMPANY v. RODMAN, &c.

(Filed June 7, 1890—Not to be reported.)

Turnpikes—Powers of directors—Under an amendment to the charter of the Bardstown and Green River Turnpike Company by the legislature the directors were authorized to change the location of the tollgates on the road for the best interest of the road, and the directors having changed the location of several tollgates and being about to sell the land constituting the former sight of a gate keeper's house and purchase a site for such house at the new location, some of the stockholders seek to enjoin the proposed action of the directors. Held—That in the absence of a charge of fraud or bad faith on the part of the directors the stockholders can not enjoin the action of the directors in changing the location of the toll gates or disposing of the old sites and purchasing new ones, as such powers are discretionary with the directors.

J. D. Wickliffe, J. W. Thomas and G. S. Fulton for appellant

Jno. S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

This action is by some of the stockholders of the Bardstown and Green River Turnpike Road Company against that company, its president and directors, to enjoin the latter from making an improper use of the corporate property, charging waste and other mismanagement of the corporate funds.

It seems that the board of directors thought proper to remove a tollgate upon its road, known as gate No. 1, to the north side of the Beech Fork of Salt river; also to remove one of its gates, No. 2, to the land of Dr. Elliott, next to New Haven. They also desired to sell a toll house near Muldraugh's Mill, in Larue county, on the same pike. It is insisted that there was no necessity for changing the tollgates or for selling the toll house in Larue county, and that the location of the tollgates and houses, as they stood before the contemplated removal, afforded all the facilities for collecting the toll, and that no reason existed for making the change. The testimony shows clearly that a change of the gates nearer to Bardstown and New Haven, as contemplated by the board of directors, would catch travel of neighborhoods that have used the road for a long time without paying toll, and, whether just or not to these localities, the company, through its directors, had the right, by express legislative enactment, to make the change. In the session of 1887 and 1888 the legislature passed an act authorizing the company "to remove any of its gates and establish them at such points as they may deem right, and for the best interest of the road." This board of directors, under this authority, removed, or proposed to remove, the gates. They have been guilty of no fraud, or made any disposition of the corporate property, except for the purposes of the road, and the stockholders have no right to substitute their judgment for that of the board of directors, for no other reason than that the removal of the gates, in their opinion, was unwise.

This power is confided to the directory, and so long as they act in good faith neither the chancellor nor the stockholders can, or should, interfere with their actions. If dissatisfied with the present board, a new one should be elected. The remedy is with the stockholders in the selection of the board of directors, and the chancellor ought not to have interposed to prevent the removal of the gates.

They propose to purchase the land of Dr. Elliott, and the deed would have been made but for the injunction in this case. Besides, the authority to remove the gates would carry with it the right to provide a house in which the gate-keeper could live. This is only a question of difference as to where the tollgate sohuld be located, and of this the board of directors must be the judge.

And as to the sale of the toll house, if not necessary, in the opinion of the board, to own it, or keep a tollgate at that place, there is no reason why it should not be sold. The directors did not exceed their powers in determining that a change of location for the toll house and gates was proper, or that a sale of the toll house in Larue would prove beneficial to the company. They had the power, under the charter, to remove the gates and to sell the toll house. There is no fraud alleged or bad faith shown, and in the exercise of a judgment that belongs to them, they should be allowed to act.

Our attention has been called to the provision of the General Statutes requiring the company, where it has acquired land for its use, to make disposition of it, if it desires to sell to the owner of the adjoining land, and prohibiting the building at the tollgate from being used as a residence by any other person than the tollgate keeper. This provision was doubtless enacted for the benefit of the owner of the adjoining land, and to enable him to

e-purchase when the use of the acquired property is abandoned by the company. He is not complaining in this case, and if the company is restrained from selling this property in Larue, it necessitates an expenditure of the means of the company to build other toll houses, and leaving the one in Laure county unoccupied.

It may not be wise to remove the gates, or to sell the abandoned toll house, but of this the board of directors must judge, and not the chancellor. We perceive no reason for the injunction.

The judgment is, therefore, reversed and remanded, with directions to dismiss the petition.

ROCKFORD v. ROCKFORD, &c.

(Filed June 12, 1890—Not to be reported.)

Executors and administrators' heirs—Parties to actions—The heirs can not maintain an action for the recovery of purchase money on land sold by their ancestor. The administrator alone can maintain such action.

C. H. Lee for appellant.

L. T. Applegate for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Pryor.

Pierce Rockford died, leaving several children, and his surviving children, except Philip Rockford, brought suit against Philip to have the land upon which Philip lived partitioned between all the children, alleging that it belonged to their father.

Philip made defense, alleging that he had purchased the land of his father, and exhibited the latter's bond for title. This, therefore, ended the cause of action.

The heirs then filed an amended petition, seeking to recover the purchase money.

The action for the recovery of the money should have been instituted by the administrator, and a recovery by the heirs would be no bar to an action by the administrator or by creditors. The father of these children died in the year 1884 or 1885, and there is no reason why they should be allowed to sue on these notes, and partition the recovery between the children.

Judgment reversed and remanded, with directions to dismiss the petition without prejudice.

DANT v. HEAD.

(Filed June 10, 1890.)

1. Judgment—Installments of debt—In an action for personal judgment on the second installment of a debt which was due, it was error to render judgment for the installment due and to require the defendant to show cause by the next term of court why he should not be adjudged to pay three other installments described in the petition and which plaintiff suggested to the court had become due and remained unpaid, and that power to enforce payment of other installments from time to time was reserved, as section 185,

Civil Code of Practice, authorizes judgment to be entered for installments of lien debts described in the petition as not due upon suggestion that the installment has become due pendente lite, but such judgment can not be rendered unless a lien on property exists to secure it.

2. Statute of frauds—Contract not to be performed within a year—Appellee leased to appellant his interest in a distiller's brand for a period of eight years in consideration of $100 per annum to be paid at the end of each year, the terms of the lease being in writing and signed by the appellee alone. In an action for recovery of an installment of rent becoming due two years after the making of said lease, appellant having in the meantime had the use and benefit of said brand, appellant pleads as a defense the statute of frauds. Held—That the statute of frauds applies only to contracts wholly executory, and that such plea is untenable in this case, as appellant has received benefits from the contract, and to be permitted to avoid payment for such benefits would enable him to commit a fraud on appellee.

3. Trade-mark—Pleading—Fraud—A distiller's brand is a trade mark and a subject of sale and transfer, and in an action by appellee to recover the value of the use of the same, the answer alleging that appellee fraudulently represented the brand to be of good repute, and it was agreed to be paid for upon faith of that representation, although appellee had by the manufacture of a large quantity of inferior whisky impaired and destroyed the value of the brand, which fact he fraudulently concealed from appellant, presented a good defense.

Rountree & Lisle for appellant.

Harrison & Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Lewis.

September 12, 1881, appellee, in consideration of $4,000, sold and conveyed to appellant his interest in a tract of land leased jointly with B. F. Bryant from R. C. O'Bryan for ten years, beginning June 1, 1879, upon which was a distillery.

The deed, in addition to the contract for sale of the realty, contained the following: "It is hereby covenanted and agreed that said F. M. Head, party of the first part, for and in consideration of $100 per annum, payable at the end of each year during the time of the present lease from R. C. O'Bryan, which is eight years from June 30, 1881, sells, conveys and confirms unto said J. B. Dant, his heirs, executors and assigns, all his right, title and interest in or to a certain distiller's brand, known to the trade as 'F. M. Head & Co.' To have and to hold all and singlar the above mentioned premises, together with all and singular the appurtenances," etc.

November 28, 1883, appellee instituted this action for judgment on the second installment of purchase price of the land mentioned, which became due September 12, 1883, the first having been paid, and judgment also upon the remaining six installments, to take effect as they respectively become due.

The judgment rendered was for recovery of the second installment, together with interest, and that defendant be required to show cause by the next term of court why he should not be adjudged to pay three other installments which the plaintiff suggested to the court had then become due and remained unpaid. Power to enforce payment of the other installments, from time to time, was reserved.

Section 135, Civil Code, provides: "A party may be allowed on motion to file a supplemental pleading, alleging material facts occuring after the filing of the former pleading; but if a plain-

tiff having a lien for a debt due and a debt not due upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due pendente lite, have judgment for a sale of the property therefor."

A plaintiff may under that section by supplemental pleading, allege another or other notes, of the same series and given for the same consideration as the one sued on, have become due during pendency of the action, and have judgment therefor. But it does not seem to us a mere suggestion, on record, of such fact was intended to authorize judgment on a note not due when the action was commenced, except when a lien on property to secure it exists.

It thus results the only judgment appellee was entitled to as the record stands, if any at all, was for amount and interest of the installment sued on.

The main defense set up in the answer, to which a general demurrer was sustained, is that the agreement sued on is not enforcible, because within operation of section 1, chapter 22, General Statutes, as follows: "No action shall be brought to charge any person * * * upon any agreement which is not to be performed within one year from the making thereof unless the * * * agreement * * * or some memorandum, or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent; but the consideration need not be expressed in writing; it may be proved when necessary or disposed of by parol or other evidence."

It was definitely settled by this court as early as Roberts v. Tennell, 3 Mo., 247, that a parol agreement to pay money, though not to be done within a year, is not void, if the consideration be legal. In that case a distress warrant for rent, payable in ten year's was issued, and the court said: "As a verbal lease for more than a year no action will lie, but as the statute has not declared the lease void, any use may be made of the lease by either party, except that of maintaining an action upon it. The lessee, therefore, in case he enters in virtue of the lease, may use it for the purpose of showing he is no trespasser, and after he has enjoyed the leased premises for a term he will be liable for the rent, not upon the express contract, but upon the contract implied by law from his use and occupation of the premises; and in such an action either party, we apprehend, may avail himself of the express contract to show the amount of rent to be recovered." In the same case it was held an action can not be maintained upon an agreement the borrower shall repay at the end of two years money loaned, because by the terms of the agreement it is not to be performed within a year from the making thereof. But it was said: "To give the statute the effect of making the contract void, and thereby utterly preventing the lender from recovering the money lost, or if he be allowed to recover the money upon the implied contract resulting from the loan, to give to the statute the effect of not permitting the borrower to prevent the recovery of the money lent before it is due, or of a higher rate of interest than is due by the terms of the contract, would be extending the operation of the statute beyond its letter, and instead of making the statute the means of preventing frauds, it would be converting it into an instrument of fraud and injustice; it most certainly could not be said to be demanded by the reason and spirit of the statute."

In Berry, &c. v. Graddy, Adm'r, 1 Met., 353, by a verbal agreement Belt, the decedent, induced appellee, who had married his niece, to abandon his determination to remove from the State and incur expense of purchasing a farm, by verbally agreeing

to pay a certain amount of the price in three annual installments. Graddy was to, and did, perform his part of the agreement within a year, and his right as administrator to credit for the amount was held to be unquestionable according to the doctrine settled in Roberts v. Tennell. But although it was then said to have been decided in England and some of the American courts that in such case the statute of frauds does not apply, and an action will lie for nonperformance of the agreement by the other party, it was not deemed necessary to decide whether or not the doctrine could be sustained on principle, the right of Graddy to the amount claimed being placed on the common law right of retainer for the debt due under the verbal contract.

In Montague v. Garnett, 3 Bush, 298, it was held there was "a distinction between contracts executed in part or whole, and one wholly to be executed by both parties. But the right of the plaintiff to recover for the pork and corn loaned to the defendant was based alone upon the implied contract to return or pay for the articles, simply because the agreement was not to be performed within a year, although the statute was then said to have been "never designed to enable one man to get property of another by virtue of a parol contract, and then refused to either execute the contract or return the property."

It now seems to us the statute was intended and does properly apply only to an agreement that is not to be performed by either party within a year, but not one which is to be or has been performed by one or either of them within such period. And that construction has been adopted elsewhere. (Atchison, T., S. R. Co. v. English, Pacific Rep., 82; McClellan v. Sanford, 26 Wis., 595; Curtis v. Sage, 85 Ill., 22; Berry v. Dumas, N. J. Law., 403; Haugh v. Blythe, 20 Ind., 24; Smalley v. Green, 52 Iowa, 241; Blanding v. Sargeant, 33 N. H., 239.) For if the practical effect and operation of the statute is, as has been uniformly held by this court in every case where one party has performed an agreement within a year, to hold the other party liable on such agreement, although he is not to perform within a year, such should be construed and held to be the meaning and import of the language used. In fact the statute properly applies to agreements that are wholly executory; and one that has been performed by one of the parties within a year is to that extent executed and can not, with propriety, be called an agreement not to be performed within a year.

In this case the agreement is set out in the deed, which was accepted by appellant and recorded. The distiller's brand, which is the consideration for the amount he agreed to pay, was received, used and is still his property, and to permit him to evade payment under cover of the statute would serve to pervert the purpose of it without any reason. The defense that the distiller's brand was not a subject of sale and transfer, and, therefore, formed no consideration for the alleged agreement, because the use thereof by another than F. M. Head & Co. was deceptive, is not valid, for it is well settled that a trade-mark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment.

But it is stated in the answer that appellee fraudulently represented the distiller's brand to be of good repute, and it was purchased by appellant upon faith of that representation, although appellee had by the manufacture of a large quantity of

inferior whisky impaired and destroyed the value of the brand, which fact he fraudulently concealed from appellant.

It seems to us that allegation, if true, constitutes a defense, and it was error to sustain the demurrer to the answer; and the judgment must be reversed for further proceedings consistent with this opinion.

BOSWORTH v. CITY OF MT. STERLING.

(Filed June 12, 1890—Not to be reported.)

1. Construction of statutes—Limitation—In an action by a city to recover a strip of land held by the appellant, she pleaded the statute of limitation as a defense and the proof showed enclosure and adverse possession by appellant for a period of twenty years. To avoid this defense the city relies upon the provision of the General Statutes, page 905, passed in December, 1878 eleven years after appellant held possession, which provides that notice shall be given to a city by a person in possession, or about to take possession, of a street or alley, that such possession will be adverse. Held—Such statute is not retrospective in its nature as provided in section 14, chapter 21, General Statutes, and the right of the city to said strip of land not being barred at the enactment of the statute of limitations, appellant's rights are regulated thereby.

2. Estoppel—The proof showing that the city did not know the location of the street claimed until more than twenty years after appellant and those under whom she claims enclosed and claimed adversely the land in controversy, and the pavements having been made in front of said property under the supervision of the street commissioner, the city is estopped to claim said land.

Lewis Apperson and Wm. H. Holt for appellant.

Ed. C. O'Rear for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted by the city of Mt. Sterling against Sallie D. Bosworth and others to recover a small strip of land in the possession of the defendants, and which is alleged constituted a part of one of the streets of that city, and had been, without right, inclosed by the defendants. The case was brought and tried in a court of equity, and judgment rendered for the city. The testimony conduces to show that the strip of land in dispute had been originally a part of one of the streets, and, on the other hand, it appears that the defendants, and those from whom they derive title, had included this land as a part of the lot adjoining, and had used, possessed and claimed it as their own for the period of twenty years.

The statute of limitation was pleaded as a defense to the action.

After the defendants had been in the possession of this ground, with an actual inclosure, for the period of eleven years, claiming it as their own, the act upon which the recovery was based was enacted by the legislature. This act was passed in December, 1873, and is found under the title of "Limitation of Actions," General Statutes, page 905. The substance of this statute is that limitation "shall not begin to run, in respect to actions by any town or city for the recovery of any street or alley or other public easement, or any part of either, and until the trustees of the council or the corporation have been notified in writing by the

party in possession, or about to take possession, to the effect that such possession will be adverse to the right or title of such town or city." The possession is deemed amicable until the notice is given.

Under the title "Construction of Statutes it is provided" that no part of the revision is retrospective unless expressly so declared. (General Statutes, section 14, chapter 21.) It is insisted for the appellant that, the entry having been made prior to the adoption of the General Statutes, the provision in reference to limitation has no application to this case, and to determine otherwise would affect an existing right.

The statute applies to the party in possession, as well as to the one about to take possession, and, besides, there can be no retrospective operation of the statute cited, because no right had vested and the title, if such is the case, being in the city, the latter could have recovered the possession of what rightfully belonged to it. The possession had not ripened into a title when the statute was enacted, and if the title was in the city, no right of the appellant was affected by it.

The pleadings, however, in this case deny title in the city, and from the character of the proof before us it seems that the city did not even know the location of its street, or the particular boundary from the year 1862 until this action was instituted, some twenty years after the vendors of the party now in possession had inclosed what is now claimed to be a part of the street, and to adjudge title in the plaintiff leaves the dwelling of the defendant on the line of the street with no front, and this, after pavements had been made under the supervision of the street commissioner, and with no claim to apprise purchasers of the nature of the title. There is the testimony of one witness, who says that years ago, when the strip of land was inclosed, the party then in possession stated that its occupation was only temporary, but on cross-examination he seems to have been mistaken as to the locality. With this testimony in, and while the doctrine of estoppel should not be applied so as to aid the defense of the statute, we are disposed to adjudge that the boundary line is where the defendant's fence runs.

Its recognition for twenty years is sufficient to counteract the testimony for the city in this regard.

The judgment is, therefore, reversed, with directions to dismiss the petition.

Judge Holt not sitting.

EGGIN v. HUSTON.

(Filed June 12, 1890—Not to be reported.)

1. Usury—Appellant, on March 3, 1863, executed a promissory note for $1,000 and yearly interest was paid on it until March 3, 1873. Shortly after said date the payee died, and appellee, as his residuary devisee, became entitled to the note. On March 3, 1874, this note was cancelled, and a new note for $1,000 was exouted in lieu of it. At the same time appellant executed a note for $70, being for interest on old note for year beginning March 3, 1873, and ending March 3, 1874. These notes having been paid off and cancelled in October, 1887, this action was brought in April, 1888, to recover usurious interest paid from 1863 to 1874.

The court on motion struck out of the petition so much as sought to charge appellee with interest actually paid to appellee's testator. Held—This

was error, the proof showing that usurious interest was carried into the new note. Appellant is entitled in this action to recover the difference between the legal rate and the rate paid as so much paid without legal consideration.

2. Decedents' estates—Proof of claims—Appellant having paid to appellee usury which accrued on the old note held by his testator, the amount of which had been carried into a note executed to appellee, the cause of action to recover same accrued against appellee and did not constitute a claim against decedent, and no proof was necessary.

Gilbert & Reasor for appellant.

J. A. Fulton and A. P. Harcourt for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Chief Justice Lewis.

March 3d, 1863, appellant gave his note for $1,000 to M. E. Huston, the consideration being borrowed money, and executed mortgage on land to secure payment.

Yearly interest was paid on the note to March 3, 1873. A few days after which date M. E. Huston died, when appellee, as his residuary devisee, became entitled to the note. But March 3, 1874, it was cancelled and the mortgage released, and in lieu thereof a new note for $1,000, bearing interest at the rate of ten per cent. per annum, was given to appellee, and another mortgage executed on the same land to secure it. At the same time a note for $70 was given for interest on the original note for the year beginning March 3, 1873, and ending March 3, 1874.

The last-mentioned note for $1,000 and interest was paid off and cancelled in October, 1887, and in April, 1888, this action was brought to recover the amount of interest paid in excess of the legal rate, which it is alleged was from 1863-1874 at the rate of eight per cent. per annum.

But upon motion the lower court made an order, "that so much of the petition as seeks to recover of or charge defendant for such sums in the way of usury as may have been actually paid to M. E. Huston, defendant's testator, be stricken from the petition and suppressed.

Inasmuch as the stipulated rate of ten per cent. was authorized by statute existing March 3, 1874, when the last note for $1,000 was given, it is manifest the effect of that order of court was to defeat any recovery whatever by the plaintiff, except probably such usury as may have been in the note for $70 mentioned. And the question, therefore, to consider is whether such order was proper.

In Fitzpatrick v. Rudd, 79 Ky., 272, it was held that the mere change of the payee for even a part of the obligors is not a payment of the usury, but the creation of a new contract; and if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor, the usury should be extracted. And in Rudd v. Planters Bank, MSS. opinion, May 26, 1880, it was held that "to the extent that usury is embraced in the debt, and so long as it can be traced, the new obligation given in discharge of the old indebtedness is without consideration."

It does not make any difference how change of the payee occurs, whether by assignment for valuable consideration, or, as in this case, by devise, to the extent a note, when sued on, whether by the original holder, or a devisee or assignee, contains usury, or to the extent usury on an old debt becomes part of

a new note in the hands of an heir or devisee, recovery may be abated and lessened.

The same principle was reiterated in Kendall v. Crouch, 10 Ky. Law Rep., 998, where it was said payments made on a note will always be, at election of the debtor, treated as payments of legal interest and pro tanto of the principal, however they may have been applied by the creditor. And such election may be made when the note is sued on by pleading usury, or within one year after the note has been paid off and cancelled the debtor may sue for and recover the usury back.

It was not necessary for the plaintiff in this case to make affidavit and proof, required by statute, of demands against estates of deceased persons, because the claim of the plaintiff is not a demand against the estate of M. E. Huston, deceased.

What the plaintiff is here seeking to recover is the amount of the note paid by him in excess of that for which there was a legal consideration, for to the extent usury paid on the old became part of the new note, appellee had collected of appellant what he was not entitled to, and the latter has the right to recover it back from him, and can look to no other person or source for it. Consequently, the demand is against him alone.

There is evidence tending to show there was usury paid on the old note, which, if properly applied, would lessen the amount appellee had a right to recover on the new note, but how much it is not necessary to now decide, as it may be more properly ascertained by reference to a commissioner.

The judgment is reversed and cause remanded for proceedings according to this opinion.

COLLIER v. COMMONWEALTH.

(Filed June 12, 1890.)

Criminal law—Forgery—Former jeopardy—Upon the trial of appellant upon an indictment charging him with forging an entire order for $1.75 the plea of not guilty was entered, the jury selected and sworn, and the proof heard in part when the court, over objections of appellant, withdrew the case from the jury and referred it to another grand jury, which found a new indictment, charging appellant with forgery, committed by inserting the figure 1 before the figures 75. Upon the trial of the second indictment the court overruled appellant's plea of former jeopardy. Held—That the court erred to the prejudice of appellant in overruling said plea, as the evidence heard on the second trial was competent to prove a forgery under the first indictment.

Cornelison & McKee for appellant.

P. W. Hardin for appllee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

This is an appeal by the appellant from judgment sentencing to confinement in the penitentiary for the crime of forgery, etc. The only ground relied on for reversal is that the court refused to sustain the appellant's plea of twice in jeopardy for the same offense.

The instrument of writing, said to have been forged by the appellant, is as follows:

"Mr. J. C. King, pay to bearer $1.75 until to-morrow morning, and oblige Dan Halteron."

The first indictment charged that the appellant forged and counterfeited the entire body of this instrument, as well as that of the signature thereto.

To this indictment a plea of not guilty was entered, and a jury was selected and sworn to try the issue, and the proof having been heard in part, the court, over the objections of the appellant, withdrew the case from the trial jury and re-referred it to another grand jury, which found a new indictment, charging the appellant, in substance, with having committed the crime of forgery, by writing the figure 1 just before the figures 75, so as to make the order read $1.75 cents, instead of 75 cents, for which sum it was given. The alleged alteration in the particular last mentioned was an actual occurrence. These two indictments set out substantially the same offense. The facts alleged in the second indictment, and proven on the trial, were competent evidence under the first indictment, and were sufficient to have sustained a verdict of guilty under said indictment. It was alleged in the first indictment that the whole order was forged; but it turned out that only a part of it was forged, to-wit, the insertion of the figure 1, as representing one dollar, thereby making the order read $1.75, instead of 75 cents. This fact, under the allegation in the first indictment, that the order was forged for the whole amount, could have been proven, and the proof of this fact would have authorized a verdict of guilty, therefore, the appellant was twice put in jeopardy for the same offense, which is not allowable.

The judgment is reversed, with directions to grant a new trial and dismiss the indictment.

CRANE v. COMMONWEALTH.

(Filed June 17, 1890—Not to be reported.)

Criminal law—Instructions—Upon the trial of appellant under an indictment for manslaughter the court, after instructing the jury as to the law of manslaughter, erred to the prejudice of appellant in instructing the jury as to recklessly firing his pistol and unintentionally killing deceased. Said instruction was misleading as the appellant admitted the intentional shooting, but insisted that he did it in self-defense. It was prejudicial error to give the following instruction: "If the jury find from the evidence, to the exclusion of a reasonable doubt, that the defendant brought about a meeting between himself and the deceased for the purpose either of killing or of chastising him, and in a meeting so brought about the parties became involved and the defendant shot and killed the deceased, they will not acquit on the ground of self-defense or apparent necessity, even though he may have been in imminent danger of great bodily harm at the time, as contemplated in the second indictment." There was proof tending to show that after going to a public meeting, where both the accused and deceased had the right to go, and that the accused, just before the conflict, abandoned any purpose to injure the deceased and was in good faith trying to avoid a conflict. The court should have given an instruction recognizing the right of self defense after abandonment of any intention to inflict bodily harm upon the deceased.

Yeaman & Lockett for appellant.

P. W. Hardin for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Holt.

The appellant, George Crane, urges several grounds for a reversal of his conviction upon an indictment for manslaughter, charging him with the killing of Douglas Below. We perceive but one error, and it alone will, therefore, be discussed.

The court, after instructing the jury as to the law of manslaughter and self-defense, gave these two instructions:

"3. If the jury find from the evidence, to the exclusion of a reasonable doubt, that the defendant brought about a meeting between himself and the deceased for the purpose either of killing or of chastising him, and in a meeting so brought about the parties became involved, and the defendant shot and killed Below, they will not acquit on the ground of self-defense or apparent necessity, even though he may have been in imminent danger of great bodily harm at the time, as contemplated in the second instruction.

"4. If the jury believe from the evidence, beyond a reasonable doubt, that defendant, at the time and place mentioned by the witnesses, intentionally fired off his pistol, and accidently, in a careless, reckless manner, and not in self-defense, shot and killed deceased, they will find him guilty, and fix his punishment as in the first instruction."

The last instruction was misleading. There was no claim that the killing was a reckless, unintentional one. The only question was whether the appellant acted in self-defense.

This was the issue, and the only one disclosed by the evidence.

The appellant testified that he did the shooting, and that it was intentional, but in his self-defense. No instruction should, therefore, have been given as to a reckless, unintentional killing. Nor did the third instruction present correctly and fully the law of the case as disclosed by the evidence.

Its language is objectionable in being of a too general character. It tells the jury if the accused "brought about a meeting" between himself and the deceased, in order to kill or chastise him, then he could not rely upon self-defense, even though he may have been in imminent danger when he shot the deceased.

Undoubtedly this is true, generally speaking, as to one who seeks and then provokes a quarrel with another in order to kill him. If one, by his own wrongful act, makes the danger or harm to himself necessary or excusable in the person about to inflict it, then the former can not excuse the taking of life or doing of great bodily harm upon the plea of self-defense.

The term "brought about a meeting" is of too general a character, however, for use in an instruction to a jury where life or liberty is involved.

It gives them too much latitude. It is true it was coupled with a required intention upon the part of the accused, but yet it is, in our opinion, as was said in Allen v. Commonwealth, 9 Ky. Law Rep., 784, open to objection.

The killing occurred at a public meeting, to which the accused had a right to go. The jury may, from the general language of the instruction, have believed, however, that by so going he "brought about the meeting," and was, therefore, deprived of the right of self-defense, although they might believe that after his arrival he was in no way, or to any extent, the aggressor.

There was testimony tending to show, however, that even if the accused sought the deceased for the purpose of provoking a difficulty, and then doing him great bodily harm, he had, just before the conflict, abandoned any such purpose, and was, in good faith, trying to avoid one. If this were so, his right of self-defense revived; and, there being some evidence to this effect, this phase of the case should have been, by proper instruction, submitted to the jury. It is in this respect the instruction now under consideration is especially objectionable.

We refrain from a discussion of the evidence in the case as there must be a retrial.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

CITY OF COVINGTON v. ARTHUR, &c.

(Filed June 7, 1880—Not to be reported.)

Appellants, being the owners of property within the corporate limits of the city of Covington, resist the collection of city taxes on same for the years 1880 and 1887, inclusive, alleging that the land is not used for city purposes or benefited by improvements and expenditures made by the city. Held—That as this court held that this land was not subject to city taxation for 1873, and the proof failing to show any substantial change in its condition since that time, the burden of city taxation for the years claimed can not justly be imposed upon it.

Hallam & Myers and W. A. Byrne for appellant.

O'Hara & Bryan for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

The corporate limits of the city of Covington having been so extended by legislative act as to include a portion of the land of Richard Southgate, he, as to the year 1852, denied the right of the city to tax it, upon the ground that it was not used as town property, but was vacant or used for agricultural purposes.

His claim was sustained by this court in 1854. (City of Covington v. Southgate, 15 B. M., 491.)

The opinion in the case discusses the limitations upon the power of taxation in such a case, and following Cheaney v. Hooser, 9 B. M., 344, decides, in substance, that where the property is not really necessary for town purposes, and is not benefited by the local burden, it can not be subjected to it, because this would, in effect, be taking the property of one person, and, under the guise of taxation, giving it to others.

Southgate died, and his lands were partitioned among his devisees.

In doing so the commissioners left spaces through the land, upon the idea that the streets leading toward it would, in time, be extended.

The city assessed the land for 1859 and 1860. Some of the devisees denied its rights to do so; and this court, in 1863, finding that the status of the land was substantially the same as in 1852, sustained their denial, holding that the imaginary streets upon

the plat of the division by the commissioners, and which had been left to correspond with the streets of the city that were pointing in that direction, did not amount to a dedication of the land for city purposes, and also finding, as a fact, that the division of it into lots was for convenience, intended to equalize the owners in the division of it.

The appellees are the owners of a part of the Southgate land. The city assessed their lots, or some of them, for the years 1868 to 1873, inclusive; and this court in 1879 sustained their application to enjoin the collection of the taxes.

That action was between the same parties as this one. The court was then called upon to determine the same question that is now before us, save the taxation relates to different years. It then held that the condition of the land, as it was in 1860, substantially remained in 1873, and that the former action, therefore, determined that one.

This suit is also to enjoin the collection of city taxes assessed against certain lots of the appellees, and which are a part of the Southgate land, for the years 1880 to 1887, inclusive, and the question is whether the condition of the property has so changed from 1873 to the period for which taxes are now claimed as to authorize their imposition.

It is urged in argument that such a change had taken place as to render this case entirely free of the principles and consequences of the former decisions.

Let us see. The proposed tax does not embrace all of the land of the appellees lying within the city limits. In considering the question at issue it is proper, however, to regard all of the lots so far as they adjoin. We must also have in view their condition when the tax was assessed, and not when the evidence in this case was taken.

Seven years had elapsed from the time of the last attempted imposition of tax considered by this court until the city commenced the assessment now in question. During that time the city and its improvements had been gradually extending in the direction of the appellees' land. Some additional houses had been erected here and there in the vicinity of the lots. In 1880, however, no streets or other city improvements, such as water or gas-pipes or street lamps had been extended to or in the immediate vicinity of any of the lots of the appellees.

Together they amounted in area to about twenty acres.

They did not all lie adjacent, however. Some of the lots assessed were sold by the appellees in 1881, some in 1882 and one in 1883. Those so sold lay nearest to the approaching city improvements, and comprised all the land the city sought to tax, save some lots, beyond which, together with other adjacent lots of the appellees, constituted one body of land of about thirteen and a half acres.

The city did not, of course, seek to tax the lots sold by the appellees as against them after their sale.

Their condition and situation up to that time is, therefore, to be regarded.

The evidence is satisfactory as to the lots so sold that up to the time of the sale no city improvements, in the shape of streets, lights, gas-pipes, etc., were contiguous to them, or so near as to be of use or benefit to them, and that they were not in use as town lots, or so situated that they should be so regarded.

It is shown, by photographs and otherwise, that soon after the sale the city extended itself to some of them, or in the immediate vicinity, by the erection of houses, the grading of streets,

etc., but this avails only as an additional fact, showing that the city was spreading in that direction. This is not sufficient, however, to authorize their taxation under the circumstances existing prior to their sale. As to the thirteen and a half acres of land, it is evident that its condition and use has not changed materially since 1873, when this court held that it, or portions of it, were not liable for city tax. It is still used mainly for agricultural purposes. It is enclosed by a rough fence, save one lot, which is uninclosed and used for making brick. No streets touch it, and no city improvements are so near it as to be beneficial to it. It is remote from the improved portion of the city, not far from its southwestern limit, and adjoining it are acres of unimproved and unoccupied lands. It is true the city has, since 1873, extended its water service, lamp-posts, etc., in the direction of this land; but it in no sense needs these improvements; they are not necessary to its present use, and they did not reach the other lots of the appellees until after their sale.

This court had decided in 1879 (Arthur, &c. v. City of Covington, &c., MS. opin., January 16, 1879) that this property was not liable for city tax in 1873. This being so, the onus rested upon the city to show such a change as authorized its imposition.

The lower court has found that this has not taken place. It is a question of fact.

Its opinion is entitled to weight, and upon a consideration of the testimony we concur in it, and the former decisions of this court must, therefore, control.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

BAMBERGER, BLOOM & CO., &c. v. VINCENT.

(Filed April 23, 1890.)

1. Venue—An action upon a return of no property found, pursuant to section 439 of the Code, must be brought in the county in which the judgment is rendered, or in which the judgment defendant resides or is summoned. And if the action is brought in any other county than that in which the judgment defendant resides, the jurisdiction does not attach until the summons is served on the judgment defendant in the county in which the action is brought, and, therefore, there is no lis pendens, and the plaintiff acquires no lien upon the debt which he attempts to subject to the satisfaction of his judgment until the summons is thus served.

2. A void judgment can not be reversed until a motion to set it aside has first been made in the lower court and overruled.

H. C. Martin and W. J. Macey for appellants.

W. P. D. Bush, W. H. Botts and H. A. Watkins for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Presiding Judge Barbour.

Section 70 of the Civil Code provides that "an action upon a return of no property found, pursuant to section 489, must be brought in the county in which the judgment is rendered, or in which the defendant resides or is summoned."

The words we have italicised have reference to the judgment defendant, and not to a person who may be made a defendant in the action as a garnishee. Therefore, unless the petition shows that the action is brought in the county where the judgment was rendered, or the county in which the judgment defendant resided, or unless the judgment defendant is summoned in the county in which the action is brought, there is no lis pendens, and the plaintiff in the action acquires no lien upon the debt which he attempts to subject to the satisfaction of his judgment. If the action is brought in the county where the judgment is rendered, or where the judgment defendant resides, the court has jurisdiction. But if it is brought in any other county, the jurisdiction does not attach until the sumomns is served on the judgment defendant in that county.

In this case Bamberger, Bloom & Co. obtained a personal judgment against Slaughter in Grayson county, and after execution issued thereon was returned no property found, instituted this suit in Hart county against the judgment defendant and Handley, who owed him a debt secured by mortgage on land in Hart county, to subject the debt to the satisfaction of their judgment.

After the institution of this suit, but before process had been served on either Slaughter or Handley, Slaughter, for a valuable consideration, assigned the debt on Handley to the appellee, Vincent. As it is not alleged that Slaughter was a resident of Hart county, the jurisdiction of the Hart Circuit Court could only attach when the summons was served on Slaughter in that county.

Until the summons was thus served there was no lis pendens, and Vincent having in the meantime become the owner of the debt on Handley, can not now be affected by the filing of the petition in Hart, though it was filed before he bought the debt, for, as we have said, there having been no service on Slaughter (in fact it appears he never was summoned), it must be held that there was no action pending at the time he bought the note.

The judgment in so far as it subjects the mortgaged land to the payment of Vincent's debt is correct, but in so far as it attempts to subject it to the payment of Bamberger, Bloom & Co.'s judgment against Slaughter it is clearly void. The judgment in effect makes Handley pay not only his debt (and that is all he could be made to do), but Slaughter's debt also. But we can not reverse the judgment on this appeal for two reasons:

1st. There was no motion made to set aside the judgment in so far as it subjected the land to the payment of Bamberger, Bloom & Co.'s demand against Slaughter, and we can not reverse a void judgment until a motion to set it aside is first made and overruled. (Carroll's Code, section 763.)

2d. On this appeal Handley is not complaining of the judgment in favor of Bamberger, Bloom & Co., but prosecutes the appeal in conjunction with them. The real complaint being, it seems, that Vincent was preferred over Bamberger, Bloom & Co.

The judgment is affirmed.

(From Albany Law Journal.)

UNITED STATES SUPREME COURT.

LEISY & CO. v. HARDIN.

(Filed April 28, 1890.)

Constitutional law—Original liquor package case.

Dissenting opinion. Prevailing opinion, ante 123.

Opinion of the court by Judge Gray.

Mr. Justice Harlan, Mr. Justice Brewer and myself are unable to concur in this judgment. As our dissent is based on the previous decisions of this court, the respect due to our associates, as well as to our predecessors, induces us to state our position, as far as possible, in the words in which the law has been heretofore declared from this bench.

The facts of the case, and the substance of the statutes whose validity is drawn in question, may be briefly stated.

It was an action of replevin of sundry kegs and cases of beer, begun in an inferior court of the State of Iowa against a constable of Lee county in Iowa, who had seized them at Keokuk in that county under a search warrant issued by a justice of the peace pursuant to the statutes of Iowa, which prohibit the sale, the keeping for sale, or the manufacture for sale, of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under an annual license granted by the district court of the proper county, upon being satisfied that the applicant is a citizen of the United States and of the State of Iowa, and a resident of the county, and otherwise qualified.

The plaintiffs were citizens and residents of the State of Illinois, engaged as brewers in manufacturing beer at Peoria, in that State, and in selling it in the States of Illinois and Iowa.

The beer in question was manufactured by them at Peoria, and there put up by them in said kegs and cases, each keg being sealed, and having upon it, over the plug at the opening, a United States internal revenue stamp, and each case being substantially made of wood, containing two dozen bottles of beer, and sealed with a metallic seal which had to be broken in order to open the case. The kegs and cases, owned by the plaintiffs and so sealed, were transported by them from Peoria by railway to Keokuk, and there sold and offered for sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases.

The Supreme Court of Iowa having given judgment for the defendant, the question presented by this writ of error is whether the statutes of Iowa, as applied to these facts, contravene section 8 of article 1, or section 2 of article 4 of the Constitution of the United States, or section 1 of article 14 of the amendments to the Constitution.

By section 8 of article 1 of the Constitution "the congress shall have power," among other things, "to regulate commerce with foreign nations and among the several States," and "to

make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

By section 2 of article 4 "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By section 1 of the fourteenth amendment "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By the tenth amendment "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Among the powers thus reserved to the several States is what is commonly called the police power—that inherent and necessary power essential to the very existence of civil society, and the safeguard of the inhabitants of the States against disorder, disease, poverty and crime.

"The police power belonging to the States in virtue of their general sovereignty," said Mr. Justice Story, delivering the judgment of this court, "extends over all subjects within the territorial limits of the States, and has never been conceded to the United States." (Prigg v. Pennsylvania, 16 Pet., 539, 625.)

This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain firetest is beyond the constitutional power of congress to enact, except so far as it has effect within the United States, as, for instance, in the District of Columbia and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters-patent from the United States. (United States v. Dewitt, 9 Wall., 41; Patterson v. Kentucky, 97 U. S., 501.)

The police power includes all measures for the protection of the life, the health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling-houses and lottery tickets. (Slaughter-house Cases, 16 Wall., 36, 62, 87; Fertilizing Co. v. Hyde Park, 97 U. S., 659; Phalan v. Virginia, 8 How., 163, 168; Stone v. Mississippi, 101 U. S., 814.)

This power, being essential to the maintenance of the authority of local government and to the safety and welfare of the people, is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect, "no legislature can bargain away the public health or the public morals. The people themselves can not do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself. (Stone v. Mississippi, 101 U. S., 814, 819; Butchers' Union Co. v. Crescent City Co., 111 Id., 746, 753; New Orleans Gas Co. v. Louisiana Light Co., 115 Id., 650, 675; New Orleans v. Houston, 119 Id., 265, 275.

The police power extends not only to things intrinsically dan-

gerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is a subject of commerce and of lawful use, yet, because of its explosive and dangerous quality, all admit that the State may regulate its keeping and sale.

And there is no article, the right of the State to control or to prohibit the sale or manufacture of which within its limits, is better established than intoxicating liquors. (License Cases, 5 How., 504; Downham v. Alexandria Council, 10 Wall., 173; Bartemeyer v. Iowa, 18 Id., 129; Beer Co. v. Massachusetts, 97 U. S., 25; Tiernan v. Rinker, 102 Id., 123; Foster v. Kansas, 112 Id., 20; Mugler v. Kansas and Kansas v. Ziebold, 123 Id., 623; Kidd v. Pearson, 128 Id., 1; Eilenbecker v. Plymouth County, 134 Id., 31.

In Beer Co. v. Massachusetts, above cited, this court, affirming the judgment of the Supreme Judicial Court of Massachusetts, 115 Massachusetts, 153, held that a statute of the State, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the State had long before chartered and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this court for its judgment were the following:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature can not be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporation may suffer. All rights are held subject to the police power of the State.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself.

"Since we have already held, in the case of Bartemeyer v. Iowa that a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts." (97 U. S., 32, 33.)

In Mulger v. Kansas and Kansas v. Ziebold, above cited, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage, and declaring all places where such liquors were manufactured or sold in violation of the statute to be common nuisances, and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the State, even as applied to persons who, long before the passage of the statute, had constructed buildings specially adapted to such manufacture.

It has also been adjudged that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such li-

quors, under the internal revenue laws of the United States, affords any defense to an indictment by a State for selling the same liquors contrary to its statutes. (License Tax Cases, 5 Wall., 462; Pearvear v. Commonwealth, Id., 475.)

The clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," has no bearing upon the case. The privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship. (Connor v. Elliott, 18 How., 591, 593; Curtis, J., in Scott v. Sanford, 19 Id., 393, 580; Paul v. Virginia, 8 Wall., 168, 180; McCready v. Virginia, 94 U. S., 391, 395.) As observed by the court in Bartemeyer v. Iowa, "the right to sell intoxicating liquors, so far as such right exists, is not one of the rights growing out of citizenship of the United States." (18 Wall., 133.)

Nor is the case affected by the fourteenth amendment of the Constitution. As was said in the unanimous opinion of this court in Barbier v. Connolly, after stating the true scope of that amendment, "but neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." (113 U. S., 27, 31.) Upon that ground the amendment has been adjudged not to apply to a State statute prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose, or the sale of oleomargarine lawfully manufactured before the passage of the statute. (Mugler v. Kansas, 123 U. S., 623, 663; Powell v. Pennsylvania, 127 Id., 678, 683, 687.)

The remaining, and the principal, question is whether the statute of Iowa, as applied to the sale within that State of intoxicating liquors in the same cases or kegs, unbroken and unopened, in which they were brought by the seller from another State, is repugnant to the clause of the Constitution granting to congress the power to regulate commerce with foreign nations and among the several States.

In the great and leading case of Gibbons v. Ogden, 9 Wheat., 1, the point decided was that acts of the legislature of New York, granting to certain persons for a term of years the exclusive navigation by steamboats of all waters within the jurisdiction of the State, were, so far as they affected such navigation by vessels of other persons licensed under the laws of the United States, repugnant to the clause of the Constitution empowering congress to regulate foreign and inter-state commerce.

Chief Justice Marshall, in delivering judgment, after speaking of the inspection laws of the States, and observing that they had a remote and considerable influence on commerce, but that the power to pass them was not derived from a power to regulate commerce, said: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to State legisla-

tion. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." (Pages 203, 204.) Again, he said that quarantine and health laws "are considered as flowing from the acknowledged power of a State to provide for the health of its citizens," and that the constitutionality of such laws had never been denied. (Page 205.)

Mr. Justice Johnson, in his concurring opinion, said: "It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision." (Page 235.)

That Chief Justice Marshall and his associates did not consider the constitutional grant of power to congress to regulate foreign and inter-state commerce as of its own force, and without national legislation, impairing the police power of each State within its own borders to protect the health and welfare of its inhabitants is clearly indicated in the passage above quoted from the opinions in Gibbons v. Ogden, and is conclusively proved by the unanimous judgment of the court delivered by the chief justice five years later, in Willson v. Blackbird Creek Marsh Co., 2 Pet., 245.

In that case the legislature of Delaware had authorized a dam to be erected across a navigable tide-water creek which opened in Delaware bay, thereby obstructing the navigation of the creek by a vessel enrolled and licensed under the navigation laws of the United States. The decision in Gibbons v. Ogden was cited by counsel as conclusive against the validity of the statute of the State. But its validity was upheld by the court for the following reasons:

"The act of assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks, passing through a deep marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

"The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States to 'regulate commerce with foreign nations and among the several States.'

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States;

we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." (2 Pet., 251, 252).

In Brown v. Maryland, 12 Wheat., 419, the point decided was that act of the legislature of Maryland, requiring all importers of foreign goods by the bale or package, or of spirituous liquors, and "other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce," to first take out a license and pay $50 for it, and imposing a penalty for failure to do so, was, as applied to sales by an importer of foreign liquors in the original packages, unconstitutional, both as laying an impost, and as repugnant to the powers of Congress to regulate foreign commerce.

The statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and was not an exercise of the police power of the State. And Chief Justice Marshall, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder, or the removal or destruction of infectious or unsound articles which endanger the public health, "is a branch of the police power which unquestionably remains, and ought to remain, with the States." (Pages 443, 444.)

Moreover, the question there presented and decided concerned foreign commerce only and not commerce among the States. Chief Justice Marshall, at the outset of his opinion, so defined it, saying: "The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported." (Page 436.)

It is true that, after discussing and deciding that question, he threw out this brief remark: "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State." (Page 449.) But this remark was obiter dictum, wholly aside from the question before the court, and having no bearing on its decision, and, therefore, extra-judicial, as has since been noted by Chief Justice Taney and Mr. Justice McLean in the License Cases (5 How., 504, 575, 578, 594), and by Mr. Justice Miller in Woodruff v. Parham, 8 Wall., 123, 139.)

To a remark, made under such circumstances, are peculiarly applicable the warning words of Chief Justice Marshall himself in an earlier case, where, having occasion to explain away some dicta of his own in delivering judgment in Marbury v. Madison, 1 Cranch, 137, he said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may

serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (Cohens v. Virginia, 6 Wheat., 264, 399. 400.) Another striking instance in which the maxim has been applied and acted on is to be found in the opinion of the court at the present term in Hans v. Louisiana, 134 U. S., 1, 20.

But the unanimous judgment of this court in 1847, in Pierce v. New Hampshire, reported together with Thurlow v. Massachusetts and Fletcher v. Rhode Island as the License Cases, 5 How., 504, is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the court, and Chief Justice Taney, as well as each of six associate justices, stated his reasons for concurring in the judgment.

The cases from Massachusetts and Rhode Island arose under statutes of either State prohibiting sales of spirituous liquors by any person, in less than certain quantities, without first having obtained an annual license from municipal officers; in the one case, from county commissioners, who, by the express terms of the statute, were not required to grant any licenses when, in their opinion, the public good did not require them to be granted; and in the other case, for a town council, who were forbidden to grant licenses whenever the voters of the town, in town meeting, decided that none should be granted. (Massachusetts Revised Statutes, 1836, chapter 47, sections 3, 17, 13-25; statutes 1837, chapter 42, section 2; Rhode Island Public Laws of 1844, page 496, section 4; Laws of 1845, page 72; 5 How., 506-510, 540.) Those statutes were held to be constitutional, as applied to foreign liquors which had passed out of the hands of the importer; while it was assumed that, under the decision in Brown v. Maryland, those statutes could be allowed no effect as to such liquors while they remained in the hands of the importer in the original packages upon which duties had been paid to the United States. (5 How., 576, 590, 610, 618.)

The case of Pierce v. New Hampshire directly involved the validity, as applied to liquors brought in from another State, of a statute of New Hampshire, which imposed a penalty on any person selling any wine, rum, gin, brandy or other spirits, in any quantity, "without license from the selectmen of the town or place where such person resides." (New Hampshire Laws of 1838, chapter 369; 5 How., 555.) The plaintiffs in error, having been indicted under that statute for selling to one Aaron Sias, in the town of Dover, in the State of New Hampshire, one barrel of gin without license from the selectmen of the town, at the trial admitted that they so sold to him a barrel of American gin; and introduced evidence that "the barrel of gin was purchased by the defendants in Boston, in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua bridge, and from thence to the defendants' store in Dover, and afterward sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts." The defendants contended that the statute was unconstitutional, because it was "in violation of certain public treaties of the United States with Holland, France and other countries, containing stipulations for the admission of spirits into the United States," and because it was repugnant to the clauses of the Constitution of the United States restricting the power of the States to lay duties on imports, and granting the power to congress to regulate commerce with foreign nations and among the several States. Chief Justice Parker instructed the jury "that this State could not regulate

commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries, or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce and commerce between the States; and that this statute was a regulation of that character, and constitutional." After a verdict of guilty, exceptions to this instruction were overruled by the highest court of the State. (5 How., 554-557; 13 N. H., 536.)

In that case, as in the case at bar, the statute of the State prohibited sales of intoxicating liquors by any person without a license from municipal authorities, and authorized licenses to be granted only to persons residing within the State; and the liquors were sold within the State by the importer, and in the same barrel, keg or case, unbroken and in the same condition, in which he had brought them from another State. Yet the judgment of the highest court of New Hampshire was unanimously affirmed by this court.

Chief Justice Taney, Mr. Justice Catron and Mr. Justice Nelson were of opinion that the statute of New Hampshire was a regulation of interstate commerce, but yet valid so long as it was not in conflict with any act of Congress.

Chief Justice Taney, after recognizing that "spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and traffic, like any other commodity in which a right of property exists, and Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded, and may, therefore, admit, or not, as it shall deem best, the importation of ardent spirits; and inasmuch as the laws of Congress authorized their importation, no State has a right to prohibit their introduction;" and yet upholding the validity of the statutes of Massachusetts and Rhode Island, as not interfering with the trade in ardent spirits while they remained a part of foreign commerce, and were in the hands of the importer for sale, in the cask or vessel in which the laws of congress authorized them to be imported (page 577), proceeded to state the case from New Hampshire as follows:

"The present case, however, differs from Brown v. Maryland in this: That the former was one arising out of commerce with foreign nations, which congress has regulated by law; whereas, the present is a case of commerce between two States, in relation to which congress has not exercised its power. Some acts of congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island, because in these two cases the laws of the State operated upon the articles after they had passed beyond the limits of foreign commerce, and, consequently, were beyond the control and power of congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is, therefore, a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and sub-

ject to its control and regulation." (Page 578.) And he concluded his opinion thus: "Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For although the gin sold was an import from another State, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet as congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." (Page 586.)

Mr. Justice Catron expressed similar views. While he was of opinion that the ultimate right of determining what commodities might be lawful subjects of interstate commerce belonged to congress in the exercise of its power to regulate commerce, and not to the State in the exercise of the police power, he was equally clear that the statute of New Hampshire was a valid regulation, in the absence of any legislation upon the subject by congress. After pointing out the difficulties standing in the way of any attempt by congress to make the special and various regulations required at different places at the maritime or inland borders of the States, he said: "I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that congress can not do what the States have done, are doing, and must continue to do, from a controlling necessity, even should the exclusive power in congress be maintained by our decision. (Page 606.) Congress has stood by for nearly sixty years and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and all their borders, without objection; and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would, by our decision, expunge more State laws and city corporate regulations than congress is likely to make in a century on the same subject; and on no better assumption than that congress and the State legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts." (Page 607.) And finally, in summing up his conclusions, he said: "That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling, of which the defendants were indicted and convicted; but that the State law was constitutionally passed, because of the power of the State thus to regulate, there being no regulation of Congress, special or general, in which the State law was repugnant." (Pages 608, 609.)

Mr. Justice Nelson expressed his concurrence in the opinions delivered by the Chief Justice and Mr. Justice Catron. (Page 618.)

Justices McLean, Daniel, Woodbury and Grier, on the other hand, were of opinion that the license laws of New Hampshire, as well as those of Massachusetts and Rhode Island, were merely police regulations, and not regulations of commerce, although they might incidentally affect commerce.

Mr. Justice McLean, in the course of his opinion, in Thurlow v. Massachusetts, said: "The license acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all

the States. Since the adoption of its Constitution they have existed in Massachusetts." (Page 588). (Massachusetts Statutes, 1786, chapter 68; 1792, chapter 25; 7 Dane Abr., 43, 44.) "It is the settled construction of every regulation of commerce that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or any thing which contaminates its morals, or endangers its safety. And this is an acknowledged principle applicable to all general regulations.

Individuals, in the enjoyment of their own rights, must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And though they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State. (Pages 589, 590.) A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates exclusively to the internal police of the State. (Page 591.) The police power of a State, and the foreign commercial power of congress, must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments." (Page 592.)

In his opinion, in Pierce v. New Hampshire, he declared that the same views were equally applicable to that case; and added: "The taxes in the form of a license, as here presented, counteracts no policy of the Federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgence, and to advance the moral and physical welfare of society. If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which had been exclusively given to congress. But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and can not be sold without a license. The right of an importer of ardent spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on account of their having transported this property from Massachusetts to New Hampshire." (Pages 595, 596.)

Mr. Justice Daniel said: "The license laws of Massachusetts, Rhode Island and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular community may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere

with it, either in appearance or reality; they do not prohibit sales, either by wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority. These laws are, therefore, in violation neither of the Constitution of the United States nor of any law or treaty made in pursuance or under authority of the Constitution." (Page 617.)

Mr. Justice Woodbury repeated and enforced the same views, saying, among other things: "It is manifest also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore. (Page 619.) The subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power. The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, if a merchant extensively engaged in commerce often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State or abroad. (Page 620.) But this license is a regulation neither of domestic commerce between the States nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State, and become component parts of its property. Then it has, by the Constitution, the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce. (Page 625.) Whether such laws of the States, as to licenses, are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which, from their nature and object, must belong to all sovereign States. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper or apparently embraced in the Constitution. So whether they conflict or not, indirectly and slightly with some regulations of foreign commerce, after the subject-matter of that commerce touches the soil or waters within the limits of a State, is not, perhaps, very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government." (Page 627.)

Mr. Justice Grier did not consider the question of exclusiveness of the power of congress to regulate foreign and interstate commerce as involved in the decision, but maintained the validity of the statutes in question under "the police power, which is exclusively in the States." (Pages 631, 632.)

The other members of the court at that time were Mr. Justice Wayne and Mr. Justice McKinley, who do not appear, by the re-

port, to have taken part in the decision of these cases, although the former appears at page 545 to have been present at the argument, and by the clerk's minutes to have been upon the bench when the judgments were delivered. It is certain that neither of them dissented from the decision of the court. The consequences of an opposite conclusion in the case from New Hampshire, regarding liquors brought from one State into another, were forcibly stated by several of the judges.

Mr. Justice McLean said: "If the mere conveyance of property from one State to another shall exempt it from taxation, and from general State regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary." (Page 595.)

Mr Justice Catron said: "To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be that the dealers in New Hampshire would sell only spirits produced in other States, and that the production of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." (Page 608.)

Mr. Justice Woodbury said: "If the proposition was maintainable, that without any legislation by congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint of spirits or wines; and if its sale can not be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable prsons, with perfect impunity." (Pages 625, 626.)

Mr. Justice Grier, in an opinion marked by his characteristic vigor and directness of thought and expression (after saying that he mainly concurred with Mr. Justice McLean), summed up the whole matter as follows:

"The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime. I do not consider the question of the exclusiveness of the power of congress to regulate commerce as necessarily connected with the decision of this point."

"It has been frequently decided by this court 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category.

"As subjects of legislation they are, from their very nature, of primary importance; they lie at the foundation of social exist-

ence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede when they come in conflict or collision, 'salus populi suprema lex.'

"If the right to control these subjects be 'complete, unqualified and exclusive' in the State legislature, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship, which is the instrument of commerce, and its officers and crew the agents of navigation. They seize the infected cargo and cast it overboard. The soldier and sailor, though in the service of the government, are arrested, imprisoned and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of congress, but because police laws for the preservation of health, prevention of crime and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference.

"It is not necessary, for the sake of justifying the State legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere; and for the public good; and if loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people." (Pages 631, 632.)

This abstract of the license cases shows (what is made yet clearer by an attentive reading of the opinion as a whole) that the difference of opinion among the judges was upon the question whether the State statutes, which all agreed had some influence upon commerce, and all agreed were valid exercises of the police power, could properly be called regulations of commerce.

While many of the judges said or assumed that a State could not restrict the sale by the importer, and in the original packages, of intoxicating liquors imported from a foreign country, which congress had authorized the importation of, and had cause duties to be levied upon; all of them undoubtingly held that where congress had not legislated a State might, for the protection of the health, the morals and the safety of its inhabitants, restrict or prohibit, at its discretion and according to its own views of policy, the sale by the importer of intoxicating liquors brought into it from another State, and remaining in the barrels or packages in which they were brought in.

The ability and thoroughness with which those cases were argued at the bar and on the bench, the care and thought bestowed upon their consideration, as manifested in the opinions delivered by the several judges, and the confidence with which

each judge expressed his concurrence with the result, make the decision of the highest possible authority. It has been accepted and acted on as such by the legislatures, the courts and the people of the Nation and of the States for forty years. It has not been touched by any act of congress; it has guided the legislation of many of the States; and it has been treated as beyond question by this court in a long series of cases. (Veazie v. Moor (1852), 14 How., 568, 575; Sinnot v. Davenport (1859), 22 Id., 227, 243; Gilman v. Philadelphia (1865), 3 Wall., 713, 730; Pervear v. Commonwealth (1866), 5 Id., 475, 479; Woodruff v. Parham (1868), 8 Id., 123, 139; United States v. Dewitt (1869), 9 Id., 41, 45; Henderson v. Mayor of New York (1875), 92 U. S., 259, 274; Beer Co. v. Massachusetts (1877), 97 Id., 25, 33; Patterson v. Kentucky (1878), 97 Id., 501, 503; Mobile County v. Kimball (1880), 102 Id., 691, 701; Brown v. Houston (1185), 114 Id., 622, 631; Walling v. Michigan (1883), 116 Id., 446, 461; Mugler v. Kansas (1887), 123 Id., 623, 657, 658.)

In the Passenger Cases, 7 How., 283, decided in 1849, two years after the License Cases, statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving from abroad, were adjudged to be repugnant to the Constitution and laws of the United States, and, therefore, void, by the opinion of Justices McLean, Wayne, Catron, McKinley and Grier, against the dissent of Chief Justice Taney and Justices Daniel, Nelson and Woodbury, each of the judges delivering a separate opinion. The decision in the License Cases was relied on by each of the dissenting judges (page 470, 483, 497, 518, 524, 559); and no doubt of the soundness of that decision was suggested in the opinions of the majority of the court, or in any of the subsequent cases in which the judgment of that majority was afterward approved and followed. (Henderson v. Mayor of New York, and Commissioners of Immigration v. North German Llyod, 92 U. S., 259; Chy Lung v. Freeman, Id., 275; People v. Compagnie Generale Transatlantique 107 Id., 59; Head Money Cases, 112 Id., 580.)

When Mr. Justice Grier, in the Passenger Cases, 7 How., 462, said: "And to what weight is that argument entitled which assumes that because it is the policy of congress to leave this intercourse free, therefore, it has not been regulated, and each State may put as many restrictions upon it as she pleases?" The context shows that he had in his mind cases in which the policy to leave commerce free had been manifested by statute or treaty; and he had already (page 457) made it manifest that he did not intend to retract or to qualify his opinion in the License Cases.

An intention on the part of congress that commerce shall be free from the operation of laws passed by a State in the exercise of its police power can not be inferred from the mere fact of there being no National legislation upon the subject, unless in matters as to which the power of congress is exclusive. Where the power of congress is exclusive the States have, of course, no power to legislate; and it may be said that congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of congress is paramount only, and not exclusive, the power of the State is not excluded until congress has legislated; and no intention that the States should not exercise, or continue to exercise, their power over the subject can be inferred from the want of congressional legislation. (Transportation Co. v. Parkersburg, 107 U. S., 691, 702-704.)

The true test for determining when the power of congress to regulate commerce is, and when it is not, exclusive was formu-

lated and established in Cooley v. Board of Wardens, 12 How., 299, concerning the validity of a State law for the regulation of pilots and pilotage, in which Mr. Justice Curtis, in delivering judgment, said: "When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, are imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature National, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." He then stated that the act of congress of August 7, 1789, chapter 9, section 4 (1 Statute 54) in regard to pilotage, manifested the understanding of congress, at the outset of the government, that the nature of the subject was not such as to require its exclusive legslation, but was such that, until congress should find it necessary to exercise its power, it should be left to the legislation of the States, because it was local and not National, and was likely to be best provided for, not only by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits; and he added, in words which appear to us equally appropriate to the case now before the court: "The practice of the States and of the National government has been in conformity with this declaration from the origin of the National government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action." (12 How., 319-321.)

In Gilman v. Philadelphia, 3 Wall., 713, 730, this court, speaking by Mr. Justice Swayne, applying the same test, and relying on Willson v. Blackbird Creek Marsh Co., and Cooley v. Board of Wardens, above cited, upheld the validity of a statute of Pennsylvania authorizing the construction of a bridge across the Schuylkill river, so as to prevent the passage of vessels with masts; and after stating the points adjudged in Brown v. Maryland, and in the Passenger Cases, said: "But a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail, or to be sold at all, without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper." (License Cases, 5 How., 504.)

By the same test, and upon the authority of Wilson v. Blackbird Creek Marsh Co., a statute of Wisconsin, authorizing the

erection of a dam across a navigable river, was held to be constitutional in Pound v. Turck, 95 U. S., 459, 463. To the like effect are Williamette Bridge v. Hatch, 125 Id., 1, 8-12, and other cases there cited.

Upon like grounds it was held, in Mobile County v. Kimball, 102 U. S., 691, that a statute of Alabama, authorizing the improvement of the harbor of Mobile, did not trench upon the commercial power of congress; and the court, after pointing out that some expressions of Chief Justice Marshall, in Gibbons v. Ogden, as to the exclusiveness of the power of congress to regulate commerce were restricted by the facts of that case, and by the subsequent judgment in Willson v. Blackbird Creek Marsh Co., said: "In the License Cases, which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of congress in the absence of congressional legislation. Extreme doctrines on both sides of the question were asserted by some of the judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of congress is essential to prohibit the action of the States upon the subjects there considered." (102 U. S., 700, 701.)

In Woodruff v. Parham, 8 Wall., 123, a State statute, imposing a uniform tax on all sales by auction within it, was held constitutional, as applied to sales of goods, the product of other States, and sold in the original and unbroken packages. In Hinson v. Lott, 8 Wall., 148, decided at the same time, it was adjudged that a State statute which prohibited any dealers introducing any intoxicating liquors into the State, from offering them for sale, without first paying a tax of fifty cents a gallon, and imposed a like tax on liquors manufactured within the State, was valid, as applied to liquors brought from another State, and held and offered for sale in the same barrels or packages in which they were brought in; because, in the words of Mr. Justice Miller, who delivered the opinion of the court in both cases, it was not "an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State." (8 Wall., 153.) These two cases were cited by the court in Low v. Austin, 13 Wall., 29, 34, and in Cook v. Pennsylvania, 97 U. S., 566, 573, in which, in accord with the opinions in the License Cases, State taxation upon original cases of wines imported from a foreign country, and upon which duties had been paid under acts of congress, was held to be invalid.

In Welton v. Missouri, 91 U. S., 275, the point decided was that a State statute, requiring the payment of a license tax from persons selling, by going from place to place within the State for the purpose, goods not the growth or manufacture of the State, and not from persons so selling goods which were the growth or manufacture of the State, was unconstitutional and void, by reason of the discrimination; and in Machine Co. v. Gage, 100 U. S., 676, a State statute imposing a like tax without discriminating as to the place of growth or produce of material or manufacture was adjudged to be constitutional and valid, as applied to machines made in and brought from another State.

In Brown v. Houston 114, U. S., 622, it was decided that coal mined in Pennsylvania and brought in boats by river from Pittsburg to New Orleans, to be there sold by the boatload on account of the Pennsylvania owner, and remaining afloat in its original condition and original packages, was subject, in common with all other property in the city, to taxation under the general tax laws

of Louisiana; and the court referred to Woodruff v. Parham, above cited. as upholding the validity of a "tax laid on auction sales of all property indiscriminately," and "which had no relation to the movement of goods from one State to another." (114 U. S., 634.)

In Walling v. Michigan, 116 U. S., 446, the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed a different tax upon persons engaged within the State in the business of selling or soliciting the sale of intoxicating liquors to be sent into the State from that imposed upon persons selling or soliciting the sale of such liquors manufactured within the State; and the court declared that the statute would be perfectly justified as "an exercise by the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people," if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the National legislature." (116 U. S., 460.)

In Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S., 557, the only point decided was that a State had no power to regulate the rates of freight of any part of continuous transportation upon railroads partly within the State and partly in other States. In Robbins v. Shelby Taxing District, 120 U. S., 489, a State law requiring the payment of a license tax by drummers and persons not having a regularly licensed house of business within the taxing district, offering for sale or selling any goods by sample, was decided to be unconstitutional as applied to persons offering to sell goods on behalf of merchants residing in other States, because, as the majority of the court held, its effect was "to tax the sale of such goods, or the offer to sell them, before they are brought into the State." (120 U. S., 497.) Neither of those cases appears to us to tend to limit the police power of the State to protect the public health, the public morals and the public peace within its own borders.

As was said by this court in Sherlock v. Alling, 93 U. S., 99, 103: "In conferring upon congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." It was accordingly held in that case that an action against a carrier engaged in interstate commerce might be maintained under a State statute giving a civil remedy, unknown to the common law, for negligence causing death; and in subsequent cases, that what a State might punish or afford redress for, it might seek by proper precautions to prevent; and, consequently, that a State statute requiring, under a penalty, engineers of all railroad trains within the State to be examined and licensed by a State board, either as to their qualifications generally, or as to their capacity to distinguish between color signals, was not in its nature a regulation of commerce, but was a constitutional exercise of the power reserved to the State, as intended to secure the safety of persons and property within their territorial limits, and so far as it affected interstate commerce not in conflict with any express enactment of congress upon the subject, nor contrary to any intention of congress to be presumed from its silence. (Smith v. Alabama, 124 U. S., 465; Nashville, Chattanooga & St. Louis Railway v. Alabama, 128 Id., 96.)

In Railroad Co. v. Husen, 95 U. S., 465, it was expressly conceded, in the opinion of the court delivered by Mr. Justice Strong, that a State, in the exercise of its police power, could "legislate to prevent the spread of crime, or pauperism, or disturbance of the peace," as well as "justify the exclusion of property, dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases." (95 U. S., 471.) And the decision, by which the statute of Missouri, forbidding the introduction of any Texas, Mexican or Indian cattle into the State, was held to be an unconstitutional interference with interstate commerce, rested, as clearly appears in the opinion in that case, and has since been distinctly recognized by the court, upon the ground that the statute made no distinction in the transportation, forbidden, between cattle which might be diseased and those which were not. (Kimmish v. Ball, 129 U. S., 217, 221.)

The authority of the States, in the exercise of their police power, and for the protection of life and health, to pass laws affecting things which are lawful subjects or instruments of commerce, and even while they are actually employed in commerce, has been expressly recognized by congress in the acts regulating the transportation of nitro-glycerine, as well as in the acts for the observation and execution of the quarantine and health laws of the States. (R. S., sections 4278-4280, 4792-4796.)

In Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S., 455, 465, the system of quarantine laws established by the State of Louisiana was held, in accordance with earlier opinions, to be a constitutional exercise of the police power; and it was said by the court: "Quarantine laws belong to that class of State legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." It was added that in this respect the case fell within the principle of Wilson v. Blackbird Creek Marsh Co.; Cooley v. Board of Wardens; Gilman v. Philadelphia, Pound v. Turck, and other cases.

In Mugler v. Kansas, 123 U. S., 623, the court said: "In the License Cases, 5 How., 504, the question was whether certain statutes of Massachusetts, Rhode Island and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question it became necessary to inquire whether there was any conflict between the exercise by congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of congress." (123 U. S., 657, 658.)

In Bowman v. Chicago & Northwestern Railway, 125 U. S., 465, the point, and the only point, decided was that a statute of Iowa, which forbade common carriers to bring intoxicating liquors into the State from any other Sate, without first obtain-

ing a certificate from a county officer of Iowa that the consignee was authorized by the laws of Iowa to sell such liquors, was an unconstitutional regulation of interstate commerce. While Mr. Justice Field in his separate opinion (page 507) intimated, and three dissenting justices (pages 514, 515) feared that the decision was in effect inconsistent with the decision in the License Cases, Mr. Justice Matthews, who delivered the judgment of the majority of the court, not only cautiously avoided committing the court to any such conclusion, but took great pains to mark the essential difference between the two decisions.

On the one hand, after making a careful analysis of the opinions in the License Cases, he said: "From this analysis it is apparent that the question presented in this case was not decided in the License Cases. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned." On the other hand, in stating the reasons for holding the statute of Iowa, prohibiting the transportation of liquors from another State, not to be a legitimate exertion of the police power of the State of Iowa, he said: "It is not an exercise of jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it." (12 U. S., 479, 498, 499.)

In the opinion of the majority of the court in that case it was noted that the omission of congress to legislate might not so readily justify an inference of its intention to exclude State legislation in matters affecting interstate commerce as in those affecting foreign commerce, Mr. Justice Matthews saying: "The organization of our State and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon congress to regulate commerce among the States is, indeed, contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that State legislation, however legitimate in its origin or subject, when it conflicts with the positive legislation of congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the States it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that congress

has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that until it positively interferes such commerce may be left to be freely dealt with by the respective States." (125 U. S., 482, 483.)

In Kidd v. Pearson, 128 U. S., 1, a statute of Iowa, prohibiting the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary and sacramental purposes only, and authorizing any building used for their unlawful manufacture to be abated as a nuisance, was unanimously held to be constitutional, as applied to a case in which the liquors were manufactured for exportation and were sold outside the State; and the court, in showing how impracticable it would be for congress to regulate the manufacture of goods in one State to be sold in another, said: "The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. A situation more paralyzing to the State governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." (128 U. S., 21, 22.)

The language thus applied to congressional supervision of the manufacture within one State of intoxicating liquors intended to be sold in other States appears to us to apply with hardly less force to the regulation by congress of the sale within one State of intoxicating liquors brought from another State. How far the protection of the public order, health and morals demands the restriction or prohibition of the sale of intoxicating liquors is a question peculiarly appertaining to the legislatures of the several States, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits and the usages of people of various races and origin, and living in regions far apart and widely differing in climate and in physical characteristics. The local option laws prevailing in many of the States indicate the judgment of as many legislatures that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single State, much less over the area of a continent. It is manifest that the regulation of the sale, as of the manufacture, of such liquors manufactured in one State to be sold in another, is a subject which, far from requiring, hardly admits of a uniform system or plan throughout the United States. It is, in its very nature, not national, but local; and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the sale or the manufacture of intoxicating liquors generally. Congress can not regulate this subject under the police power, because that power has not been conceded to congress, but remains in the several States, nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this court in Kidd v. Pearson, above cited, it was the object of the commercial clause of the Constitution to secure.

The above review of the judgments of this court since the decision in the License Cases appears to us to demonstrate that that decision, while often referred to, has never been overruled or its authority impugned.

It only remains to sum up the reasons which have satisfied us

that the judgment of the Supreme Court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. Salus populi suprema lex. The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce.

The police power extends to the control and regulation of things which, when used in a lawful and proper manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime.

The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the legislatures of the several States, and can be judicially and effectively exercised by them alone, according to their views of public policy and local needs; and can not practically, if it can constitutionally, be wielded by congress as part of a national and uniform system.

The statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State; they include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State (the validity of which is unquestioned) authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State and sold by the importer in what are called original packages, the consequence must be that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxicating liquors of whatever description, in casks or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of congress to convince us that it contemplated or intended such a result.

The decision in the License Cases, 5 How., 504, by which the court, maintaining these views, unanimously adjudged that a

general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities, including liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed; because it was made upon full argument and great consideration; because it established a wise and just rule regarding the most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by congress, by the State legislatures, by the courts and by the people; and because to hold otherwise would add nothing to the dignity and supremacy of the powers of congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of congress upon the subject, during the long period since the decision in the License Cases, appear to us to require the inference that congress intended that the law should remain as thereby declared by this court; rather than to warrant the presumption that congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons we are compelled to dissent from the opinion and judgment of the majority of the court.

SUPERIOR COURT ABSTRACTS.

KELLER v. COOPER.

Filed June 14, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

1. Infants—Ratification of contract—One is bound by contract made during infancy if it was fairly made, was judicious in its purpose and was ratified and sanctioned by him for months after his disability was removed by the retention and use, and, finally, the sale of the property which was the subject-matter of the contract.

In this case the appellant is held to be bound, upon the principle stated, on notes executed by him while an infant for an interest in a partnership.

2. Same—Even if a ratification in writing was necessary to satisfy the requirements of the statute of frauds, a deed of assignment of the firm property, executed by the infant with the other partners several months after he became of age, was sufficient for that purpose.

George H. Alexander and W. O. Harris for appellant; F. F. Fox for appellee.

REYNOLDS, &c. v. ROLAND.

Filed June 14, 1890. Appeal from Laurel Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

1. New trial—A proceeding by petition is not the mode prescribed by law to correct errors appparent on the face of the record in the action in which the judgment was rendered, of which there was complaint. If the court in which the error was made refuses to correct it the only remedy is by appeal.

2. Same—All parties when properly in court are conclusively presumed to know the terms of court as fixed by law; if they rely upon information which is incorrect, not furnished to them in the interest of the adversary, it is their misfortune, for which the law gives no remedy.

Ewell & Smith for appellants.

TABLER v. JONES & BROWN.

Filed June 14, 1890. Appeal from Laurel Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, affirming.

1. Venue of action—Section 77 of the Civil Code, which provides that an action against a railroad contractor for labor done or materials or supplies furnished, may be brought in the county wherein the labor, or most of it, is done, or wherein the materials or supplies, or most of them, are furnished, is not restricted to the case of one who, in the ordinary sense, labors for or furnishes materials or supplies to a contractor, but applies also to an action by a subcontractor against the contractor.

2. Separation of witnesses—Section 601 of the Civil Code, which provides that the judge may exclude witnesses from the court room, is not mandatory, but leaves to the sound judicial discretion of the judge how many and what witnesses shall be excluded.

3. New trial—One of the grounds for new trial was that the verdict was rendered by mistake. In support of this appellant filed the affidavit of one of the jury, to the effect that he understood that the verdict was to be found on the preponderance of the oral testimony, excluding a certain writing, and that if he had thought he could have considered the writing he would have been for a verdict for appellant. Held—That the court properly disregarded this affidavit.

4. Instruction as to burden of proof—In all civil cases the better practice in submitting questions of fact to the jury is for the court to simply tell them to decide as they believe from the evidence the fact to be, without telling them upon which party the burden is; but instructions as to the burden of proof have been too often sustained by the appellate court for this court to now condemn them or reverse on that account.

W. O. Bradley, G. R. Bradley, Bell & Bell and W. L. Brown for appellant; Alcorn & Craft for appellees.

PEAK v. GROVER'S EX'OR.

Filed June 14, 1890. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Decedents' estates—Verification of demand—In this action against an executor upon a demand, in the nature of an account for services rendered the decedent by the plaintiff in lending and collecting money and acting as the decedent's financial agent, the plaintiff's affidavit in its formal averments follows substantially the language of the statute. It also states every fact essential to a cause of action; it shows an employment, the rendering of the services, their value and the decedent's agreement to pay. The accompanying affidavits show that the services were rendered, their character and value and from the facts stated by them the inference naturally arises that the services were rendered under an employment. Held—That the demand is sufficiently verified. It was not necessary for the plaintiff to state in his affidavit the amount of each loan, to whom made and how settled.

E. E. Settle and T. R. Gordon for appellant; Lindsay & Botts for appellee.

BOONE, &c. v. CONNELLY, &c.

Filed June 14, 1890. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

An equitable assignment by one of what he may earn under an existing contract under which he is doing work will be held as against the assignor and his personal representative, even as against equities subsequently acquired by parties ignorant of the contract.

W. H. Miller and W. A. Tribble for appellants; J. H. Brown for appellees.

LEATHERS v. BAILER.

Filed June 14, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Juge Barbour, affirming.

1. Evidence—In this action against a sheriff to recover damages for his failure to execute a capias ad satisfaciendum in favor of plaintiff, the statement of the plaintiff that the family of the defendant in the capias were "in good circumstances," if incompetent, was not prejudicial to defendant, and defendant can not complain that the witness subsequently undertook to give in detail the amount of the property owned by family and its value, as it was done at defendant's instance upon cross examination.

2. Same—Cross-examination—While a party, by cross examination, does not necessarily waive his right to insist upon his objection to the evidence in chief, which he claims was incompetent, yet if the evidence in chief was immaterial, he can not afterwards complain that his cross examination has made it material.

3. Same—Reversible error—The appellant is not entitled to a reversal, because of the admission of incompetent evidence, if the appellee was allowed, without objection, to prove substantially the same facts by another witness.

Hallam & Myers for appellant; Orlando P. Schmidt for appellee.

CITY OF BOWLING GREEN, &c. v. BARCLAY, POTTER CO.

Filed June 14, 1890. Appeal from Warren Circuit Court. Opinion of the court by Judge Bowden, reversing.

Taxation of private banks—Article 2 of chapter 92 of the General Statutes, which provides for a tax on "shares of stock in State and national banks and other institutions of loan and discount," and provides that this tax shall be paid into the treasury, and "shall be in full of all tax, State, county and municipal," does not apply to private or unincorporated banks, private bankers being left to pay, as others, under the general provision of the revenue law, and, therefore, the payment into the State treasury by a firm of private bankers of a tax of 75 cents on each $100 of their capital does not exempt them from city or county taxation.

John E. DuBose, J. C. Sims and E. W. Hines for appellants; Dulaney & Mitchell for appellees.

OWSLEY v. BEST.

Filed June 14, 1890. Appeal from Mercer Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Pleading—Defect cured—In this action against a married woman upon a note executed by her, in which the plaintiff relied upon a judgment conferring upon defendant the rights and powers of a feme sole, the petition was defective in failing to allege that the defendant was a resident of the county, the circuit court of which rendered the judgment relied on, but the omission was cured by the answer of the defendant, which conceded that she was vested with these rights and powers.

2. Same—The averment that the note was without any good or valuable consideration constituted a good plea.

W. O. Bradley, M. H. Owsley and E. W. Hines for appellant; P. B. Thompson, Sr., for appellee.

GERMAN INSURANCE CO. v. INGRAM.

Filed June 14, 1890. Appeal from Bath Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Apppeals—A circuit court has no power to grant an appeal except at the term at which judgment is rendered, and while the appeal in this case was granted at a subsequent term, yet as the appellee has entered his appearance, not moving to dismiss, this court will take jurisdiction of the appeal.

2. Jurisdiction—The defendant, having entered its appearance to the action not merely to question the jurisdiction, but without restriction, the court acquired jurisdiction of its person.

D. S. Clay and J. J. Nesbitt for appellant; Wood & Day for appellee.

SHELBY COUNTY TRUST CO. v. TRUSTEES OF SHELBYVILLE.

Filed June 14, 1890. Appeal from Shelby Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Taxation of corporations—The capital stock of a corporation is the whole amount of stock subscribed for, and not merely what has been paid in, therefore, under the provisions of a city charter imposing a tax upon "the capital stock" of banks and other corporations, a corporation must pay taxes upon the whole amount of its capital stock subscribed for, and not merely on what has been paid in.

2. Same—Section 1 of article 10, chapter 92 of the General Statutes, which provides for a process of garnishment for the collection of taxes, applies as well to corporations as to natural persons.

L. A. Weakley and J. C. Beckham for appellant; L. C. Willis for appellees.

FEDDER'S EX'OR v. FEDDER.

Filed June 14, 1890. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, affirming.

1. Final order—In so far as the judgment appealed from merely expresses opinions and gives directions to the master respecting the right of the widow to dower and distribution, it is revocable, and may be hereafter disregarded by the court, and, therefore, those matters will not be considered upon this appeal.

2. Descent and distribution—The judgment in favor of the widow against the executor for money in lieu of articles exempt from distribution and not on hand was proper.

Hallam & Myers and E. J. Gausepohl for appellant; O. P. Schmidt for appellee.

COLE, &c. v. ROSE, &c.

Filed June 14, 1890. Appeal from Calloway Circuit Court. Opinion of the court by Judge Bowden, affirming.

Practice—Partial transcript—A judgment will not be reversed on a partial record not made on a schedule, filed in accordance with the provisions of the Code.

WHITE v. DWELLING HOUSE INSURANCE CO.

Filed June 14, 1890. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Peremptory instruction—Errors in admitting testimony can not be prop-

erly corrected by tacitly excluding the incompetent testimony and treating what remains as a failure of proof. If it had been rejected when offered, or if it had been afterwards excluded; the plaintiff would have had an opportunity to establish the fact, by competent testimony, of which he was deprived by the peremptory instruction.

2. Insurance—Misrepresentations—Where an insurance agent filled the blanks in the application, relying on his own knowledge of the premises, and the insured signed the paper without reading it, relying on the agent to write correctly what he had undertaken to do, the company is precluded from relying on any misrepresentations in the application.

3. Same—Waiver of proof of loss—In this action on a policy of fire insurance, it appears that soon after the fire, and within the time limited for making proofs of loss, the adjuster sent by the company and the local agent met the insured for the purpose of adjusting the loss; that estimates had been made by a carpenter employed by the adjuster and also by one employed by the insured; that the adjuster said that $1,200 was a fair value for the property destroyed and offered to pay that amount; that he then immediately asked the insured if there was any mortgage on the property, and being informed that there was both then and when the application was made, he referred to the fact that the insured said in his application that there was no mortgage, and said that he could not do anything more with the matter until he communicated with the company. Held—That the jury could have inferred that formal proof of loss had been waived, and, therefore, it was error to give a peremptory instruction for defendant upon the ground that there had been no proof of loss.

Evan E. Settle for appellant; Young, Mitchell and Young for appellee.

LOUISVILLE & NASHVILLE RAILROAD CO. v. STOKES.

Filed June 14, 1890. Appeal from Logan Circuit Court. Opinion of the court by Judge Ward, reversing, Presiding Judge Barbour, dissenting.

Railroads—Duty to passengers—If a passenger negligently fails to get off at his station, a sufficient opportunity being given, and thereafter desires to get off between that and the next station, the company is not liable for an injury incurred in the act of getting off if it used ordinary and reasonable care. That very high degree of care exacted of the company in the discharge of its duty as carrier does not continue to apply after the passenger has negligently failed to get off at his station.

W. F. Browder for appellant; S. A. Bass and John Feland for appellee.

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KENTUCKY COURT OF APPEALS.

BEDFORD v. MAGIBBEN.

(Filed June 19, 1890—Not to be reported.)

1. Sales of personalty—Deceit—Warranty—Appellant and appellee being the joint owners of a bull calf, appellant sold his one-half interest in him to appellee, and received therefor $9,000. Appellee instituted this action to recover the price paid, alleging that under the agreement, as a condition precedent, the procreating powers of the bull were to be tested under the supervision of appellant, by the bull proving to be a breeder by service upon cows belonging to the appellee; that the cows having been furnished as agreed, appellant afterwards informed him that the tests had been made, and that some of the cows were with calf by said bull, which representations were untrue and relied upon by appellee, and the bargain completed on the faith of such representations. Appellant resists a recovery, alleging as a defense that, as a condition precedent to the completion of the contract of sale, it was agreed that the test of the procreative powers of the bull should be that the cows, after service by him, should refuse to take him again after the period usual with such breeding animals; that this test was had, and after being informed of the facts, appellee received the bull and paid for him. Held—This is not an action for deceit, as no scienter is alleged, but it is an action on a special warranty as to the qualification of the bull.

2. Instructions—The court erred in giving an instruction to the jury, at the instance of appellee, authorizing them to find for appellee if they believed that appellant guaranteed the bull to be a breeder, and that said bull was not at the time, and is not now, a breeder, and the bull to be a breeder must have possessed the power of procreation in the degree usually and ordinarily existing in short-horned bulls used for the purpose of breeding. This instruction was improper, as the action was for a breach of a special, and not a general, warranty.

Breckinridge & Shelby, Brent & McMillan, Huston & Mulligan and Porter & Wallace for appellant.

J. G. Carlisle for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted in the Bourbon Circuit Court in October, 1876, and there having been two mistrials, the case was removed to the county of Scott, and from that county to the county of Woodford, where the plaintiff obtained a verdict and judgment for $10,000, with interest from the 24th of June, 1879.

The case was brought to this court, and after arguments of counsel, passed for briefs, and the case continued by agreement, and the briefs not filed, until December, 1889. The record contains a large volume of testimony, conflicting in its character, and upon the testimony alone no reversal should be had.

The case, although the testimony has been carefully read and considered, must be disposed of upon the legal questions raised by the appellant in this court.

The plaintiff and the defendant purchased jointly a blooded heifer for the sum of $25.000. This heifer dropped a bull calf, called the Duke of Woodland.

The plaintiff, Magibben, purchased of the defendant, Bedford, his (Bedford's) one-half interest in the bull calf for the price of $9.000. the money to be paid on the first of March, 1876. The calf was then too young to serve cows, and was in Bedford's possession on his farm in Bourbon county when this sale was made. It is agreed by both parties in their pleadings that the sale was conditional, and before the payment of the money a test of the animal's capacity to procreate was to be made. How this test was to be determined is a question at issue between the parties, as no calf could be dropped between the time the calf was old enough to serve cows and the payment of the money.

It was then either a mere matter of conjecture to be determined as to the number of cows the animal turned off, or there was a warranty that the animal had proved a breeder by his performance under the special contract set up by the plaintiff.

The plaintiff, Magibben, alleges in his original petition that he agreed to purchase the half interest of the defendant at the price of $9,000, to be paid on the 1st of March, 1876, on condition that the bull should prove a breeder; that the calf was to remain on the farm of the defendant, and in his possession to be tested, and if proven to be a breeder he was to receive him and pay the money on the day the note fell due; that such was the contract between them. He alleges that in February, 1876, the defendant, in order to induce him to receive and pay for the bull, stated and represented to the plaintiff that "the test had been made and the bull had proven to be a breeder, and the plaintiff, believing and relying on these statements and representations, was induced to, and did, receive the calf, and paid to the defendant the $9,000; that by reason of his absence from the farm of defendant, where the test was to be made, he had no means of knowing or ascertaining the results of the test, except the statements and representations made to him by the defendant; that he believed and relied on those representations, and was thereby induced to copmlete the purchase. That the statements and representations made to him by the defendant were not true; that the bull was not then, and has not since been, a breeder, but, on the contrary, was impotent and incapable of getting calves, and ascertaining that fact he tendered him back to the defendant."

The plaintiff subsequently filed an amended petition, in which he alleges that "by mistake of his counsel the exact terms of the

contract were not fully set forth in the original petition and that the test of breeding was to be made upon four or five cows belonging to the plaintiff, which were to be sent to defendant's farm for that purpose, and that it was agreed, in case these cows should be got with calf by the bull, the plaintiff was to pay the $9,000 at the time mentioned and take the bull; that as soon as the bull was old enough to serve cows he sent four cows to the farm of the defendant to be bred by him, and that in the month of February, 1876, while the cows and bull were in the possession of, and under the control of, the defendant, the latter, in order to induce the plaintiff to complete the purchase and pay the money, represented to him that he had bred the cows to the bull, and three of them were in calf; and that he had proved himself to be a breeder by his service on plaintiff's cows; that plaintiff, believing and relying on this statement and representation, and having no other means of knowing or ascertaining the facts, was thereby induced to complete the contract and pay to the defendant the money; that said statements were not true in whole or in part; that none of said cows were with calf by the bull, and he had not proved himself to be a breeder by his service on them, and was not, in fact, a breeder, but was impotent and incapable of getting calves."

The answer of the defendant denies the agreement as to what the test should be, as alleged in the amended petition, and says that the bull was to remain with him in order to have his breeding capacity tested, and that when, having served cows, they refused to permit the bull to serve them again, that fact was to be accepted by both parties as conclusive evidence that the animal was a breeder, and as soon as this was ascertained the plaintiff was to accept the bull as his own, and pay the money at the time specified. He alleges that the bull served a number of cows, and turned off fully the usual and ordinary number, the cow, after being served by him the usual length of time, refusing to be served again; that he wrote to, and fully informed, the plaintiff of the tests made and the results, placing before him all the facts and circumstances relating thereto, and the plaintiff, being fully satisfied with the tests made, accepted the animal and paid for him.

He denies that he ever stated or represented to the plaintiff that he had fully tested the animal, and that he had proven to be a breeder, without laying before him truly and fully every fact to enable the plaintiff to determine the sufficiency of the tests made, and upon these facts the plaintiff, being an expert in the breeding of cattle, was as competent to form an opinion as the defendant. He denies that the bull was impotent, or that any repesentation made by him to the plaintiff was untrue, etc.

Upon the pleadings issues were properly made, and on this appeal it is insisted that the court erred in giving the instructions for the plaintiff, and in refusing those asked by the defendant.

Before noticing the instructions it may be proper to determine the character of the action instituted by the plaintiff. It is not an action for deceit, as the scienter is not alleged, but an action ex contractu upon a breach of warranty, alleged to have been made by the defendant to the plaintiff at the time the contract of sale was completed. That the contract was a conditional one all the parties concede, that is, if the bull proved to be a breeder upon the test agreed upon as to his breeding qualities, the appellee (plaintiff) was to take him and pay the $9,000.

The bull was in the possession of the appellant, and the latter represented to the appellee that the test had been made and the

cows were with calf. It was not the mere opinion of the appellant upon which the appellee relied, but the statement or representation of a fact that had to transpire before the money was paid. The representation was made according to the theory and testimony of the appellee, that the test had been made, and the cows were with calf, and this statement amounted in law to a warranty.

The test was to be made by the appellant, and upon representing that the test had been made and the cows were with calf, and on the faith of this repesentation the bull was received or the money paid, it was something more than the mere opinion of the defendant, and amounted to a warranty that the test had been made, and that the cows were in calf; and, although the appellant may have been mistaken in his judgment, he is, nevertheless, bound, if the testimony for the appellee is to prevail. There was no binding contract with these parties until the test was made, and the appellee having had nothing to do with the breeding of the bull, if induced by the appellant to pay for him upon the representation that the test had been made, and proved successful, he is bound by it, as much so as if there had been no previous agreement as to the test. The sale being made, and a statement at the time that a test had been had, and the bull had gotten the cow in calf.

The entire value of the animal depended on the fact that he had proven himself a breeder by getting the cows in calf, and the affirmation or representation that such was the fact. and the appellee relying on it as true, it was in law a warranty, upon which the appellant is responsible, if the representations were untrue, however innocent the latter may have been of any fraud.

"When the vendor at the time of the sale makes a representation respecting the kind, quality or condition of the thing sold, upon which he intends the vendee to rely, and upon which he does rely, in making the purchase, it amounts to a warranty." (Lanner v. Grey, 1 Met., 446.

The court below, therefore, very properly instructed the jury that it was not necessary to believe the defendant guilty of a fraudulent representation before they could find for the plaintiff.

This was an action on the contract, and not for a tort, as the scienter is neither proven nor alleged.

The difficulty in the way of affirming the judgment below arises from an instruction given at the instance of the appellee upon a state of fact that all parties conceded did not exist.

By instruction No. 2 the jury was told "that if they believed from the testimony that by the terms of the contract the defendant agreed with the plaintiff to guarantee the bull, Duke of Woodland, to be a breeder, and that plaintiff bought and paid $9,000 for defendant's one-half of said bull, upon the faith of such guaranty, and that said bull was not at the time, and is not now, a breeder, they should find for the plaintiff, etc. The bull, to have been a breeder, must have possessed the power of procreation in the degree usually and ordinarily existing in short horned bulls used for the purpose of breeding," etc.

There was testimony conducing to show that the bull had but one testicle, and that the appellee refused to make any purchase unless there was a warranty that the bull calf would prove to be a breeder, and also other testimony conducing to show that a general warranty was made. Now that character of testimony was not relevant to any issue that had been made by the parties, and could only be introduced as corroborative of appellee's view of the agreement. It is not claimed by the appellee that there

was a general warranty, but, on the contrary, there was only a special warranty on the facts stated by the appellee, and that was that he was to prove a breeder in the way alleged in the amended petition. The fact of a general warranty is, in fact, disclaimed by the amended petition, because the plaintiff, in his amendment, says that the averment there of facts that would amount to such a warranty was made by mistake, and then the special agreement was alleged in the amendment as presenting the real contract between the parties. It is true the appellant denies that such a contract was made, but admits that a special agreement was entered into by which the bull was to be bred to cows, without designating the number, and if he turned the cows off, as bulls usually do, it was to be conclusive that he was a breeder.

The court, after giving instructions, based on both the theory of the plaintiff and the defendant, then proceeds, in the second instruction, to ignore each of the special contracts set up, and, in effect, says to the jury, you may disbelieve both, but if there was a general warranty made you must find for the plaintiff. Now there is evidence conducing to establish the claim of the plaintiff, and also evidence conducing to establish the special agreementset up by the defense, and when both parties, especially the plaintiff, is relying on the special contract, and the representation by the defendant that it had been complied with, and the test made as agreed on, it was erorr to permit an instruction authorizing a verdict for the plaintiff on an issue not made by the pleadings, and upon a state of fact that the plaintiff, by his pleadings, said did not exist.

The plaintiff says the defendant is liable, because the test had been made of the four cows, and they were not in calf, and the representations made to him by the defendant was a warranty that the test as alleged was satisfactory and conclusive that the bull was a breeder.

Bedford says: Such was not the agreement. The bull was to be bred to cows that season, and if he turned off the usual number this was to be conclusive. The plaintiff and defendant both testified in support of their views of the contest, and each sustained by other testimony. They were equally credible, and the jury, in considering the case, might have well said that it was useless to determine who of the parties were entitled to credit upon the issues made, because the court has, in effect, said that if we believe from the testimony the defendant guaranteed the bull to be a breeder, and the bull was not then, and is not now, a breeder, we must find for the defendant, and there being evidence conducing to show a warranty, we will find that way, although the bull may have gotten the cows with calf as Bedford states, for the proof is clear that he is not now a breeder.

There are other errors relied on by counsel, but we perceive nothing objectionable but the instruction alluded to.

The judgment is reversed and remanded for a new trial in conformity with the opinion.

KENTUCKY FLOUR CO.'S ASS'EE, &c. v. MERCHANTS NATIONAL BANK.

(Filed May 24, 1890.)

Insolvency—Equitable set-off—Appellant made an assignment for the benefit of its creditors generally. At the time of the assignment it had on deposit with appellee a sum amounting to about $8,433.79, and was at the same time owing appellee a debt of nearly $30,000, not due. In an action by the assignee to recover the amount on deposit the appellee claimed it as an equitable set-off against its debt not due. Held—That the assignee occupied no better position than his assignor, and took all claims subject to such equities as existed against them, and the assignor being insolvent, the appellee, the bank, had the equitable right to set-off the amount held on deposit against its debt not due.

Thos. B. Fairleigh and Fairleigh & Straus for appellants.

Brown, Humphrey & Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The Kentucky Flour Company, on June 15, 1888, made a general assignment for the benefit of its creditors.

Among them was the appellee, the Merchants National Bank, to the amount of nearly $30,000. It had in its hands at the time, arising from cash deposits made by the Flour Company on and before the day of the assignment and from commercial paper left by it with the bank for collection, $8,433.79, and the assignee sues to recover this sum. The bank claims the right to credit it upon its debt.

The facts above stated appear from the petition. It is by no means certain whether upon its averments the debt owing to the bank should be considered as having been due or not due at the time of the assignment. We will, however, with a view to a full consideration of the question, but with some doubt, assume as contended by the appellants' counsel, that the petition shows it had not then matured.

The lower court dismissed the petition upon demurrer.

The question before us is whether a bank can apply deposits made with it by one who subsequently makes an assignment for the benefit of his creditors, as a credit upon a debt owing to it by the insolvent, but which had not matured at the time of the assignment.

Courts of equity in this State applied the doctrine of equitable set-off prior to the existence of our statute. It was found to be necessary to complete justice in cases where some fact existed impairing the efficacy of the local remedy.

Gounds must exist for its application, and insolvency has long been recognized as one of them. It is urged that equality among ceditors is equity, and that to allow the bank to apply the deposit upon the indebtedness to it would defeat an equitable distribution of the insolvent's estate.

It is true that equality in such a case is the policy of the law, but it would be inequitable to extend it so far as to disregard existing equities.

It would be unconscientious for an insolvent to coerce the payment of his claim from one to whom he is indebted in a larger sum, although the debt of the latter might not be due.

The insolvent should not ex equo et bono have such a right.

In the case of Chenault, Receiver, &c. v. Bush, 84 Ky., 528, two parties executed a joint obligation. Before its maturity one of them made an assignment for the benefit of his creditors. After the assignment the other joint obligor paid the entire debt. In an action against him by the assignee upon a note executed by him to the assignor it was held that he could set-off one-half the joint debt paid by him. Here the claim of the party asking the set-off had not matured at the time of the assignment. A right of set-off would, however, have existed as against the assignor in the event of no assignment, and the assignee merely took the estate for the benefit of the creditors, subject to all existing equities and discounts.

He is not an assignee for value, but a volunteer, and any claim of the insolvent upon a party coming to his hands is subject to the same right of set-off which would have existed againstit if no assignment had been made.

It is contended, however, that a bank stands in a different attitude from a mere individual, because its depositor would have the right to check out his deposit at any time prior to the assignment, and the bank would have no right to refuse it upon the ground that he was owing it an unmatured debt.

If this be so, and it doubtless would be in case checks were given to third parties, yet we fail to see how it can affect the question here inasmuch as the money was not withdrawn from the bank.

It is true this seems to have been the ground upon which the case of Beckwith v. Union Bank of New York, 5 Selden, 211, was determined; but the opinion in that case is meager in argument, and so far as reason is given it is unsatisfactory.

In the case of Jordan v. National Shoe and Leather Bank, 74 N. Y., 407, cited by counsel, no ground for equitable set-off was presented. The opinion expressly says so.

It is unquestionably the law that as between individuals the right of equitable set-off exists, although the debt had not matured at the time of the insolvency.

Ordinarily, of course, a debt not due can not be set-off against one aleady due.

To allow it would be to change the contract and advance the time of payment.

But where the party asserting the due debt is a nonresident, or becomes insolvent, then either of these conditions, ipso facto, gievs to the other party the right of equitable set-off, although his debt had not matured when his debtor became insolvent, or the condition arose giving the right of equitable set-off.

In the application of the rule there should be no difference between an individual and a bank. There is no ground for a distinction. The bank is merely a debtor to its depositor. It is true the debt is payable on demand, but if the money be not withdrawn, and the depositor becomes insolvent, the right of equitable set-off exists just as in case of co-existing demands between individuals; and in case the depositor assigns for the benefit of his creditors, his assignee takes the estate, subject to any equities which existed against the assignor at the time of the assignment.

It is said, however, that such a rule will lead to inequitable preferences, and, in effect, destroy the efficacy of what is generally known as the statute of 1856, relative to a preference of a creditor. We think the alarm of counsel is groundless.

If a deposit were made with a bank in contemplation of insolvency, and with a design to prefer it, those being the grounds upon which that statute declares the entire estate of the debtor, including that transferred, shall inure for the benefit of his credi-

tors generally, a state of case would be presented not now before us. We can not presume this is such a case, because here the company was evidently engaged in a considerable business, having numerous transactions with its bank, and the deposit in question is a comparatively small one.

This question is not presented by the petition, and it would be improper, therefore, to intimate any opinion as to it.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. COPPAGE.

(Filed June 21, 1890—Not to be reported.)

Willful negligence—Parties to actions—Heirs—Under section 3, chapter 567, General Statutes, the decedent, leaving no widow or children, his father, as his heir, can not maintain an action for willful neglect, which resulted in the death of decedent.

Cases of Henderson's Adm'r v. K. C. R. R. Co., 86 Ky., 389, and Jordan's Adm'r v. C., N. O. & T. P. R. R. Co., 11 Ky. Law Rep., 204, approved.

Wm. Lindsay and Rountree & Lisle for appellant.

John D. Fogle, Sam'l Avritt and Lewis Edelen for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

John L. Coppage was injured in attempting to board a train of the appellant, and died therefrom in a few hours.

This action was brought by his father, John W. Coppage, under section 3, chapter 57 of the General Statutes, which provides: "If the life of any person * * * is lost or destroyed by the willful neglect of another person, company, * * * corporation, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person, * * * company, * * * corporation, * * * and recover punitive damages for the destruction of the life aforesaid."

The petition avers that the deceased left no children or mother, and the evidence shows that he left no widow. The complaint is: First. That the injury was caused by the willful negligence of those in charge of the train; and, second, that the agents of the company, after taking charge of the wounded man, through willful negligence, caused a fatal delay in the performance of a necessary surgical operation.

The first ground appears to have been abandoned upon the trial and the case fought out upon the second one.

It is unnecessary to consider, however, whether the company is chargeable with willful neglect in either of these respects, because a preliminary question is decisive of the case.

Objection was made by demurrer to the appellee's right to sue.

This court determined, in the case of Henderson's Adm'r v. Kentuckey Cntral R. R. Co., 86 Ky., 389, that the word "heir," as used in the section of the statute above cited, was equivalent to child; and that any recovery under it was for the exclusive benefit of the widow and child, or children, of the decedent, the right to sue, so far as vested in the personal representative, being for their benefit.

This case has been followed by that of Jordan's Adm'r v. Cin., N. O. & T. P. R. R. Co., 88 Ky. —, and other cases, holding that the benefit of the recovery being confined to the wife and children, if the deceased leaves none, no action can be maintained.

These cases are decisive of this one.

We are fully aware that this construction of the statute has been largely discussed, and frequently criticised, but further consideration has only served to confirm the views expressed in those cases, and we can add little, if anything, to them.

The first section of the chapter above named confers upon the personal representative of any person (save an employe) killed by the negligence of those operating a railway, the right to sue and recover such damages as the injured party might have recovered if death had not ensued.

Under it the personal representative may recover from a railway company compensatory damages for neglect, less in degree than willful, just as the deceased might have done had he survived the injury.

By the terms of the statute, as originally enacted in 1854, the right to sue, under either the first or third section, was vested in the personal representative.

This was subsequently changed by the legislature; and it undoubtedly intended to provide for a different state of case by the third section from that provided for in the first section of the statute, or the two would not differ so essentially.

The third one is not confined to deaths resulting from the willful negligence of railway companies, but embraces all persons and companies.

Nor does it provide that the plaintiff may recover "in the same manner that the person himself might have done for an injury where death did not ensue."

It authorizes the recovery of punitive damages, and gives the right to sue to "the widow, heir or personal representative of the deceased."

We are again asked to decide that the word "heir," in the statute as amended since 1854, means "distributee," and not "child."

The history of the law upon the subject of providing a civil remedy for the killing of a person, as well as the harmony of the law, which is always, of course, to be desired, and which it is to be presumed the legislature always has in view, forbids such an interpretation.

Undoubtedly the object of providing such a remedy is to benefit the family of the deceased, or those who had a direct and immediate interest in the continuance of his life. Compensation for an injury is always given to those who suffer the loss.

This idea prompted the enactment in England of what is known as "Lord Campbell's Act," in 1846, and has led to the adoption of statutes in this country more or less similar.

The history of legislation upon this subject plainly shows that it was never intended that the recovery in such a case should be assets of the estate of the deceased.

Nor can it be reasonably supposed that it was intended it should benefit those who might be removed many degrees in relationship from the deceased, and whom he may not have known even from report.

To construe the word "heir" or "distributee" would have this effect, and extend the benefit of a recovery to the remotest heirship.

It is, of course, for the legislature to say how far the right shall extend; but in construing the meaning of terms used by it, it

is proper to consider the purpose of the statute and the history of legislation upon the subject.

The words "heir" and "distributee" are, when techniaclly considered, not interchangeable. The first applies to an estate of inheritance. The heir takes the land, but not the personalty. The word does not describe one who takes assets in the form of money from a personal representative; and in a popular usage is more often used as meaning child than distributee.

Prior to enactment of the statute in question our legislature had given the widow and minor child of one killed in a duel a right of action against the surviving principal, and all the promoters of it, with the right to also recover punitive damages.

Then came the act of 1854, as to a killing by negligence; and in 1866 the legislature enacted a law, by which "the widow and minor children of one killed by the careless, wanton or malicious use of firearms, were given a right of action against the offender for reparation of the injury, with the right to the jury to give punitive damages.

All of these statutes were incorporated into our General Statutes, which were designed to constitute a general system of law; and being in pari materia should be construed alike, unless the language used forbids it. There is no good reason why the benefit of the recovery in the one case should be confined to the widow and children, and in the other reach to the remotest relative, who was in no way dependent upon the deceased, and who suffered no loss by his death.

It follows that as the deceased left no widow or child, this action can not be maintained under the third section of the statute under consideration, and as the appellee, as father, had no right to sue under the first section of it any more than under the third section, the demurrer to the petition should have been sustained, and the action dismissed.

It is so ordered and judgment reversed.

LYONS, &c. v. DEPPEN, &c.

(Filed June 21, 1890.)

Landlord and tenant—Mortgage—A mortgage executed by a tenant upon his property during the term of his lease constitutes a lien prior to the lien of his landlord for rent, which accrues under a new lease executed after the mortgage, but such mortgage will not include property subsequently brought upon the leased premises; as to the latter the landlord's lien will be preferred.

Sections 12 and 13, article 2, chapter 66, General Statutes, construed.

Willis, Dulaney & Lindsay for appellants.

C. B. Seymour, A. C. Rucker and Guy C. Sibley for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis.

The question in this case is about construction of sections 12 and 13, article 2, chapter 66, General Statutes, as follows:

"Sec. 12. All valid liens upon the personal property of a lessee, assignee or under-tenant, created before the property was carried

upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and on property upon which the landlord hath a superior lien for his rent, then to the extent of one years rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied, provided the same is sued out in ninety days from the time the rent was due.

"Sec. 13. A landlord shall have a superior lien on the produce of a farm or premises rented, on the fixtures, on the household furniture and other property of the tenant or under-tenant, owned by him, after possession is taken under the lease; but such lease shall not be for more than one year's rent due, or to become due, nor for any rent which has been due for more than 120 days. But if any such property be removed openly from leased premises, and without fraudulent intent, and not returned, the lien of the landlord shall be lost as to it, unless the same be asserted by proper procedure within fifteen days from the day of removal."

The landlord has a lien upon property of the tenant described in section 13, in virtue alone of an express or implied contract of lease, and when the period of such lease ends, the lien, that is an incident of it, necessarily terminates, except that by express provision it can be enforced, as to property to which it had already attached, within 120 days after the rent becomes due, which might be at the same time the lease expires. But such lien does not prevail against any other valid lien created before the beginning of the term of lease, or before the property is carried upon the leased premises.

It thus results that a valid mortgage lien created during one term of a lease must, under the statute, be regarded superior to the landlord's lien existing during a second term of lease to the same tenant, that had not begun, nor was contracted for when the mortgage was executed, otherwise a mortgage, valid in all respects and enforcible between the parties to it, might be rendered inoperative at the mere will of a third party, who had, before expiration of the first term of lease, indicated no intention to lease for a second term, nor by contract bound either himself or the tenant for a second term.

For protection of the landlord intervening mortgages are not permitted by the statute to prevail against his lien, existing under contract of lease already made. But for protection of other creditors the statute, according to fair import of the language used, as well as reason, makes a mortgage lien, created before execution of a contract of lease, superior to a landlord's lien existing under such contract.

We do not regard the opinion in the case of English v. Duncan properly interpreted, inconsistent with the views here expressed.

As the mortgage upon the property in contest was executed to J. A. Lyon previous to the respective contracts between appellees, Deppen and Bowling, owners of the two buildings, constituting one hotel, and V. E. Lyon, tenant of both, for a second term of lease, it must, in our opinion, be held superior to them.

But only such property on the leased premises at death of V. E. Lyon, as is shown by the mortgage to have been actually included in his mortgage, can be made subject to it, the landlord's lien upon all such as was carried on the premises after the execution of it being superior.

The judgment as to appellees, Deppen and Bowling, is reversed, and remanded for proceedings consistent with this opinion; and as to Glen, it is affirmed.

CAVANAUGH v. BRITT.

(Filed June 17, 1890.)

1. Fraudulent conveyances—Limitation—Pleading—On May 1, 1872, appellee obtained a judgment against John Cavanaugh, the husband of appellant, Catherine Cavanaugh. An appeal was taken to this court and the judgment superseded. The appeal was dismissed in 1878; the mandate was filed in the lower court on April 6, 1878; an execution sued out and returned "no property" on May 2, 1878. November 5, 1873, the husband made a conveyance of all his property to his wife, the appellant, in consideration of love and affection. On December 7, 1887, appellee brought this action to set aside the deed as fraudulent, and to subject property conveyed to the satisfaction of his debt, to which appellant interposed the defense of the statute of limitation. Held—That the time within which appellee was prevented by the supersedeas from taking any steps towards obtaining satisfaction of his judgment will be taken out of the calculation of time of running of the statute, but the proof showing a failure to pursue his remedy for more than five years before the institution of the suit to annul the deed, the statute presents a bar to the action. Section 6, article 3, chapter 71, General Statutes, and section 21, article 4, chapter 71, General Statutes, construed.

2. Pleading—Reply—Amended petition—A reply alleging that appellee did not discover the fraud until within five years of the bringing of the action was insufficient; it was necessary to allege that by the exercise of reasonable diligence the fraud could not have been discovered within five years. After the pleadings had been fully made up the court did not abuse its discretion in refusing to permit an amended petition to be filed, which attacked the conveyance as void for want of a description of the property.

H. M. Lane for appellant.

Andrew A. Haggin and John R. Doughan for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The appellee, Joseph Britt, obtained a judgment in the Jefferson Court of Common Pleas on May 1, 1872, against John Cavanaugh, the husband of the appellee, Catharine Cavanaugh.

An appeal was taken to this court, and the judgment superseded.

The appeal was dismissed in 1878. The mandate of this court was filed in the lower court on April 6, 1878, an execution sued out upon the judgment and returned "no property, on May 2, 1878.

November 5, 1873, the husband made a conveyance of all his property to the appellant.

It was a sweeping transfer. No property was described. It conveyed, or at least attempted to convey, to her all the property of her husband of every description.

The recited consideration is love and affection.

This action was brought by the appellee on December 7, 1887, to set aside the deed as not only voluntary, but actually fraudulent, and to subject to the payment of the judgment four lots of land, which the debtor owned at the time of its rendition, and which are now claimed by the appellant, under the deed from her husband.

Several defenses are pleaded. Among them is payment. There is no evidence, however, to support this plea. Also that there was not only a good, but valuable, consideration for the deed.

It is evident, however, that if not actually fraudulent, it was constructively so as to the existing creditors of the grantor, and at best but a voluntary conveyance.

The grantee also relies upon not only the five, but the ten years' statute of limitation as to actions seeking relief for fraud, and whether the conveyance to her is protected by the lapse of time is the only real question in the case. Under our statute an action for relief, upon the ground of fraud or mistake, must be commenced within five years after the cause of action accrues; and section 6, article 3, chapter 71 of the General Statutes, says:

"In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud of mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

The five years' provision of the statute merely perfects the first clause of this section, and fixes the limitation as five years from the discovery of the fraud, or, as construed by this court, as five years from the time when the creditor, in the exercise of ordinary diligence, should have discovered it. (Dye v. Holland, 4 Bush, 635.)

The legislature has seen fit, and wisely no doubt, to also provide that an action to annul a conveyance as fraudulent, as to antecedent creditors, is barred in ten years after its execution, regardless of the time when the creditor may discover the fraud. This applies to constructive as well as actual frauds.

It was intended to quiet old transactions, and to fix a time beyond which the parties should not contend as to when the fraud was discovered.

It would be unreasonable to suppose, however, that it intended, when it so limited the time, that the creditor should be barred of his action at the end of it, if, during that period, some other provision of law had prevented him from bringing it.

In the case now before us the debtor superseded the judgment. It remained so until April, 1878. This deprived the appellee of the right to bring any action looking to the collection, or even the protection, of his judgment. The superseding of it prevented any step in that direction. This condition resulted from the act of the debtor, who was a necessary party to any suit to annul his conveyance. The law gave him the right to thus stop his creditor from proceeding to collect his demand; and it would be unreasonable to permit him to exercise this right, and then allow one holding under a fraudulent conveyance from him to claim that the time during which the right to sue had been thus suspended should be estimated as a part of the limitation.

This would bar the creditor of a right by lapse of time, when, during the same time, he was forbidden by law from exercising the right, and would have been in contempt of court if he had attempted to do so.

It was decided in Johnson v. Williams, &c. 82 Ky., 45, that after a judgment has been obtained and superseded by the debtor, the creditor has no right to bring an action upon it, and protect it by suing out an attachment against the debtor's property. He can not harass the debtor with another suit while the judgment is thus suspended, and the right to it in question.

This being so, it is not supposable that such a solecism exists in the law as to say that one must exercise a right within a certain period, or he shall be barred from doing so, when, during that same time, it forbids the exercise of the right.

Moreover, section 21, article 4, chapter 71 of the General Statutes provides: "In all cases where the doing of an act necessary to save any right or benefit is restrained or suspended by injunc-

tion, or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act, the time covered by the injunction, restraint, vacancy, absence or refusal to act, shall not be estimated in the application of any statute of limitation."

In the case of Phillips, &c. v. Shipp, &c., 81 Ky., 486, to which we have been referred, the judgment sought to be enforced against property in the hands of a voluntary grantee had not been superseded.

While, however, ten years had not elapsed before the bringing of this action, during which the appellee could have brought it, yet over nine years had, and the limitation of five years being aptly pleaded, the burden rested upon the appellee by proper pleading and evidence in support of it, if denied, to avoid the effect of the plea.

His reply merely avers that he did not discover the fraud until within five years before the bringing of the action. His testimony only goes this far; and, according to the repeated ruling of this court, it is insufficient.

In such a case it is incumbent upon him to reply, not only that he did not discover the fraud within five years before the institution of his action, but that the exercise of ordinary diligence upon his part would not have led to the discovery; and if his replication be denied, he must by testimony present a state of case showing that the exercise of such diligence by him would have been of no avail. (Zackay's Adm'r v. Hicks, 7 Ky. Law Rep., 755; Cotton v. Brown, 9 Ky. Law Rep., 115; Woods v. James, &c., 10 Ky. Law Rep., 581.)

While the recording of the conveyance may not have operated as constructive notice to the appellee of its existence, he being an antecedent creditor, yet it is a circumstance which may be considered in determining when the discovery of the fraud might, by the exercise of ordinary care, have been made.

A creditor has a right to regard the condition of his debtor, when the debt was created, as continuing; but he has no right to shut his eyes, and then say that he did not discover the fraud until within five years before the bringing of his action.

If so, then his negligence would often work great hardship to voluntary, but innocent, grantees.

If the circumstances surrounding him are sufficient to lead one of prudent mind, in the exercise of ordinary diligence, to discover the changed financial condition of his debtor, then he is required to exercise that diligence within a certain time or hold his peace.

In this instance the creditor resided in the county where the deed was made at the time of its execution.

It is true he moved to another county not very distant not long after, but he returned in 1882, and yet his action was not brought until five years thereafter. He had a return of nulla bona as early as 1878, and his long delay implies laches upon his part, which his own testimony in no way excuses. Opportunity should not, therefore, be given for an effort to cure the defective pleading.

The appellee complains, by a cross appeal, of the rejection by the lower court of an amended petition, assailing the conveyance to the appellant as void, for want of description of the property conveyed.

It was tendered after the pleadings had been fully made up, and was based upon a fact known to the appellee when he brought his action. This court can not, therefore, hold that the court below

abused its discretion, even conceding the sufficiency of the proposed pleading.

The judgment is affirmed upon the cross appeal and reversed upon the main appeal, with directions to dismiss the appellee's petition.

DURRETT. GD'N v. COMMONWEALTH.

(Filed June 25, 1890.)

1. Guardian and ward—Investment of ward's estate—The guardian of an infant having in his hands, as estate of his ward, stock in the Third National Bank of Cincinnati, O., and the National Branch Bank of Madison, Ind., and the stock in the Indiana Bank declining in value, after an examination of the affairs of the Metropolitan National Bank of Cincinnati, and after consultation with the grandfather of his ward, a person of intelligence and prudence, in whom the chancery court of the county had imposed confidence by appointing him to approve the investment of a large portion of his ward's money in real estate, decided to sell the bank stock owned by his ward, and re-invest the proceeds in stock in the Metropolitan National Bank of Cincinnati, which was paying dividends equal to the highest dividends received from the other banks. A short time after the investment the Metropolitan National Bank failed, and the owners of stock received only about 50 per cent. of the value of their stock. In an action to charge the guardian with the amount of loss on this stock, Held—That the guardian, appearing to have acted in good faith for the best interests of his ward, and having made an investment that the court, upon application to it, would have directed to have been made, will not be charged with the loss of stock resulting from the failure of a bank apparently strong and solvent.

2. Settlements—Jurisdiction—A county court, in making a settlement of the accounts of a guardian, has no jurisdiction to inquire into the propriety of any investment of the ward's funds reported by the guardian in his settlement.

Hallam & Myers and W. K. Benton for appellant.

H. P. Whitaker and Cleary & Hamilton for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Holt.

This is an action by Maria Louise Powell, an infant, by her next friend, upon the bond of her guardian, M. M. Durrett, who became such fiduciary in November, 1882. Its purpose was originally three fold:

1st. To charge him with the cost of what finally proved to be a bad investment made by him of the ward's funds, upon the ground that it was not only in direct violation of our statute, but made without that care which the general law requires of a guardian.

2d. To compel a conveyance to the ward of certain real estate in which the guardian had invested her means, taking the title to himself as her guardian.

3d. For a settlement of his accounts.

The suit was dismissed by the appellee as to the last ground of action. As to the question of liability for the investment, it was fully prepared by the parties for a hearing upon the merits. The parties pleaded to an issue as to it, took all the testimony they desired, and by consent submitted the cause for a final judgment.

The lower court ordered a conveyance to the ward of the lands purchased by her guardian, but dismissed the action without prejudice so far as it sought relief on account of the investment. This was done upon the ground that the guardian, having made several settlements in the county court, in one of which he was credited by the investment, his liability for it could only be tested in an action to surcharge his accounts, whether he was so liable was the only issue in the action. Both sides have objected to the ruling below upon this point, the appellee by then moving to set the judgment aside, while the appellant has appealed from it.

Both have fully argued the question of the guardian's liability for the investment in this court, and both desire its determination.

Evidently the lower court was in error in refusing to consider the question in this action.

The county court had no power to determine whether the investment had been properly made. It had no right to try the question whether the guardian had renderd himself and his sureties liable by investing the ward's funds negligently or in violation of law.

The settlement showed merely that the investment had been made, and credited the guardian by the amount of it.

There was nothing in the settlement to surcharge or falsify. It was true that the investment had been made, and the county court had no jurisdiction to determine any liability arising from it. Therefore, it was not necessary, as a condition precedent to the bringing of this action, to sue to surcharge it. The estate, which came to the hands of the guardian, was a large one. It amounted to considerably over $100,000.

The appellant assumed the trust at the instance of the mother and grandfather of his ward, her father being dead. The estate descended to her from her paternal grandfather. It consisted largely of stocks in corporations. In 1883 the guardian, after consultation with relatives and friends of his ward, obtained leave from the Kenton Chancery Court to invest her means in real estate in the city of Covington, Kentucky.

It was ordered by the court upon condition that the investments were to be approved by two certain persons one of whom was the ward's grandfather. In this way nearly $100,000 was invested. Among other property so purchased was some vacant land, upon which it was deemed advisable to erect some houses, but not immediately, owing to certain circumstances which need not be detailed. Such appears to have been the design in the near future. It was, therefore, considered advisable that the guardian should retain some means of the ward in his hands. This conclusion was reached after consultation between the guardian. the ward' grandfather and other persons of experience and judgment. Among the estate which had come to his hands, and which had belonged to his ward's grandfather, was some stock in the Third National Bank of Cincinnati, O., and the National Branch Bank of Madison, Ind

The stock in both banks had declined in value. It is true that of the first bank had regained its former value to a considerable extent, but in 1886 it was again declining, or at least there were indications that it would do so. The dividends in the Indiana bank had fallen from twelve to six per cent. per annum. There was ground for apprehension of loss upon the stock of both banks. It could then be sold for considerable more per share than stock could be purchased in the Metropolitan National Bank of Cincin-

nati, O., which was then considered an entirely sound institution financially, and the stock of which was paying the same dividend as the two banks in which the ward held stock. But few governmental securities were then on the market, and they were held at a high premium, and yielded but little interest. After full examination and inquiry into the condition of the Metropolitan Bank, and after consultation with the ward's grandfather, who, it will be recollected, was one of the persons selected by the court to approve the investments in real estate, and other persons of financial knowledge and experience, it was decided best to sell the stock then held by the ward, and invest the proceeds in Metropolitan Bank stock, which there was then good reason to suppose would be readily sold whenever it became desirable to improve the real estate. It was accordingly done in the fall of 1886 and early in 1887. The stocks sold had a downward tendency, while that obtained was steadily advancing in value. The Metropolitan Bank failed in February, 1888, and probably not over fifty per centum of the par value of its stock will be realized by the owners.

This is the investment with which it is sought to charge the guardian. It is manifest he acted throughout in good faith, and with that diligence and care which an ordinarily prudent man would exercise in the conduct of his own affairs. In support of this fact the evidence shows that, notwithstanding the loss upon the bank stock, which will probably be from $10,000 to $15.000, the estate now amounts to considerably more than it did when it came to his hands. No one could have foreseen the loss; and yet if the guardian, although guilty of no mala fides, and not open to the charge of neglect even, has violated the law, it, owing to its watchfulness of the interests of helpless infants, will hold him responsible.

Mere good faith, while requisite and commendable, is not all that is required of such a fiduciary. He must be competent also. While it is his duty to make the ward's estate as productive as a prudent use will admit, yet he must do so in conformity to law. He must possess such legal knowledge as is needful to the proper execution of the trust. Anciently guardians were held reponsible for the sufficiency of all personal security which they might venture to take for the estate of their wards. They were not liable if they loaned the trust fund upon real estate or governmental security. The severity of this rule has been somewhat relaxed by modern decisions; but it is not necessary to here determine to what extent. Courts have been slow, however, to depart from its strictness.

It was accordingly held in Smith, &c. v. Smith, 7 J. J. M., 288, where a guardian invested the money of his ward in bank stock, that he was liable for its depreciation; and undoubtedly if he were to loan the trust estate to an individual without taking security, he would be liable, in the event of its loss, although the borrower might, at the time of the loan, be a man of means.

Our statute has provided that our courts of equity may, upon the application, by petition of the guardian or ward, cause the estate to be invested, under its direction, in real estate or in safe interest bearing bonds of the United States, State of Kentucky, or some county or town of this Commonwealth, if it be made apparent that such an investment will be beneficial to the ward. (General Statutes, page 707.) This statute is not exclusive of all other investment, however. It is the duty of the guardian to make the estate productive, and he may, therefore, in a prudent manner, loan out the money of the ward, taking solvent personal

security. In such a case he will not be held liable if a loss results without neglect upon his part in preventing it.

Independent of the statute, supra, the guardian had the power, under particular circumstances, to change the nature of the estate where it was manifestly for the infant's benefit. If a court would have done it, then it will support the conduct of the guardian in doing so. In saying this, however, we do not mean that he may do so, regardless of the character of the investment.

It is urged in this case that the guardian removed the ward's property out of the State, and that this is forbidden by our law.

Our statute does provide that a resident guardian shall not remove any of the property of the ward out of this Commonwealth without the permission of a court of chancery. (General Statutes, page 707.)

If the term "property," as used in the statute, embraces intangible estate, yet in this instance we do not think that there was a removal within the meaning of the law. It is true that, generaly speaking, the legal situs of choses in action is where the owner resides; but the estate in question was already represented by stock in foreign banks, and the guadian merely sold it, and at once invested it in other stock in a foreign bank. If the legal situs of that sold was in Kentucky, why is that not true of the new stock? Neither is it true that the appellant took steps in making the investment in violation of the judgment authorizing him to invest the means of the ward. It did not require him, by its terms, to invest all the estate in real estate.

The entire control of it as to investment was not, therefore, transferred by the suit to the chancellor. It did not take away from the guardian the power of investment which he had by the general law, independent of the direction of the court.

It may often be vital to the interest of the ward that the guardian should have such power, and be able to act at once without waiting for the direction of a court. The estate may be in peril, and an exchange may save it; under such a state of case common sense, as well as a proper policy, unite in saying that he should be protected when he acts in good faith, and as a man of ordinary prudence would in his own affairs.

While he may go into a court of equity, and by means of a suit get the direction of the chancellor and thus protect himself from liability, yet he is not bound, under all circumstances, to do so. Time may not admit of it. The interest of the ward may forbid delay, and to require him always to do so would often endanger the ward's estate.

The fact, therefore, that the statute gives him the privilege of doing so should not lead to his being held to a stricter accountability than would otherwise be the case.

In fact counsel for the appellee seem to concede that the guardian may change the security without an order of court, and that investment by him of the ward's means is not confined to the securities named in our statute, but contend, and properly, we think, that it must be a secured investment of a character authorized by the general law, and such as has been sanctioned by courts of chancery.

In this instance it must be borne in mind, however, that the guardian had not originally, with the means of his ward, purchased the bank stock. It had come to her by descent. It was, as appeared to the guardian, as a reasonable man, in peril. The circumstances authorized such belief.

Acting honestly, and as he would no doubt have done for him-

self, he, in effect, exhanged it for stock in another bank, which was apparently solvent beyond question. In doing so, he made personal examination, and acted upon the advice also of his ward's near kinsmen, and of others in whose judgment and financial opinion he had a right to place confidence. It was under the circumstances such a change as a court would have sanctioned. The same kind of security was obtained, and under such circumstances the guardian should not be held liable for a loss, which could not, by any diligence whatever, have been foreseen, or even apprehended in the slightest degree,

The judgment, so far as it dismissed the action without prejudice as to the claim on account of the bank stock investment, is reversed and cause remanded, with directions to do so absolutely.

LYONS v. HODGEN & MILLER.

(Filed June 17, 1890.)

Gaming—Recovery of money lost—Appellant brought this action to recover of appellees $1,600 lost by him and paid to them in bets and wagers, between him and them, upon the future rise and fall in price of petroleum, grain, provisions and stocks, where settlements of differences in values were made, and no delivery contemplated or had. A demurrer having been sustained to the petition, and petition dismissed, on appeal, Held—The petition sets forth a cause of action as authorized by article 1, chapter 47, General Statutes, title "Gaming."

D. M. Rodman and Brown, Humphrey & Davie for appellant.

W. W. Thum and Rozel Weissinger for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Lewis.

Appellant brought this action to recover of appellees $1,600, alleged in his petition to have been lost and paid by him, and won and received by them in sums of more than $5 at any one time, between January, 1884, and January, 1886, in bets and wagers between him and them upon the future rise and fall in price of petroleum, grain, provisions and stock, which bets and wagers were determined and settlements thereof made according to difference in each case, less commissions charged by them, between the contract price at time of a deal and market price on the day for delivery of the property, which, however, was not, nor intended to be, delivered. It is further stated that appellees, during the period mentioned, were engaged in the city of Louisville under the name of The Louisville Cotton, Grain and Provision Exchange, in the business of gaming, speculating and wagering for money upon fluctuations of prices of the articles mentioned, none of which were actually sold and delivered; and while so engaged they won and received from appellant in the manner mentioned the amount sued for. To the petition a general demurrer was sustained, and whether porperly done depends upon the true construction and meaning of article 1, chapter 47, General Statutes, the sections of which relating immediately to the question are the following:

"Section 1. Every contract, conveyance, transfer or assurance for the consideration in whole or part of money, property or other thing won, lost or bet at any game, sport, pastime or wager,

or for the consideration of money, property or other thing lost or advanced at the time of any betting, gaming or wagering, shall be void.

"Sec. 2. If any person shall lose to another at one time, or within any twenty-four hours, $5 or more, or property or other thing of that value, and shall pay, transfer or deliver the same, such loser, or any creditor of his, may recover the same, or the value thereof, from the winner or any transferee of the winner, having notice of the consideration, by suit brought within five years after the payment, transfer or delivery. Recovery may be had against the winner, although the payment, transfer or delivery was made to his indorsee, assignee or transferee, and if the conveyance or transfer were of real estate, or the right thereto, in violation of the first section of this chapter, the heirs of the loser may recover it back by suit brought within two years after his death, unless it shall have been passed to a purchaser in good faith for valuable consideration without notice."

Section 3 authorizes an action in equity for discovery and relief by such loser, or his creditor, or the persons designated in the preceding section, but when so obtained the winner shall be discharged from all penalty and forfeiture for having won the money or other thing which, or the value of which, is so recovered back.

Section 4 empowers any other person to sue the winner, and recover treble the amount or value of money or thing lost, if such loser or his creditors do not sue within six months after its payment or delivery.

Section 5 provides for recovery from a stakeholder any money or other thing that may be staked on any bet or wager.

And succeeding sections of the same article provide fines, penalties and forfeitures where certain designated machines and contrivances used for betting are set up and kept; for fine of a person who invites, persuades or induces another to visit any place where gaming is carried on, and recovery from such person by the loser or his creditor of what may be lost in gaming at such place, and specific modes for punishing offenders and suppressing such games.

Article 2 relates alone to betting on elections, and provision is made not only for fines, but also for forfeiture to the Commonwealth of the money or other thing so bet and received. Although section 1, artice 1 seems to apply to executory contracts, the consideration of which, in whole or in part, is money or property won, lost or bet, at some one of the specified forms of gaming, and, therefore, independent of the statute, void and unenforcible, it must, nevertheless, be taken and considered, in connection with all other parts of the chapter, in order to definitely and certainly ascertain and carry into effect the intention of the legislature.

For as each part relates to the subject of gaming, the inference is the entire chapter "was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

That policy, as clearly indicated, is to not only punish by fines and forfeitures for the offense of setting up and keeping certain designated games, which, by an act passed subsequent to adoption of the General Statutes, was made a felony, but to give to the loser, or his heirs and creditors, the right to recover from the winner money and property bet and lost in any game within purview of the chapter. But if the right to recover given by section 2, under which this action was brought, be decided as is contended, not to relate to money lost in any one of the modes described in section 1, it is utterly without value or meaning.

It is, therefore, both a legitimate and decisive inquiry in this case whether the process by which appellant, as alleged, lost to appellees the money sued for, can be properly denominated a wager, not, we think, being either a game, sport or pastime according to common and approved usage of those terms; and if it can be fairly and legally thus classified, appellant has prima facia cause of action.

In Smith, &c. v. W. U. Telegraph Co., 84 Ky., 684, this court used the following language in reference to parties engaged in the precise character of business described in appellant's petition: "They merely wagered on the market price of the commodity at some specified time in the future. A mere statement of the character of business done by them shows it to be a species of gambling, as well defined and as reprehensible as that of keeping a faro bank or a dice machine, and is, therefore, illegal and contrary to public policy."

In Braddus, Wood & Co. v. McElrath & Co., 88 Ky., 280, it was held a contract in form, one for sale and future delivery of personal property, but made with no intention to deliver, but that instead the seller should pay or receive the difference between the contract price and market price on the day stipulated for delivery is a mere wager, and can not be enforced by either party.

The same ruling was, in substance, made in Sawyer, Wallace & Co. v. Taggart, 14 Bush, 751; and so has the peculiar business in question been characterized and denounced by courts generally elsewhere.

It would, therefore, seem this court can not now consistently decide otherwise than that the process by which appellant lost and appellees won and received the money in contest was, in the meaning of the statute, a wager, and being so, the right to recover it exists under section 2, article 1.

It is, however, contended that the mode by which the money in question was bet, won and lost is not within the provision of chapter 47, because, first, it had not been contrived nor was known to the legislature in 1852 when the statute, as it now exists, was first embraced in the Revised Statutes; second, it is not comprehended by the language used in section 2.

Whether it was known or devised as early as 1852 does not seem to us at all material, for the policy of the legislature was then, as it is now, to give to a loser right to recover from the winner money or property "bet and lost at any game, sport, pastime or wager," no matter by what particular process or contrivance it might then or thereafter be done.

It was the vice of gaming and its baleful consequences intended by the statute to denounce and provide against, and whatever mode then used, or has since been devised, which may be correctly denominated either a game, sport, pastime or wager, must be regarded as then and now in contemplation of the legislature. It seems to us just as logical to say that the business or occupation in question is not against public policy, because not known or practiced in 1852, as that for the same reason a winner thereby may hold to his ill-gotten gains, or enforce his contract for payment of losses incurred by his dupe, for if that form of gambling is not within operation of the statute no obstacle to recovery by a winner what may be lost by his customer exists at all.

The language used in section 3 of the act of 1798, which gave right of recovery to the loser at any game, is: "That if any person at any time hereafter, within the space of twenty-four hours, by playing at any game, shall lose," etc.

That provision was evidently made with reference to money

lost at cards or other like games, and would not be applicable to a wager of the character we are considering. But the language used in section 2, article 1, chapter 47, General Statutes, is: "If any person shall lose to another at one time, or within twenty-four hours, $5 or more," etc.

It does not, in our opinion, make any difference when the bet or wager may be made or how long it be pending and undetermined; but when there is lost at a wager as much as $5 at one time, the right of the loser to recover it from the winner exists, and he may sue therefor, or for the aggregate amount so lost during a given period.

We think a cause of action was stated in the petition, and it was error to sustain the demurrer. Wherefore, the judgment is reversed, and cause remanded for proceedings according with this opinion.

HALL v. COMMONWEALTH.

(Filed June 19, 1890—Not to be reported.)

Homicide—Murder—The facts of the case show that the appellant, in taking the life of Fields, committed a wanton and cruel murder, and no extenuating circumstances are shown that entitle appellant to a reversal of the judgment of conviction.

P. W. Hardin for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Pryor.

There was no excuse or justification on the part of the accused for taking the life of Fields.

The deceased, according to the weight of the testimony, was standing near to one of his friends with his hand on his shoulder when the accused approached with pistol drawn and shot him dead. The witness told the accused not to shoot, but the latter, bent on taking the life of the deceased, persisted in firing the fatal shot. He was in no danger whatever when he fired; but, on the contrary, it clearly appears that it was a wanton and cruel murder. There is no legal question raised in the case, and certainly none prejudicial to the accused.

The jury seem to have been lenient in their verdict resulting, no doubt, from testimony showing that Fields, when drunk, was a dangerous man. There is no ground for a reversal.

Judgment affirmed.

VANMETER v. VANMETER'S ASS'EE.

(Filed June 14, 1890—Not to be reported.)

Homestead—A debtor having made an assignment for the benefit of creditors, claimed as his homestead a tract of land containing 110 acres, owned by him in fee, and adjoining a tract of land containing about 150 acres, owned by his wife, upon which they resided and had their homestead, and in which he owned a right of courtesy worth more than $1,000. Held—That his tract of 110 acres is not exempt as a homestead, as the exemption con-

templated by the statute was owned by him in the tract belonging to his wife.

Leland Hathaway for appellant.

I. N. Cardwell for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

The appellant assigned all his estate to W. Miller for the equal benefit of his creditors, reserving to himself a right of homestead, etc. He owned one hundred and ten acres of land in fee, and his wife owned one hundred and fifty acres of land adjoining this one hundred and ten acres, he owning a curtesy right therein, which was worth more than $1,000. On this land the appellant lived, and had his homestead at the time of the assignment. He claimed a homestead in his own tract of land in addition to his right in his wife's land; but the court would not allot it to him, upon the ground that as he owned a life interest in his wife's land, which was worth as much as $1,000, and as he was living on said land as a home, he could not claim a homestead in his own adjoining tract upon which he did not live.

The object of the law was to exempt from forced sale, etc., a debtor's homestead, not exceeding $1,000 in value, to enable him to support and care for his dependent family. In this case the appellant owned two freehold estates, the one a life estate, the other an estate in fee. The former he lived upon as a home, and his right to live upon it for life as a home was as absolute as was his right to live upon the latter for life. It is his right to a homestead for the support of his family, and after his death his widow's and infant children's right that the law contemplates. Here the appellant's right is secured during his life, and at his death the widow, in right of herself and dependent family, is entitled to a homestead; so all the rights, as appears from existing facts that the law contemplates, are secured. The contingencies suggested that may alter these rights may never arise. It is not presumed that they will. The case must be determined by existing facts. According to these facts the appellant's rights under the homestead law are amply secured. If we allowed ourselves to adjudicate upon the basis of what might hereafter occur, why not allow a man, without a family, a homestead, upon the supposition that he might thereafter have one? If ones' life estate was worth tnousands of dollars, as is not infrequently the case, which he occupied as a homestead, and he owned in fee only $1,000 worth of land adjoining his homestead, would it be right to exempt the latter tract from the payment of his debts? We think not. To allow this, the homestead law would be an engine of oppression, instead of a benefit to the unfortunate and helpless.

The judgment is affirmed.

SIMS v. COMMONWEALTH.

(Filed June 17, 1890—Not to be reported.)

1. Indictment—The Criminal Code does not require the Commonwealth's attorney to sign an indictment. An indictment alleging that appellant

killed the deceased by shooting him with a pistol is sufficient without alleging that the pistol was loaded with powder and some hard substance.

2. Instructions—The facts showing no provocation whatever for the killing, and the conviction being only for manslaughter, under an instruction for manslaughter given by the court, appellant can not complain.

W. L. Hurst for appellant.

P. W. Hardin for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Bennett.

The Criminal Code of Practice requires that an indictment must be indorsed "a true bill, and the indorsement signed by the foreman." The Code does not require the Commonwealth's attorney to sign the indictment. It makes no difference whether the person signing the indictment was county or Commonwealth's attorney. The law did not require either to sign it.

The indictment charges that the appellant "did feloniously, willfully and with malice aforethought, kill and murder Arthur Fitchpatrick, by shooting him with a pistol."

It is contended that the indictment is lacking in sufficiency, because it fails to state that the pistol was loaded with powder and leaden ball or other hard substance. It is alleged that the appellant killed the deceased by shooting him with a pistol. It seems that it would be necessarily understood that the pistol was loaded with powder and some hard substance, capable of producing death.

There is no dispute about the fact that appellant killed the deceased without any provocation from him whatever. The appellant says he was shooting at a man by the name of "Convict Joe," who had just tried to kill the appellant, and he accidentally shot the deceased. If it be true that Convict Joe had just shot at the appellant, he, Joe, was, at the time the appellant shot, running from the appellant with the evident purpose of abandoning the conflict, and the appellant was pursuing him, which was not necessary for him to do in order to free himself from apparent danger, therefore, it was not error not to instruct the jury upon the subject of self-defense in reference to Joe, in order to excuse the accidental killing of the deceased. But the court did instruct the jury that if the appellant tried in sudden heat and passion to kill Joe, and accidentally killed the deceased, he was only guilty of manslaughter. This was as favorable as the appellant was entitled to. The appellant was found guilty of manslaughter only.

The judgment is affirmed.

RIDGWAY, &c. v. NATIONAL BANK OF NEW CASTLE.

NICHOLSON v. SAME.

Filed June 14, 1890.)

1. Banking—Discounting and purchase of paper—To constitute a "discounting" of paper, either within the meaning of section 21 of chapter 23 of the General Statutes, which provides how a note may be placed upon the footing of a bill of exchange, or, within the meaning of the national banking act, the money must be lent or advanced to the holder and owner of the paper at a stipulated rate, fixed by the general course of the bank's business,

the interest being deducted from the face value of the paper, by way of discount, and as the price to be paid for the paper and the use of the money advanced thereon. But this does not mean that there should be an exact and uniform standard applicable to all paper, without regard to the ability of the parties to it, or the amount, or the time for which it is to run, but that paper of its several classes may have, and does have, a discount value generally regular and uniform, and if that standard of uniformity is acted upon, then it may be said there was a discounting; but if there is a rate generally applied, and the transfer is made without reference to that, but as in a case of a barter and sale on the street, or as applied to things generally other than choses in action, then the transaction is a sale and purchase, and not a discounting.

The note sued on matured December 30, 1887. The cashier says the bank purchased it in the regular course of business on the 27th of December; that the time was so short he did not calculate the interest; that he gave $259 on the note in a lumping trade, taking off $1—the note being for $260—that the bank's rate of discount has remained at 8 per cent. for a number of years. Held—That the bank's acquisition of the note was by purchase, and not by discount; and, being a national bank, its act was ultra vires, and it acquired no title to the paper.

2. A national bank can not acquire title to a note by purchase, the purchase of promissory notes not being within the powers conferred upon national banks.

3. Pleading—The words "sold" and "discounted," used in the petition, were intended by the pleader to have the same meaning, the word "sold" being used to convey the idea of a transfer by discounting according to the usages of business and the regular rates of discount, rather than a barter and sale. Moreover, as an issue was made by the answer as to whether the bank acquired the note by purchase or by discount, it is now too late after issue, verdict and judgment to say that the petition was defective for duplicity.

J. W. Croan, Fairleigh & Straus and Jno. T. Bashaw for appellants.

Wm. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Ward.

It is, perhaps, unfortunate that there was an agreement in the lower court that one of these cases should abide the result of the other, because it is evident that there is some difference in fact between the two cases, and without having these differences pointed out in some mode it is, of course, impossible to say whether the result under the law should be the same in both cases. As the agreement was made, the difficulty is more complicated by the rendition of a judgment in the second case before a result was reached by a final and conclusive judgment in the first case.

Evidently this court can be controlled in its consideration and determination only by the pleadings, evidence and rules of law, made, given and applied in the principal case, and without giving construction to the agreement, or meaning to intimate what ought to be the law of the other case, simply affirm or reverse the judgment in the second case, as it may affirm or reverse the judgment in the other.

Looking to the decisions of the courts of this State, this case is one of first impression. That it is a very important one will be conceded by all. Its consideration and decision should, therefore, be approached with a clear understanding of its controlling facts, and of the statutes by which the effects following from these facts are to be determined.

The appellee, a bank incorporated and acting under the United States national bank act, claiming to be the holder and owner of the note hereinafter set out in full, instituted this suit thereon against the makers, the appellants, and the indorsers. The note was as follows:

"$260. March 30, 1887.

"Nine months after date we promise to pay to the order of B. S. Smith two hundred and sixty dollars, at German Insurance Bank, Louisville, Ky., value received.3

"J. W. RIDGWAY,
"L. B. NICHOLSON."

Indorsed "B. S. Smith and J. J. Smith."

The bank alleged that "before the 30th of December, 1887, B. B. Smith sold, assigned and transferred, and discounted for value said promissory note to the plaintiff, and at the same time J. J. Smith indorsed said note to the plaintiff, and guaranteed the payment thereof at its maturity."

The makers only made defense.

It is insisted by them that the petition is defective in this, that it sets out inconsistent claims, first, that the note was sold to it; and, second, that it was discounted by it, and that as the bank had no right to buy or purchase the note, but only the right to acquire the title to it by discounting it; that its pleading should be most strongly construed against it, and that on demurrer the allegation should be construed to be an allegation of purchase rather than one of discount.

This position would, in our opinion, be well taken, if the words "purchase" and "discount," as used in ordinary business transactions, necessarily meant different things, but as we will have occasion before this opinion is completed to show that these words are often used synonomously, or as convertible terms, their exact meaning depending more upon all that was said and done in connection with the word than upon the exact and technical meaning of the word, we are of opinion that it would be too technical to say that "sold," as used in the petition, was intended to convey the idea of barter and sale rather than the transfer by discounting according to the usages of business and the regular rates of discount.

The collocation of the words in the petition shows that they were intended to have the same meaning by the pleader, and this is made more manifest in view of admission by counsel for appellant that, pending a demurrer to the petition, the word "discounted" was interlined by consent.

Moreover, an issue was made by the answer as to whether the bank acquired the note by purchase or by discount, and it is now too late, after issue, verdict and judgment, to say that the petition was defective for duplicity. The only question before this court for review is, was that issue properly tried?

As indicated, the makers of the note, by their answer, claimed that the appellee, bank, purchased the note; that it did not discount the note, and that as the purchase of promissory notes is not within the powers conferred on national banks, its act was ultra vires, and it acquired no title to the paper. A second contention is, that if the act was not ultra vires, that still as the note was not discounted, but purchased, the bank, if it acquired title at all, it took the paper subject to all defenses which the makers had against it before notice of the assignment, and, in appropriate averments, a defense was relied upon, which we need not

state, as the sole question now before us relates to the issue as to whether there was a discounting or a purchase.

The only evidence given upon the subject was that of the cashier of the bank, who stated, in substance, that he had been cashier of appellee, bank, since 1874. The bank purchased the note sued on before its maturity, and, as shown by the protest thereon, it was protested at the German Insurance Bank, Louisville, Ky., and had been sent there before maturity some weeks. Do not remember exact time. The plaintiff had purchased it for value before due, and in the regular course of business. Our rate of discount has remained at eight per cent. for a number of years. The transaction of purchase is of record on the books. We bought both notes at the same time. After examining the books he said: "I was mistaken as to the time the notes were purchased before maturity. The note sued on matured December 30, 1889, had three days of grace, and the record shows that they were purchased December 27, 1887, but the bank obtained them on the 26th, and the entry was made on the 27th, the day after they were bought. I did not calculate the interest on this note, the time was so short. It did not amount to much.

"I gave Smith $259 on the note in a lumping trade, taking off $1; the note was for $260, and I paid him for it $259."

Upon this evidence the court instructed the jury to find for the plaintiff if it believed from the evidence that the note was discounted in the usual course of business, and for value, etc., and refused at appellants' instance to instruct the jury to find for defendant if the note was purchased, and also refused to define the words purchase and discount.

The court, by its action upon the pleadings, seems to have been of the opinion that the issue was a material one, and, being of this opinion, it seems, if it was a case admitting of doubt in its facts, that the appellees were entitled to have the first instruction asked by them, as it was but the converse of the one given for the plaintiff. It further seems that the terms, there being much confusion in the minds of the business and commercial world, and in the books, as to what is the exact meaning of these words as employed in the statute, should have been defined, if the definition asked by counsel were correct.

But as there was no dispute about the facts, there being but one witness affecting the question now before us, and he being introduced by the appellee, bank, we may, in considering the case, treat that evidence as we would had there been a motion for a peremptory instruction by the appellant. This motion would have conceded that the evidence was true, and that concession is the most favorable one which the appellee could have asked below, or can ask here. So, without setting out the instructions given or refused more minutely, we will apply the law as we understand it to the facts.

Among the powers conferred upon national banks by the act under which they are organized, is provided, in the seventh subdivision, that they shall have power "to exercise, by its board of directors, or duly authorized officers subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin or bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title."

By the provisions of section 21 of chapter 22 of the General Statutes of this State, which we need not here recite, a note of

the kind therein described must, in order to be placed upon the footing of a foreign bill of exchange, be indorsed to, and discounted by, a bank of the kind described in the statute.

As the words "indorsed to and discounted by" are the only words used in our statute as descriptive of the mode by which the bank can acquire title to the paper, so as to cut off defenses by the maker, it is certainly safe to say that in construing that section we would be obliged to give to these words the technical meaning which they have in banking business. (Section 17, chapter 21.) At any rate the difference could not be material to this appeal, since if there was not a discounting within the meaning of our statute, the defense was not cut off, and if there was not a discounting within the meaning of the national banking act, then the title did not pass, and the bank had no right of action at all. The difference of construction would not prevent a reversal if an improper construction was given below.

But in view of the general principles of banking, and of the powers granted to banks, which are denied to brokers or shavers, and of the reasons for the grant of these extraordinary powers, we are satisfied, without more minutely stating the reasons therefor, that the word "discount," as used in both statutes, has the same meaning, and that in both it means that money is to be loaned or advanced to the holder and owner of the paper at a stipulated rate, fixed by the general course of the bank's business, which interest is deducted from the face value of the paper, by way of discount, and as the price to be paid for the paper and the use of the money advanced thereon.

We do not mean by this that there should be an exact and uni- from standard applicable to all papers, without regard to the ability of the parties to it, or the amount, or the time for which it is to run, but that paper of its several classes may have, and does have, a discount value generally regular and uniform, and if that standard of uniformity is acted upon, then it may be said that there was a discounting; but if there is a rate generally applied, and the transaction of transfer is conducted without reference to that, but as in a case of barter and sale on the street, or as applied to things generally other than choses in action, then the transaction is a sale and purchase, and not a discounting. (Morse on Banking, sections 18, 48, 49, 72 and 78; First National Bank of Rochester v. Pierson, 24 Minn., 141; Lazear Brothers v. National Bank, 82 Md., 124; Dunkle v. Renick, &c., 6 Ohio State, 582.)

In the latter case the fact that the value of the paper, or the price to be paid for it by the bank, was fixed by the agreement of the parties, rather than by reference to the bank's usual rates of discount in use in the transaction of its business, was regarded as a proper test, and to show that the transaction was one of purchase and sale, and not of discounting.

This seems to be a reasonable and just test. Banks are organized for the purpose of issuing and loaning money, sometimes only for the latter, and it would certainly greatly detract from their powers of usefulness if they were allowed under the guise of discounting paper to charge for it whatever the necessities of their customers might demand. We judicially know that they do not transact business that way, but that discounting, as applied to a banking transaction, means the deduction of a sum according to standards of recognized uniformity, as applied to the amount and time for which the paper has to run, which is the subject of

negotiation; and that to purchase paper means to pay a sum certain for it, the standard for which is fixed by the agreement of the parties.

It is true that many cases may be found which hold that there was a discounting, when, according to the standard which we have fixed, it would have been a sale, but these transactions were really discounted, only sales colorably for the purpose of covering up a usurious transaction; and the courts, in order to prevent usury and grant relief against it, never suffer themselves to be fettered by conventional terms or subterfuges resorted to to evade the statute. They aim to go to the essence of the transaction.

In connection with the authorities referred to above, we have had other cases cited by distinguished counsel, whose labors have greatly aided us in reaching the conclusion stated above, but the citations above made seem to sustain the conclusion we have reached, and we deem it unnecessary to attempt, at greater length, to unravel a question which Mr. Morse says: "Has got tangled in the double meaning of words, as well as having inherent difficulties, and has been much litigated." And especially do we so feel, in view of the fact that this court's opinion is not of ultimate authority, save in this case, and may not be in it.

Applying the evidence of this case to the law, as we understand it, it is clear that the appellee's acquisition of the note in contest was by purchase, and not by discount; that its act was ultra vires, and it acquired no title to the paper.

The judgments are reversed and the cases remanded for a new trial and further proceedings consistent herewith.

Judge Barbour not sitting.

Judge Bowden delivered the following separate opinion:

A national bank has power to become the owner of such a note. That is conceded. The criticism relates to the manner in which that power may be exercised. If the deduction made was equal to twenty-four per cent. and the bank had stipulated for that rate and had so gotten the note, its title could not be questioned. The usury would have been great and the bank would have been liable to an action, but that is all—i. e., it has power to get the title by doing exactly what was done so far as the amount is concerned that it retained, if it had ostensibly charged the $1 as usury; but it is said to have gotten no title by reason of the fact that it did not take the $1 as usury, but as a deduction in gross. That makes the title depend on the manner of doing an act whereby title is acquired, while admitting that title would have been acquired if the transaction had been different in form but exactly the same in result.

It seems to me the proper rule in regard to the fact of getting title is this:

If the bank retains an excessive discount, whether estimated by reference to rate of interest and time or whether as an agreed sum, it is to be treated as usury, and as not affecting the bank's title, provided the indorser remains liable, for it is then really an advancement on the personal credit of the indorser, whatever the form of the transaction.

It may be that if a sum in gross is received, and the indorser does not remain liable, it should be regarded as a sale, and ultra vires. It may be that if discounted, with reference to rate and time, even when the rate is excessive, the title will vest, though the indorser does not remain liable. What should be said in these cases is not now to be considered. In the case before us the indorser remained liable; a gross sum was taken, which, as a dis-

count, involved an excessive rate. It seems to me in such case the bank should be treated, however the question may arise, just as it would be if the sum retained had been ascertained by a rate high enough to have produced it. In this connection, it seems to me, power relates to substance, and not to form.

If, when a gross sum is retained, the maker pays the note, and then sues to recover, the bank might be estopped to plead that it got no title, and might properly be treated as if the transaction had been both in form and substance a loan, and this would not be inconsistent with the doctrine laid down in the opinion that if the bank sues, the maker may resist recovery on the ground that it has no title. The propositions are wide apart. Cases, therefore, in which a recovery has been allowed, though the transaction was one in which a gross sum was retained, can not be cited as against that doctrine. Nor have I found any case in which the view I suggest has been taken. The cases cited in the opinion seem to sustain it.

OWINGS v. TUCKER.

(Filed June 19, 1890.)

1. Acceptance of deed—In 1858 J. deeded jointly to his children his home place as a gift, reserving only a maintenance out of the land. his son, H. L., at the time being an infant and one of the donees. In 1859 J. divided the land among his children, giving separate deeds to each, but the portion to H. L. he gave to him for life, remainder to his children. Appellant having purchased the life estate of H. L., under an execution, and having taken possession of same under his purchase, resists recovery of the land, claiming to have purchased the fee-simple interest of H. L. under another execution. Held—That at the date of the sale under execution H. L. had no fee-simple title to said land, as both allegation and proof show a reconveyance before the execution of the deed of 1859.

2. Presumption of acceptance—An adult can not be made a grantee in a deed without his knowledge and consent. A grant made to an infant, if beneficial to him, equity will imply an acceptance, but he may reject the grant upon his arrival at age.

Wood & Day and Turner & Son for appellant.

Wm. H. Holt and H. L. Stone for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

In 1858 David L. Jones deeded jointly to his children, as a gift, his home tract of land, containing 475 acres, reserving the right of maintenance out of the land. H. L. Jones was an infant son of the donor, and was one of the donees. In 1859 David L. Jones divided this land between said children, and made each a deed to his part, deducting previous advancements from his interest. David L. Jones conveyed by deed the part designed for H. L. Jones to him for life, remainder to his children. Several years thereafter the appellant caused the life interest of H. L. Jones in this land to be sold by the sheriff, and he purchased it and received a deed for it, and took the possession of it under said deed, and so held the possession for several years, when he discovered, as he says, that David L. Jones had, in 1858, conveyed to H. L. Jones an undivided fifth interest in said tract of land in fee,

which he had sold under another execution to satisfy the remainder of the debt existing after the sale of said life interest.

Did H. L. Jones acquire title under the deed of 1858? Certainly not. The case of Davenport v. Trewett, &c., 9 B. M., 98, 99, &c., upon which the appellant relies, says that, in order to make a valid conveyance, there must be both a grantor and grantee, and, if the grant is beneficial to the grantee, it may be presumed that he has accepted it, and if, from the nature of the grant, this presumption does not arise, an acceptance of the grant must be otherwise shown, else there is no grant.

And if a grant is made to an adult, without his knowledge or consent, it is no grant, because he can not be made a grantee without his knowledge and consent; and when the knowledge is brought home to him he may reject the grant. Also a grant made to infant, if beneficial to him, equity will imply an acceptance; but he may reject the grant upon his arrival at age, if he has not done some act which will estop him. Here there is no proof whatever that H. L. Jones ever accepted the deed of 1858; on the contrary it is expressly proven that he did not accept said deed, but accepted the deed of 1859, and took possession of the land under it, and held the possession under it until it was sold by the appellant.

The old suit upon which the appellant relies as evidencing that H. L. Jones accepted the deed of 1858, explicitly shows the reverse of that fact. It shows that H. L. Jones accepted the deed of 1859. Also it is shown beyond all cavil that the deed of 1858 was, prior to the deed of 1859, cancelled by a re-conveyance of the land. This is shown not only by the decided weight of evidence in this case, but by the answer of J. M. Jones in the old suit referred to, which is not denied in the particular that it alleges the reconveyance.

The judgment is affirmed.

Judge Holt not sitting.

CLEVELAND COAL CO. v. SLOAN & DICK.

(Filed June 21, 1890.)

Assignment for benefit of creditors—Wrongful attachment of partnership property—Parties to actions—Two partners having made an assignment for the benefit of creditors after the issual of an attachment and before levy of the same, in their petition allege a joint wrong inflicted upon them by injuring their credit, for which they seek a recovery in damages. Held—That the partners can not maintain such action as the right of action for injury to the firm credit or property belongs to the assignee alone.

O. H. Waddle for appellant.

Curd & Denton and M. H. Owsley for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Pryor.

The appellees were partners, engaged in the sale of goods, wares and merchandise, and while conducting the former business the appellant obtained an attachment that resulted in their closing their establishment, and making a general assignment for the benefit of creditors. They allege a joint wrong inflicted upon them—a loss of credit by which they were compelled to quit

business to their great damage. The assignment was made between the issual of the attachment and the levy, and it is apparent, from the proof, that insolvency was inevitable, and the effect of the attachment was only to hasten the time for making it. It is claimed by the appellant that as the right of action was an injury to the partnership, whether to its property or to its credit, the claim, if any, passed by the assignment to the assignee, and being firm assets when collected, as the right of recovery existed before the assignment, the recovery should go to the assignee for creditors, and that, therefore, the assignee must sue. It may be a tort, and yet if an injury to the firm property, it passed to the assignee; and if an injury to the firm credit, the same result would follow. If the cause of action would survive them, as said in Frances v. Bennet, it would pass to the personal representative. By our statute so much of the action for malicious prosecution as is intended to recover for the personal injury dies with the person. (Chapter 10, General Statutes.) There was nothing sought to be recovered for personal injury in this case, because they sue as partners for an injury to the firm's credit and business. This is the gravamen of the complaint, and none other existed upon the facts alleged. The inquiry is: How could the firm be exposed in any other way than as to its property or its credit or its business? It affects the partnership and not the individual member, only in so far as he is connected with the business, and no individual or several injury is alleged. While there might be a separate cause of action as to each partner by reason of the wrongful levy, the facts alleged do not present such a cause of action. When the property of the firm is injured or its credit destroyed, the firm, as such, is affected by it, and must bring the action. It is conceded that the judgment in this case is for the firm and is firm assets, and that one member of the firm can have it applied to pay partnership debts; if so, the cause of action accruing before the assignment, the right of recovery passed by its terms to the assignee. There has been no personal injury, in the sense of the statute, inflicted on the individual partner. They have not been arrested or imprisoned or a several injury inflicted so as to enable one of the firm to appropriate the recovery for his own use against the will of the other. In such a case we think it manifest that these appellees can not recover, and the defense made upon that ground should have been sustained.

The judgment is reversed and remanded for proceedings consistent with this opinion.

EVANS, &c. v. RHEA.

(Filed June 14, 1890—Not to be reported.)

Partnership—Liens—Subrogation—In August, 1879, M. and E. became partners in the drug business, M. furnishing $1,200 without interest, and E. his personal services without charge. In November, 1879, they purchased of C. a rival drug store, executing therefor their promissory notes, one for $500 and two for $950 each, to secure the payment of which they executed a mortgage upon both stocks of drugs, and also on three lots of land belonging to E. M. paid off the $500 note at maturity, and by permission of E. sold out his interest in the firm to R., who took up the remaining purchase-money notes and instituted this action for a settlement of the partnership accounts, and judgment for the balance due him; also that the three lots of E. be sold to satisfy one-half of the notes executed to C. Held—That the payment of

the notes held by C. were advancements made to the firm, for which R. is entitled to charge one-half against the firm, and have personal judgment for against his partner, as balance due on settlement, but R. is not entitled to have the lots sold to satisfy same, or be subrogated to the lien of C. A party being bound as a surety may, upon payment of the debt, be subrogated to the rights of his principal or co-surety in any security held by either of them, but in this case they were not sureties for the firm or for each other, and no right of subrogation exists.

Cromwell Adair, Richards & Hines and Ken. Chapeze for appellants.

Hughes & Hughes, W. P. D. Bush and F. F. Bush for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Chief Justice Lewis.

August, 1879, J. A. Mason and R. P. Evans became partners as retail druggists in Morgantown, under the firm name of R. P. Evans & Co., the former furnishing $1,200, to bear no interest, as capital in the business, and the latter agreeing to personally attend to it without charge.

November 1, 1879, a purchase was made of the entire stock of a rival drug store in the same town at the price of $2,400, for which three notes signed by Mason & Evans individually were executed to Cromwell, the seller, one for $500, due January 1, 1880, and two for $950, each due respectively November 1, 1880, and November 1, 1881; and to secure payment of the notes a mortgage was executed on both stocks of drugs, and also on three lots of land belonging to Evans, his wife uniting with him in it. Mason paid the first one of the three notes when it fell due, with the amount of which he seems to have been credited on books of the firm. But March, 1880, he, with the consent of Evans, sold his interest in the store to appellee, Rhea, and the business was thereafter conducted under the same firm name until November 1, 1881, when the dissolution took place, Rhea taking possession of the business and assets of the firm. This action was instituted August, 1882, by Rhea against Evans and wife, for settlement of the partnership accounts, and judgment was asked for the balance due to Rhea from Evans, and also for enforcement of the mortgage lien on the lots of Evans mentioned to satisfy one-half amount of the Cromwell notes, one of which, as before stated, had been paid off in full by Mason, and the other two by Rhea.

From report of the master commissioner, exceptions to which were overruled, it appears that at the dissolution of the firm the total amount of assets was $4,817.16, of which $427.25 was an account against Rhea, and $1,934.31 was against Evans.

The total liabilities of the firm amounted to $3,946.24, leaving a profit of $870.92. But as the debts, consisting of $1,200, originally put in by Mason, and $2,746.24, amount of the Cromwell notes and interest, were due entirely to Rhea, the result found by the commissioner was that, after deducting from what Evans indivually owed the firm, his half the profits, he was indebted to Rhea $1,498.85, for $125.73 of which personal judgment was rendered, and to satisfy $1,373.12 thereof, being one-half the Cromwell notes, the three lots of land were adjudged to be sold.

The evidence seems to justify the result reached by the commissioner, if it be true, as assumed by him, that Evans was an equal partner in respect to losses as well as profits. And that such

was his attitude, we think, is satisfactorily established by the evidence as well as so found by the lower court.

The principal question then is, whether, in virtue of payment by Mason of the first and by Rhea of the other two notes, the latter is entitled, by way of subrogation, to enforce the mortgage lien ordinarily held by Cromwell on the lots of Evans, to satisfy one-half amount of the notes so paid off.

It is, as contended by appellee's counsel, a general rule that when a person paying a debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, a court of equity substitutes him in place of the creditor.

But Mason & Evans were not sureties of the firm of R. P. Evans; nor was either surety of the other in the notes executed to Cromwell. They were, it is true, jointly bound for payment, but the stock of goods for which they gave the notes were intended and can be regarded in no other way than as advances made to the firm by them respectively.

To secure payment of the notes not only the stock of drugs purchased of Cromwell, but also the stock then owned by the firm was mortgaged, showing it was considered by them as entirely a partnership transaction. The reason for including the lots of land belonging to Evans in the mortgage was, doubtless, because Mason had advanced so far all the capital, but it can not be fairly inferred from that fact the lien thereon was intended to continue after Cromwell was paid.

By the terms of the contract between them Mason sold to Rhea his entire interest in the drug store, including stocks, notes and accounts, Rhea assuming all Mason's part of indebtedness of the firm. It was stated in the writing that the interest of Mason was $1,277.20 more than that of Evans, and that Mason had also paid off the first note of $500 Cromwell held on the firm, and that note was then delivered to Rhea as a debt due by the firm to him, and that Rhea was entitled to draw the $1,277.20 out of the firm assets as fast as the same could be spared from the business so as to make him and Evans equal partners. About the same date Rhea and Evans made and signed a written contract, in which it was stipulated that any money paid by Rhea on the notes to Cromwell for purchase of his drug store was to be refunded with eight per cent. interest at such time as the house might be able to spare the same from the business, or on the final settlement of accounts.

It seems to us plain that the purchase of the drug store from Cromwell was understood by Mason and Evans to have been by and for the firm of R. P. Evans & Co., and the payment therefor was assumed by Mason & Evans as advances to the firm. For in the contract between Mason & Rhea the note for $500, previously paid by the former, was transferred to the latter as a debt due by the firm, and in the contract between Rhea & Evans not only was one-half the notes paid by Rhea to be refunded with eight instead of six per cent., but it was, in terms too plain to be misunderstood, agreed that the amount so paid by Rhea should be repaid or accounted for on final settlement of accounts of the firm, if not before paid by the firm.

It is a well-settled rule, approved by this court, that advances to a firm and advances from it do not constitute debts, strictly speaking, but are only items in the account between the partners in the winding up of the concern. (13 B. M., 411.)

By his express contract with Evans, which leaves no room for

discussion as to the nature and effect of the original transaction between Mason and Evans, Rhea agreed, in effect, to treat the payment by himself of the notes to Cromwell as Mason treated the payment he made of the first note as a debt against the firm, and the one-half due on that account by Evans as a debt due from him to the firm, which necessarily resulted in obliterating any equitable right of subrogation to the mortgage on the lots, even if it ever existed.

That Evans subsequently misapplied the firms assets, or withdrew more than he was entitled to, and thereby rendered a fair adjustment between the partners, as well as payment of the balance due Rhea by the firm, impossible, did not have the effect to change the situation of the parties, or the nature of existing liabilities.

In our opinion appellee was entitled to a personal judgment for the balance found due to him by appellant upon a final settlement of the business of the firm, but no right to enforce satisfaction thereof, in virtue of the original mortgage to Cromwell.

The judgment must, therefore, be reversed and cause remanded for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

NORTHINGTON v. BOYD.

(Filed April 23, 1890.)

1. Exemptions—Fraud—A debtor may sell all or any of the articles specifically exempt from execution and then have an allowance out of other property, if he has spent the money. By making such a sale he does not commit a fraud against the exemption law. The fraud, if there be any, must consist in the effort to retain the proceeds of the property sold.
2. Inconsistent pleadings—An amended answer assailing a mortgage as fraudulent, and without consideration, was properly rejected, as it did not retract the averments of a former answer treating the mortgage as valid; the defendant could not hold both positions.

J. D. White & Son for appellant.

J. M. Nichols for appellee.

Appeal from Ballard Court of Common Pleas.

Opinion of the court by Judge Bowden.

1st. The second paragraph of the amended answer, to which a demurrer was sustained, does not allege that the breadstuffs, corn, etc., sufficient to maintain his family a year were sold by Boyd after the distress warrant issued. The averment is that the sale was "before the levy and sale;" but when or how long before is not averred. The words "at that time" refer to no antecedent, and, therefore, designate no time. It may have been

months before the warrant was issued. It is alleged that the sale was made with the fraudulent intent to secure exemptions out of the tobacco in lieu of articles specifically exempt. But it is also admitted that when the tobacco was sold Boyd did not have these articles, and that he had no money, or other property. If a poor debtor, anticipating a levy, and having three work beasts, but only one cow, sells one of the work beasts and buys another cow, we do not suppose the latter could be taken, though it were admitted that he did so in order to hold, in this way, the value of the work beast. He might sell any or all of the articles specifically exempt, and then have an allowance out of other property if he had spent the money. If the sales were fraudulent, in the sense of being collusive, the purchaser might possibly be called on to account, but we do not understand the exemption law to refer to any time, except that at which it is sought to take the property. One does not commit a fraud against that law, nor is it an effort to take a fraudulent advantage of it, to sell what he has, exempt or not, for a fair price, and to honestly apply the proceeds. If Boyd, desiring to prefer creditors, and as a means to that end sold his breadstuffs, corn, etc., and paid his debts, his claim to exemptions out of what he had left could not be disputed by creditors subsequently levying. In the nature of the case the fraud must consist in the effort to retain the proceeds, which, it is admitted, was not done in this case, and no fraud with regard to the proceeds is suggested.

The construction given also accorded with this view.

2d. The appellant, offering the amended answer assailing the mortgage as fraudulent, and without consideration, did not retract the averments of the former answer, treating it as valid. He could not hold both positions. But that mortgage operated as a limitation on the amount of recovery; and if it had been out of the way, Boyd would doubtless have recovered more than he did. The appellant holds the tobacco as purchaser, and in proceeding under article 14, chapter 38 of the General Statutes, or in any other proceeding in which the mortgagee claims, he may find that his interest was subserved rather than injured by the rejection of his amended answer.

The judgment is affirmed.

CITY OF BOWLING GREEN, &c. v. BARCLAY, POTTER & CO.

(Filed June 14, 1890.)

Taxation of private banks—Article 2 of chapter 92 of the General Statutes, which provides for a tax on "shares of stock in State and national banks, and other institutions of loan and discount," and provides that this tax shall be paid into the treasury, and shall be in full of all tax, State, county and municipal, does not apply to private or unincorporated banks, private banks being left to pay as others under the general provisions of the revenue law. And, therefore, the payment into the State treasury by a firm of private bankers of a tax of 75 cents on each $100 of their capital stock does not exempt them from city or county taxation.

John E. DuBose, J. C. Hines and E. W. Hines for appellants.

Dulaney & Mitchell for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Bowden.

The appellees are private bankers, doing business in the city of Bowling Green; the appellants are seeking to tax their banking capital for local purposes; and they claim that under section 1, article 2, chapter 92 of the General Statutes they are exempt from all local taxation, paying to the State the rate there prescribed in full of all tax State, county and municipal. The firm is composed of twelve members; their banking capital is divided into shares of $100 each; they are not incorporated.

The fact that the capital employed is held in shares is not an incident, but an account; in case of a sole banker it would be impossible; as a rule, it does not exist as a mere form; as a matter of law, it does not, in any way, affect the status of the firm, or the rights or liabilities of the partners; companies not sanctioned expressly by the legislature are wishing more than ordinary partnerships, and the laws which govern them are the same. (Wells v. Gates, 18 Barb., 557; Williams v. Bank of Michigan, 7 Wend., 542.) The question presented is, therefore, the same as if the appellee were a single individual banker.

"Sec. 1. Shares of stock in State and National banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents," etc.

The tax is laid on the shares of stock: First, in State banks; second, in national banks; third, in other institutions of loan or discount; and, fourth, in all corporations described. Shares of stock are the usual and essential form of corporate capital; of the four classes, the first, second and fourth are, in terms, corporate; and the third is an institution in which the capital stock is held in shares. Its terms do not embrace any private capital employed by an individual banker; nor the capital of any firm, organized as firms usually are; in the former shares can not exist; in the latter, they do not exist. As we have indicated, in order to include any private banker or mere firm, it is necessary that it shall include all private banks. As it can not include all, it includes none.

If the word "institutions" is to be known by its associates, they are such as are organized under law, general or special. The rule of interpretation gives the reading: "And in other like institutions of loan or discount, sanctioned by law, as corporations are." There may be institutions, such as joint stock companies, for instance, not classed as corporations, though having like management.

A corporation must have a capital stock held in shares, the exact number of which can be known. This capital is the basis of credit. A private banker, or a firm of private bankers, need not have any fixed sum devoted to the business. The individual estate, which may be lands, and high personal character, may secure deposits so that the protecting fund of the banker need not be large. It may even vary with the seasons, as business changes, a part of what is usually devoted to banking puproses being used into their pursuits. Just what capital on September 15 of each year is being used for banking purposes it might be difficult for the banker himself to ascertain; certainly, if he were the least inclined to conceal, his report could not be challenged. The law nowhere undertakes to provide for so hard a task. The case, as we think, was not contemplated; the private banker being left to pay, as others, according to the general provision.

Every where corporate and official management is presupposed.

"Sec. 1. The auditor may investigate the books of such bank, institution or corporation; and any officer having in charge the

affairs of such bank, institution or corporation who shall refuse," etc., shall be subject to indictment.

"Sec. 2. The cashier of a bank and the owner of any other institution or corporation, shall report the true amount of capital stock," etc. "If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. on the amount, and any State bank, institution or corporation shall thereby forfeit the privilege of its charter." This clearly indicates that no "institution" was intended that does not have a charter that may be forfeited, and a cashier to be fined. The same inference is to be drawn from the official certificate required.

Sec. 3. W. assumes that an official report, as required by section 2, will be made; and requires a report as to investments in United States funds, which is possible only when the capital stock is fixed and known.

Sec. 4. This refers manifestly to corporations only, for it relates to such as have charters, fixing a rate of taxation, which they are practically invited to waive so as to be taxed under section 1. Yet the language is: "Each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may, per its consent," etc. Those corporations thus provided for are the same kind as theretofore referred to, "each of said banks," etc. The institutions referred to are, therefore, such as have a corporate authority, stockholders, regular meetings.

Sec. 7. If any State or national bank fails or refuses to pay, the consequence is provided for; but nothing is said in regard to any institution of loan or discount which is not a State or national bank, in case it fails. This indicates that the phrase, "other institutions of loan or discount," is inserted out of great caution, in order to cover every business of loan or discount conducted under express authority of law, whether by corporations or by joint stock companies, having shares and corporate management, and whether strictly denominated banks or otherwise. We suppose that section 7 refers to everybody on whom section 1 imposes a tax; and that it would include all such "institutions of loan or discount" as the article contemplates, though that phrase is not there used, which is clearly indicated by the proviso in regard to "said banks or corporations."

Section 25 of article 6 presupposes the construction we have given. It makes it the duty of the sheriff to report to the clerk "all property which corporations may have omitted for any year or years to have listed with the auditor," implying that corporations only are to list with the auditor. Item 53 of section 27, "stock not paid on by corporations," has the same implication.

The act of February 24, 1869, Acts 1869, page 41, is entitled "An act requiring the chartered banks of this Commonwealth to make semi-annual reports of their condition." Section 2 imposes a penalty on recusant corporations alone. It seems, therefore, clear that it relates to incorporated banks only. A loose expression in section 1 can not justify the assertion that the legislature intended more than it expressly declared in the title was meant, and especially as such contention would render the validity of the act doubtful, at least, as including individuals, when the title included only chartered banks.

In our opinion article 2 of chapter 92 does not include private bankers, such as the appellees. It imposes a tax on shares of stock, which are only a mode of taxing the share in the hands of the shareholder, which the bank is prudently required to pay; but does not impose a tax on the capital itself; and, therefore,

does not, and can not, apply to private banks, in which there can not be what the law intends by the words "shares of stock," and where the basis of business is the capital employed (4 Bush, 98), which this article does not purport to tax.

The judgment is, therefore, reversed and the cause remanded, with directions to enter a judgment in conformity to this opinion.

ORIGINAL PACKAGE STATUTE.

An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom, by reason of being introduced therein in original packages or otherwise.

Approved August 8, 1890.

SUPERIOR COURT ABSTRACTS.

PEOPLE'S BANK OF KENTUCKY v. BARBOUR, &c.

Filed June 14, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

Assignment of property to be acquired in future—There can be no assignment of a thing not in esse at the time of the assignment so as to affect the rights of creditors.

Where a bank agreed with a depositor to pay him interest on deposits, the depositor could not make a valid assignment of the interest to be earned on deposits thereafter made, and, therefore, his direction to the bank to credit such interest, when earned, to his account as executor, was not a valid assignment of the interest to the testator's estate, and can not defeat an attaching creditor of the depositor whose lien was created after the interest was earned, and had been credited to the individual account of the depositor, instead of to his account as executor, as he had directed.

Judge Barbour, dissenting, holds that the assignment of the interest to be earned was valid, the case being similar to that of an assignment of wages to be earned in the future under an existing contract. And even if the assignment would be good only when there is a part performance under the contract, the facts of this case bring it within the rule, a part of the interest having been credited to the depositor's account as executor, as provided in the contract, before any antagonistic interest was asserted by any one to the fund.

Fairleigh & Straus for appellant; Brown, Humphrey & Davie for appellee.

SHORT ROUTE TRANSFER RAILWAY CO. v. FULTON.

Filed June 14, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Ward, affirming.

1. Railroads—Injury to abutting lot owners—It is not necessary that the construction and operation of a railroad along a street should obstruct the use of the street to the detriment of an abutting lot owner, in order to entitle him to recovery for the injury to his property resulting from the jarring, noise, dust and cinders caused by moving trains.

2. Same—Res adjudicata—The refusal of the court to enjoin the construction of a railroad along a street, upon the ground that the construction and operation of the road would not so obstruct the street as to authorize the court to prevent it from being built and operated, does not preclude an abutting lot owner, although a party to the injunction suit, from recovering such damages as he may have sustained by the jarring, smoke, cinders, etc., of moving trains.

Bullitt & Shield and A. Barnett for appellant; Simrall & Bodley and B. F. Buckner for appellee.

ORM v. BUCKLER.

Filed June 14, 1890. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Vendor and vendee—Rescission—In this action by the vendee for the rescission of a contract for the sale of land, as it appears that since the purchase the land has been sold under a judgment enforcing prior liens, the plaintiff is entitled to a rescission of the contract, although the purchase-money notes may have fallen into the hands of an innocent holder. If, however, it should appear that there has been no eviction from the land under the judgment enforcing the prior liens, and the defendants are able to, and do, tender a good title, the contract may yet be enforced.

2. Same—Judgments—As the matters which the plaintiff relies upon for a cancellation of the contract existed and were known to plaintiff before judgment at law was rendered upon one of the purchase-money notes, the chancellor had no power to set aside that judgment. (Civil Code, section 17.) But if the contract is rescinded, the assignee of the purchase-money notes should be made to account for all he has received upon that judgment, with interest. On the other hand, the vendee, having had possession of the land for several years, should be charged with rents, and judgment given for the party in whose favor the balance may be.

Kennedy & Son for appellant; W. W. Kimbrough for appellee.

CHENOWITH v. PHŒNIX INSURANCE CO., &c.

Filed June 14, 1890. Appeal from Mercer Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Insurance—Proof of agency—C., claiming to represent an insurance company at Lawrenceburg, applied to appellant to take insurance; the contract was agreed upon, the policy was to be issued and the premium paid the 1st of January thereafter, the arrangement having been made in December. C. applied to J. & Bros., agents of the B., F. & M. Co., living at Lawrenceburg, and they caused the policy to be issued December 15, 1884, and deliv-

ered the same to C. The policy acknowledged the receipt of the premium, C. saying to J. & Bros. that he would pay it at the end of the month. They reported the premium to the home office as paid, but having failed to collect it, they afterward deducted it from other collections they had made for the company. After C. procured the policy of insurance he went with it to appellant and had him to accept an order drawn on him in favor of B. for the premium to be paid January 1, and he then delivered the order and policy to B., who paid him the premium, and afterwards appellant paid B. and took up the order and policy. Held—That these facts are sufficient to show that C. was a solicitor of insurance for B., F. & M. Co., under J. & Bros., and that they trusted to C. to collect the premium and authorized him to do so, and that the premium was actually paid to the company upon the faith of C.'s promise that he would pay J. & Bros. on the 1st of January. Judge Bowden in a separate opinion holds that C. was not the agent of the company.

2. Same—Arbitration and award—In adjusting the amount which an insurance company should pay, neither the insured nor the company is bound by an award between the insured and another company in which the property was insured, fixing the value of the property in adjusting the amount which that company should pay.

3. In concurrent insurance the sum to be paid by each company is to be ascertained by the proportion which the whole insurance bears to the loss, and the sum insured by each company to its share of the loss. The amount of the entire loss can not be fixed except by agreement with each company or by legal proceeding to which those to be affected are parties.

4. Arbitration and award—By a written agreement between an insurance company and the insured the amount of loss sustained was submitted to two arbitrators and an umpire. The insured by attorney notified the arbitrators that in case there was a disagreement between them the parties were to be notified so that they might introduce evidence and be heard, and the arbitrators agreed that they would do so. The arbitrators did disagree as to an important fact—the size of the building which had been destroyed. After this disagreement the arbitrator selected by the insured requested that notice of the disagreement should be given, but the other arbitrator and umpire refused, and proceeded with the arbitration and made an award, the arbitrator selected by the insured refusing to take part in the proceeding after the disagreement and refusal to give notice thereof. Held—That the request that notice of disagreement should be given was a reasonable and proper one, and the disregard of it was such misconduct as vitiated the award.

T. C. Bell for appellant; Poston & Jacob, T. H. Hardin and Breckinridge & McFerran for appellees.

THE KENTUCKY LAW REPORTER.

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AMENDMENTS TO THE GENERAL STATUTES.

The following amendments to the General Statutes were passed at the last session:

CHAPTER 17.

Amends chapter 28, article 17, section 1. Adds the following words: "But the court of claims shall have no power to make an appropriation or to create any debt exceeding the sum of $50 at any one time, unless the same shall be voted for by a majority of all the justices in commission, and the yeas and nays thereon entered on the minutes."
Approved January 15, 1890.

CHAPTER 18.

Amend section 4, article 5, chapter 92. Add after the words: "Chattel mortgage" where they occur the first time in said section, the words "or lease or conveyance of coal, oil, gas, or other mineral rights or privileges."
Approved January 15, 1890.

CHAPTER 66.

Amends subsection 1, section 4, article 12, chapter 38, by adding: "Which receipt shall be recorded by the clerk with the execution."
Approved January 25, 1890.

CHAPTER 83.

Amends section 3, chapter 97. Permits the great seal of the Commonwealth to be used in certain cases, but does not deprive assistant secretary of state of legal fees.
Approved January 28, 1890.

CHAPTER 172.

Amends section 2, article 17, chapter 29, by providing that if any

person shall draw a deadly weapon upon another, or shall point any deadly weapon at another, he shall be deemed guilty of an assault upon such person, whether said weapon shall be loaded or unloaded, and, upon conviction, shall be punished as persons guilty of assault are now punished by the laws of this State. If any person, from ambush or any concealment or hiding place, shoot at any person without inflicting a wound upon such person, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.

Approved February 14, 1890.

CHAPTER 242.

Amends section 5, chapter 18, by adding, "each juror composing said jury shall be allowed $1 per day for his services, to be taxed as other costs."

Approved February 25, 1890.

CHAPTER 317.

Amends article 4, chapter 92, by taxing the franchise of corporations in this Commonwealth.

Approved March 11, 1890.

CHAPTER 497.

Amends section 1, article 1, chapter 94, by inserting the words "public cemetery" after the word "worship" in the fifth line of said section.

Approved April 2, 1890.

CHAPTER 518.

Amends article 3, chapter 92, title "Revenue and Taxation," by subjecting railroads to taxation for benefit of common school districts through which they pass.

Approved April 3, 1890.

CHAPTER 557.

Amends chapter 92, title "Revenue and Taxation," by regulating the duties of assessors and boards of county supervisors.

Approved April 4, 1890.

CHAPTER 570.

Amends section 5, article 2, chapter 16, by striking out of line four the words "without any fee or charge therefor," and insert in lieu thereof "without charging the State tax for affixing seals."

Approved April 4, 1890.

CHAPTER 573.

Amends section 18, chapter 31, so as to read as follows: "Said court shall have authority to give the petitioner the parental control of such adopted person, if an infant, but not without the consent of the parent or parents, if both or either be living, and said petitioner shall be under the same responsibilities as if the person so adopted were his own child."

Approved April 8, 1890.

CHAPTER 580.

Amends section 8, article 2, chapter 44, by adding the following: "The provision of this section shall apply to assignments made by

debtors for the *pro rata* payment of debts generally, as well as to trusts created by the statute against preferences and fraudulent conveyances."

Approved April 7, 1890.

CHAPTER 581.

Amends chapter 47, entitled "Gaming," as follows: "If any person or persons shall engage in any hazard or game in which money or property is bet, won or lost, such person or persons shall be subject to a fine of not less than $20 nor more than $100."

Approved April 7, 1890.

CHAPTER 583.

Amends section 1, article 4, chapter 5, by adding the following: "He shall also attend to all civil cases and proceedings in the circuit courts of his district in which the Commonwealth is interested: *Provided*, That the Commonwealth's attorney for the district in which Franklin county is now or may hereafter be located, shall not discharge such duties for the Commonwealth in civil cases and proceedings in the Franklin Circuit Court."

Approved April 7, 1890.

CHAPTER 739.

Amends article 1, chapter 47, entitled "Gaming," by providing penalty for playing oontz or craps, and for keeping houses where such games are played, for playing such games fine not less than $50 nor more than $100, or confinement in county jail not more than three months, or both, at discretion of the jury; for keeping such houses confinement in penitentiary not less than one nor more than three years, and rendering the keeper infamous.

Approved April 11, 1890.

CHAPTER 758.

Amends seetion 5, chapter 79, by striking out the word "first" in the second line and substituting therefor the word "third."

Approved April 15, 1890.

CHAPTER 766.

Amends section 5, article 2, chapter 45, by providing that fugitives from justice, for the apprehension of whom the governor has offered a reward, may be delivered to some safe jail designated by the Governor in his proclamation.

Approved April 15, 1890.

CHAPTER 1310.

Amends section 15, article 1, chapter 5, by giving to attorneys at law a lien on all claims and demands, including claims for unliquidated damages upon which suit has been instituted for amount of fee agreed upon between attorney and client, or in the absence of an agreement, for a reasonable fee.

Approved May 6, 1890.

CHAPTER 1834.

Amends article 4, chapter 12, by providing for change of venue in criminal cases where judge and Commonwealth's attorney agree that there is a state of lawlessness in county where indictment found

preventing a fair and impartial trial. The change of venue to be to the nearest county where such lawlessness does not exist.
Approved May 26, 1890.

CHAPTER 1387.

Amends section 15, chapter 73, by striking out of said section these words: "In their discretion not exceeding $4 per week," and insert in lieu thereof the following: "For their board and maintenance, the same as allowed to other patients by the State."
Approved May 10, 1890.

CHAPTER 1919.

Amends section 7, article 5, chapter 92, by adding thereto the following: "Exhibitions displayed under canvass or any hall or building, which consists solely of performances by educated or trained horses, shall pay to the county clerk a license of not exceeding $5 a day: *Provided*, The price of admission thereto does not exceed 25 cents for each person over fifteen years of age, and not more than 15 cents for each person under the age of fifteen years.
Approved May 27, 1890.

AMENDMENTS TO CIVIL CODE OF PRACTICE.

CHAPTER 1411.

An act to amend section 51.

Be it enacted by the General Assembly of the Commonwealth of Kentucky: § 1. That section 51 of the Civil Code of Practice be amended as follows: Where the defendant corporation is the owner or the lessee of a railway in this State, or the builder or constructor of a railway in this State, and can not be served with summons under existing laws, then the person or corporation controlling or operating the railway so owned or built or constructed shall be treated as the representative of the defendant, and service of summons upon such of the officers or agents of the persons or corporation operating or controlling the railway, as would be required if such controllor or operator were the party sued, shall be a sufficient service of summons upon the defendant to the action; but such service must be twenty days before the commencement of the term, and the facts authorizing the same must be made to appear by the return of the officer, or the affidavit of some person other than the plaintiff in the action, and the appearance of the defendant to move for the quashal of the service of the summons shall operate as an appearance for all the purposes of the action, and the same shall stand for trial at the succeeding term of the court in case the motion to quash shall prevail.
§ 2. This act shall take effect from its passage.
Approved May 10, 1890.

CHAPTER 876.

Amends title 4, chapter 2, section 56, by inserting after the word "infants," in the first line of said section, and before the word other in the second line thereof, the following: "Under the age of fourteen years."

Approved April 18, 1890.

CHAPTER 1095.

An act to amend section 10.

Be it enacted by the General Assembly of the Commonwealth of Kentucky: § 1. That section 10 of the Civil Code of Practice be, and the same is hereby, amended as follows: The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court of purely common law to a court of purely equity jurisdiction, whenever the court, before which the action is pending, shall be of the opinion that such transfer is necessary, because of the peculiar questions involved, or because the case involves accounts so complicated, or such great detail of facts, as to render it impracticable for a jury to intelligently try the case.

§ 2. This act shall take effect and be in force from and after its passage.

Approved April 29, 1890.

CHAPTER 1223.

Amends section 710 by striking out and repealing the following part thereof, viz: "Unless the defendant or defendants all reside in one district, and there be an acting justice of the peace and acting constable in such district."

Approved May 3, 1890.

AMENDMENTS TO CRIMINAL CODE OF PRACTICE.

CHAPTER 919.

Amends section 28 by adding in the tenth line thereof, and just after the word "committed," the following words, "or by any constable making the arrest." Also by adding in the eleventh line just after the word "deputy," the following words, "or any such constable."

Approved April 19, 1890.

CHAPTER 976.

Amends section 36, chapter 2, title 3, by adding the following as subsection 3: "That such peace officer with a warrant of arrest, when in the actual pursuit of an offender, may cross a county line for the purpose of making the arrest, and may make the arrest in the adjoining county."

Approved April 22, 1890.

KENTUCKY COURT OF APPEALS.

HASTY'S HEIRS v. BERRY.

Homestead—When a debtor reserves the right of homestead in a deed of trust for the benefit of creditors, a creditor who accepts the provisions of the deed by sharing in the distribution under it, can not afterward subject the homestead to the payment of the balance of the debt.

(*Filed June* 17, 1886—*Not to be reported.*)

Wood & Day for appellants.

W. H. Holt for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Pryor.

The appellee in this case had made an assignment of his property, including his real estate, reserving the right of homestead. The appellant had attacked the assignment as fraudulent, and was a party to the proceeding by the assignee to settle the trust, in which the homestead had been allotted to the appellee. He participated in the distribution of the proceeds of sale, and is now (having failed to make all of his debts) seeking to subject the homestead to its payment, upon the ground that his debt was created prior to the homestead law.

All these matters were litigated in the former proceeding. The right to a homestead was set up against all the creditors, and if not entitled, the question should have been made by the appellant. The claim was asserted, and the homestead had been set apart, and if liable to appellant's claim, the right of appellant should have been asserted in the suit for the settlement of the trust estate. Besides, in this case, there was property, or the proceeds of other land, excluding the homestead, that was sufficient to pay this debt, and as all the creditors claimed under the deed of trust and accepted its provisions by participating in the distribution they can not now disturb appellee in the enjoyment of his rights. The case of Webster v. Bronston, 5 Bush, 521, has been disapproved by this court, and the dissenting opinion of Judges Robertson and Peters recognized as the law in the case of Gardner v. South, 10 Bush, 245.

The judgment is, therefore, affirmed.

Judge Holt not sitting.

HOLCOMB V. HOOD.

(*Filed Sept.* 9, 1886—*Not to be reported.*)

Homestead—Pleading—In an action by a debtor to recover his land, which has been sold under execution, upon the ground that he was entitled to it as a homestead at the time of the sale, it is not necessary that he should allege in his petition that the debt, for the satisfaction of which the land was sold, was created subsequent to the acquisition by him of the land, a *prima facie* right to the exemption is established by alleging that he was, at the time of the sale, an actual *bona fide* housekeeper with a family, occupying and claiming the land as a homestead.

2. *Where a debtor has acquired land by gift*, he is entitled to homestead therein, although the debt to which it is sought to be subjected existed prior to its acquisition. The provision of the statute that a debtor shall not be entitled to a homestead if the debt for which the land is sought to be sold existed prior to its purchase does not apply where the land has been acquired by gift.

Roe & Roe for appellant.

Thomas H. Paynter for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Lewis.

It has been held by this court, in accordance with established rules of pleading, that it is sufficient to make a *prima facie* right to exemption from sale under execution, attachment or judgment of any court of so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value $1,000, if it be made to appear that he was, at the time of such sale, an actual *bona fide* housekeeper with a family, occupying and claiming the land as a homestead. Nichols v. Sennett, 78 Ky., 630.

It was, therefore, not necessary, in order to constitute a cause of action in this case, for the plaintiff, who is the debtor, to state in his petition that the debt, for the satisfaction of which the land was sold under execution, was created subsequent to the acquisition by him of the land, and the demurrer was properly overruled.

But the answer does not state sufficient facts to make a defense to the action. For the proper issue in a case where the debtor claims the land by purchase, is not when the deed was executed and accepted, but when he did, in fact, make the purchase.

The land, however, in this case was not acquired by purchase, in the meaning of the statute, but was a gift to the debtor by his father; and it is, therefore, immaterial when he so acquired it.

By section 11, article 13, chapter 38, General Statutes, it is provided that the exemption provided in that chapter shall not apply to sales under execution, attachment or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements. But as held by this court in Jewell v. Clark, 78 Ky., 398, the effect of that provision was to prevent debtors from purchasing homesteads after creating debts or liabilities, and then claiming the exemption against such debts. But, said the court, that case, which was where the title was acquired by descent, did not come within the letter of the law; nor, it may be added, did it come within the reason of the provision.

The same rule must, of course, be applied in a case where the debtor acquires the land by gift, as this court has done in the case where it has been acquired by descent. For an acquisition of land by gift is altogether different from an acquisition by purchase in the sense in which the term is used in the statute.

It, therefore, is immaterial whether the land in this case was given to the debtor before or after the creation of the debt for which it was sold, for, according to neither the letter or spirit of the homestead law, can it be made subject to appellant's debt.

Judgment affirmed.

LUCKETT, &C. v. BUCKMAN, &C.

(*Filed Sept.* 9, 1886—*Not to be reported.*)

1. *Parties to actions—Res adjudicata*—One acting in one right can not be benefitted or injured by a judgment for or against him when acting in some other right. Two of the trustees of a school district were sued as individuals jointly, with others, for an alleged trespass to land. The defendants to that action pleaded *liberum tenementum*, and whether the close belonged to the school district or to the plaintiffs in that suit was the issue. The plaintiffs recovered judgment. *Held*—That the judgment is not a bar to an action by the school district to recover the land, the title to which was an issue in that action, as the trustees *as such* were not parties to that action.

2. *Amendment to Code of Practice*—Prior to the amendment of May 15, 1886, to section 553 of the Civil Code, the deposition of a witness could not be re-taken without leave, although in rebuttal.

Rountree & Lisle for appellants.

Hill & Rives for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The deed to the appellants, Luckett and Fowler, was made in 1880; and it is admitted by them in both their pleadings and testimony that Patrick Hickey, in 1869, and while the owner of the land embraced by their deed, gave a small portion of it to the appellee, school district No. 49 of Marion county. The gift was by writing, which is lost; whether a bond or deed does not appear; but it is shown that it was never recorded. The donee, however, was in the actual possession of the school lot when the Lucketts and Fowler purchased, and had been from the time of the gift; moreover, the grantees in the deed of 1880 had notice before their purchase of the grant of 1869. It is, however, claimed by them that the line of the school lot was the Town Lick branch, while the appellees contend that it extended to a bluff just across the branch, and that the bluff was the line, thus embracing a valuable spring, which appears to have burst forth just at the foot of the bluff and near the branch, subsequent to the gift to the school district, but before the purchase of the Lucketts and Fowler. Upon this question of fact the testimony is somewhat conflicting, but sufficient, in our opinion, to support the opinion of the chancellor, who sustained the claim of the district.

It appears that after the purchase by the Lucketts and Fowler they took possession of the spring; built a house over it, and locked it up, thereby preventing the district from using the spring.

It was at once torn down by the patrons of the school, two of its trustees being of the party. The Lucketts and Fowler sued them, some sixteen in number, in trespass, and recovered a small judgment. The defendants to that action plead *liberum tenementum;* and whether the spring belonged to the district or the plaintiff to that suit was in issue.

The verdict in it is now relied upon in this action as estopping a recovery by the district, and it is claimed that the matter is *res adjudicata.*

It is true that two of the trustees of the district were defendants to that action; but as individuals, and it was in tort.

The school district, as a corporation, was not a defendant, and it was not claimed that it had in any way authorized the alleged trespass. The trustees as such were not parties, but were sued jointly, with others, and as individuals for the alleged tort. It is true that they claimed that the title to the spring was in the district; but it was not contended that the corporotion was in any way liable for the wrong.

The parties to that action and this one are essentially different.

The judgment in the one case could not divest the title of the district, or estop it from substantially asserting it, merely because two of its trustees were, as individuals, parties to it. They, acting as individuals, could not raise an issue which would bind the corporation, it being in no way a party to the suit. It is a rule of law that one acting in one right can not be benefited or injured by a judgment for or against him when acting in some other right. An estoppel must be mutual. If the plaintiffs in the trespass suit had been defeated, it would not have prevented them from thereafter proceeding against the school district by suit for the land; and the objection to the plea of former adjudication was properly sustained.

It is proper to say that upon the appeal of the trespass case, formerly heard by this court, we were of the opinion, upon the evidence then presented, that the appellants were the owners of the spring, but additional evidence, material upon that question, is now presented.

The appellees re-took the depositions of certain witnesses, without leave of the court. This was forbidden by the provisions of the Code of Practice then in force.

It is true that the testimony so taken was mainly, if not altogether, in rebuttal, but the then existing law made no exception.

Section 553 of the Civil Code, prior to the late amendment of May 15, 1886, which authorizes the re-taking of a deposition in rebuttal without leave, provided: "The deposition of a witness shall not be re-taken without leave of the court." The lower court erred in not suppressing this testimony; but as it is of such a character that it would not have changed the result, the judgment below is affirmed.

Judge Lewis dissenting.

SPALDING V. MATTINGLY, &C.

(*Filed Oct.* 6, 1886.)

1. *Pledge of property with power to sell*—A principal may vest his surety with the title to personal property, for the purpose of selling it privately and applying the proceeds to the payment of the debt for which he is bound as surety, the balance of the funds, if any, to be paid to the principal. Such a bill of sale does not operate as a mortgage merely.

2. *Principal and agent*—The equitable rule which prevents an agent from dealing with his principal's property for his own benefit, inconsistent with the interest of the principal, applies only to agents who are relied upon for counsel and direction, and not to those who are employed merely as instruments in the performance of an appointed service, such as an employe, to render manual labor for the principal without any power being delegated to him to act on behalf of the principal, such an employe may purchase the principal's property from any other person authorized to sell it as if he were a stranger.

Hill & Rives, W. E. & S. A Russell and H. P. Cooper for appellant.

Rountree & Lisle and J. P. Thompson for appellees.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Thomas B. Spalding, and the appellee, George Mattingly, were partners in the business of buying cattle and hogs, and feeding them on distillery slops. They had no means of their own to put in or run the business.

The appellee, who was a man of fine credit, and in good circumstances, aided them in the way of indorsing their paper in banks, whereby they were enabled to purchase and pay for the cattle and hogs purchased by them.

In the summer of 1881 said partners had a large number of cattle and hogs on hand, which had been paid for with money, amounting to several thousand dollars, borrowed from the banks by them, with appellee, B. F. Mattingly, as their indorser.

The appellee, B. F. Mattingly, desiring to be secured against loss, by reason of being indorser of said partners, they, on the 2d day of July, 1881, executed and delivered to him a bill of sale to all of the cattle and hogs they then owned. The bill of sale gave said Mattingly full power to sell the cattle and hogs, and apply the proceeds of sale to the payment of a note of $3,200, held by the Marion National Bank, and another note of $7,000, held by the ———— National Bank, given by said partners, with appellee, B. F. Mattingly, as surety; and, if any balance remained of the proceeds of sale, after the payment of said debts, it was to be paid over to said partners.

It is contended that this bill of sale operated as a mortgage only, and, therefore, appellee, B. F. Mattingly, could not sell the property therein mentioned, except by the judgment of a court having jurisdiction, &c., although the writing gave him the power to sell, &c.

The said firm being in debt, and said appellee being bound for the indebtedness as their surety, we can see no legal objection to the firm giving said appellee the power to sell said property for the purpose of raising the money with which to pay said indebtedness, and for that purpose vest him with the legal title. Said firm could have made the same arrangement with a stranger—a person not bound for them as surety, and no one would, we apprehend, question their legal right to do so. The fact that appellee, Mattingly, was their surety can make no difference in their legal right to vest him with the legal title to said property, for the purpose of selling it privately, and apply the proceeds to the payment of the debts for which he was bound as their surety, and pay the balance of the proceeds, if any, after the payment of said debts, to them.

About the time of making this agreement the hogs and some of the cattle were sold by appellant, with the consent of appellee, with the understanding between them that the proceeds of sale were to be applied to said indebtedness. The bulk of the proceeds was so applied, which reduced the bank's indebtedness to the sum of about $4,700.

The number of cattle remaining after said sale amounted to about 120, and appellee being dissatisfied, because the whole proceeds of said sale were not applied to said indebtedness as agreed, proposed

to take possession of said remaining cattle and sell them for the purpose of paying the balance of said indebtedness. About this time he discovered another note of over $800, which he was on as surety of said firm, had not been paid, so he agreed with said firm to take possession of said cattle at his distillery, and furnish slops to feed them on during the slopping season—about 180 days, when appellee was to sell them and apply the proceeds of sale under the agreement of the 2d of July.

Appellant and appellee, B. F. Mattingly, differ about the terms of this last agreement.

Appellant contends that appellee was to furnish 100 bushels of slops per day, on which to feed said cattle, at 6 cents per bushel, and also was to let the firm have sixty-six bushels per day, besides, free of charge, in consideration of certain things to be done by the firm. Appellee contends that he was to furnish 100 bushels per day at 6 cents per bushel, on which to slop said cattle, and no more.

Appellant swears positively to his version of the contract in this particular.

The appellee swears equally as positive to his version of it. Besides he is somewhat corroborated by other testimony. The court below seemed to think that appellee's version was best sustained by the weight of the evidence. We are not prepared to say that the court's judgment was wrong in this particular.

Appellant contends that appellee, in about a month after taking possession of said cattle, in violation of his agreement, sold them, and also the slops on which they were to be fed, as well as the sixty-six bushels per day extra, to B. S. Mattingly, who bought them for the firm of Simons & Mattingly, of which firm he was a member, whereby he, appellant, was largely damaged. He also, by an amended petition, made the firm of Simons & Mattingly defendants, and sought to hold them responsible for the value of said cattle and slops, upon the ground that said B. S. Mattingly, at the time he made said purchase, was employed by him to slop and attend to said cattle, &c.

The terms of sale of said cattle to Simons & Mattingly were that they were to pay the entire indebtedness for which said cattle were bound, and were to pay in addition all over 6 cents per pound the cattle might bring when sold by them. Appellee, B. F. Mattingly, was also to furnish 100 bushels of slops per day, on which to feed said cattle during the slopping season, and sixty-six bushels per day extra during the season free of charge.

The appellee, B. F. Mattingly, contends that he was justified in selling the cattle at the time he did, for the reasons that by the agreement he made with the firm of Mattingly & Spalding, they were to superintend and help erect the pens in which to confine said cattle, whereby he was to be relieved of expense and trouble. Also they were to furnish straw or hay for said cattle at their own expense, and personally attend to and feed said cattle during the slopping season, so as not to attach any of the expenses of these things to said cattle or himself, as it was feared that said cattle would not bring enough to pay the debts on which he was liable for said firm, which agreement they violated *in toto*, except to work a few days on said pens and then quit, and leave him to finish them at a cost of $1,200, and also hired B. S. Mattingly to straw and slop and attend to said cattle, at the price of $110 per month, and that he, B. S. Mattingly, looked to him, B. F. Mattingly, for his pay, and also proposed to hold said cattle bound for it. That under these circumstances, and

or these reasons, he sold said cattle to B. S. Mattingly, upon the terms above mentioned.

As to these alleged breaches appellant swears that there were none; his partner also comes to his relief.

Appellee, B. F. Mattingly, swears that breaches did occur. B. S. Mattingly also swears that he was employed by appellant, at the price of $110 per month, to straw, slop and attend to said cattle, and that he looked to the cattle and B. F. Mattingly for his pay. Also that appellant and his partner only worked a few days on said pens.

The lower court again believed the appellee's side of the evidence, and we are not prepared to say that it decided against the weight of the evidence.

We are also of the opinion that appellant having violated said contract, the appellee, B. F. Mattingly, had the right to sell said cattle when he did. Of course he was bound, in the exercise of a reasonable judgment, to make the best sale of them he could. We think the proof shows that he did.

The contention of appellant that appellee, B. S. Mattingly, is liable to him for the value of said cattle at selling time, and also for the slops, less his expenses (although appellee, B. F. Mattingly, may not be liable), because, at the time he purchased the cattle from B. F. Mattingly, he was acting as appellant's agent in slopping and attending to said cattle, can not be sustained, for the reason that the equitable rule which prevents an agent from dealing with his principal's property for his own benefit, inconsistent with the interest of that of the principal, "applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service, or both, and not to those who are employed merely as instruments in the performance of an appointed service," such as an employe to render manual labor for the principal, without any trust power delegated to him to act on behalf of the principal, but only to render some appointed labor for him for wages, then the employe may purchase the principal's property as well as any one not so situated. It would not be contended that a person merely employed by the owner of a team of horses to feed and drive them could not purchase them from any other person authorized to sell them.

Here appellee, B. S. Mattingly, was only employed to straw, slop and attend to said cattle at an agreed price, and appellee, B. F. Mattingly, having the right, under the circumstances, to sell them, B. S. Mattingly was under no equitable obligation not to buy them for himself upon fair terms.

After carefully considering the whole case we are of the opinion that there is no reversible error in the proceedings in the court below.

The judgment is affirmed.

DURST, &C. V. AMYX.

(*Filed June* 12, 1890—*Not to be reported.*)

1. *Marreed women—Parties to actions—Res adjudicata*—A judgment in ejectment having been rendered against the husband of appellants presents no bar to their claim, they not having been parties to the action.

2. *Boundary*—A line having been pointed out to the vendee by the vendor as the true boundary line, and the trade having been consummated upon such representation, the vendee can not afterwards dispute the location of such line.

Jno. T. Hazelrigg for appellants.

Orear & Bigstaff for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

Upon the facts of this record the injunction was properly perpetuated, because the facts show that the land of which the female plaintiffs are about to be evicted belongs to them, and not to their husbands. The former action, although litigated, determined no right affecting these married women. They were not parties to the action or before the court by a summons, or by an answer, and the mere fact that a judgment was rendered against them divested them of no right or title to the land. The former action, therefore, in which the husbands were parties, can not be pleaded in bar of the present suit. By agreement between the owners and occupants of the several tracts of land the division line, as contended for by the appellees, is the true boundary, and, in fact, it is. The line was shown to Allen, the father of the appellant and vendee, as the line that divided the two tracts. There is no evidence to the contrary. The land was bought and paid for to this line.

It appeared from the old suit that this land belonged to the female appellees, and still they were not made parties, and we perceive, therefore, no reason for holding that there is a bar to the recovery by reason of the judgment in that case.

The judgment below is, therefore, affirmed.

OWENSBORO AND NASHVILLE R. R. CO. v. SUTTON.

(*Filed June* 25, 1890—*Not to be reported.*)

Injunction—Injury to abutting lot owners—A railroad company having obtained the right of way along Lewis street, in Owensboro, to run its tracks to its depot on the banks of the Ohio river on First street, appellee, who owns a lot and residence abutting on Lewis street, obtained an injunction, restraining said company from "passing and re-passing his residence on Main and Lewis streets with its locomotives in making up its trains in said Lewis street, and from using the said Lewis street as a depot for cars, and from receiving and discharging freight from its cars therein." *Held*—That said injunction was properly granted. The grant to a railroad company of the right to lay its tracks along a street does not authorize said company to unreasonably obstruct said street; nor does such grant deprive the owners of property abutting on said street and railroad from recovering damages sustained by reason of the construction and operation of said railroad along said street. Legislative power does not exist to exempt either an individual or corporation from obligation to so use his or its own as not to hurt others.

W. F. Browder and W. N. & J. J. Sweeney for appellant.

G. W. Williams and G. W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an appeal from a judgment of the Daviess Circuit Court, rendered in an action of J. E. Sutton v. Owensboro and Nashville

Railroad Company, enjoining and restraining the defendant from "passing and re-passing plaintiff's dwelling-house on Main street and Lewis streets, with its locomotives, in making up its trains in said Lewis street, and from using the said Lewis street as a depot for cars, and from receiving and discharging freight from its cars therein."

It seems that appellant has had for several years right of way for a railroad track from the south side along Lewis street, in the city of Owensboro, to the Ohio river bank on First street, and that appellee owns a lot of land binding on Second and Lewis streets, upon which is situated his residence.

There appears to be no dispute of the right of appellant to run its locomotives and cars along the center of Lewis street, nor to use switches, which connect with the main track, between Second and First streets, in order to reach its yard and depot, situated on its own lot east of Lewis street, and between the other two streets. Nor could such right be withheld in this case without preventing passage of trains through the city, and reception and discharge of passengers and freight at convenient and accessible places.

But the argument of counsel is, in substance and meaning, that authority to lay its tracks and switches in Lewis street having been granted to appellant, it acquired, as an incident of that grant, such necessary use of the street as its business requires, and as will not unreasonably obstruct the use which the general public has in the street.

The use of a public way may be granted to a railroad company for passage through a city or town, or by switches from its main track to its depot, or receptacle for passengers and freight, because it is, in many cases, necessary, and may be done without materially injuring the street as a public way. But even a grant for that limited purpose can not be made, or the right under it exercised, except upon condition of the company being liable for injury done thereby to owners of abutting property. For legislative power does not exist to exempt either an individual or corporation from obligation to so use his or its own as not to hurt others.

There is no reason, nor necessity in this or any other case like it, for a railroad company to use a public street as a place for making up its trains, or as a depot for standing cars, or for receiving or discharging freight, for such use necessarily defeats the purpose for which streets are dedicated to the public, prevents reasonable enjoyment by owners of abutting property, and, consequently, a municipal legislature is without power to grant the right.

It seems to us appellant does not have the legal right to use Lewis street in the manner complained of by appellee, and such use of it was properly enjoined by the lower court.

Judgment affirmed.

MAY AND WIFE V. SCOTT, JR.

(*Filed June* 12, 1890—*Not to be reported.*)

Conveyance—Limitation—A grantor having conveyed land to his two daughters, reserving to himself a life estate therein, did not divest said daughters of their interests therein by subsequently conveying the same land to his son, the son having notice of the prior conveyance. Limitation did not begin to run against the daughters until the termination of the life estate reserved to their father.

Brown & Brown and Geo. N. Brown for appellants.

R. C. Burns for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Pryor.

It is plain from the proof and the exhibits that Richard Scott, sr., conveyed to his two daughters, Mrs. May and Mrs. Hicks, twenty-five acres of land, with certain exclusions, and it is equally certain that Mrs. May has not parted with her title; that the appellee has possession of it under a deed from his father, made subsequent to the conveyance made to the sisters, and with notice, as his own testimony shows, of the existence of the latter conveyance. The statute of limitations has not run, for the reason that no cause of action accrued to the grantees until the termination of the life estate, the grantee having reserved a life estate for himself and wife. It does not appear that there was any recovery of this land, or sale of it by creditors; nor does the appellee claim any title but that derived from his father.

The judgment denying the relief is reversed, with directions to allot to May and wife their interest in this lease.

KENTUCKY SUPERIOR COURT.

BUSH V. CHENAULT, RECEIVER.

(*Filed April* 30, 1890.)

1. *Contempt*—There is no rule of practice requiring, in a proceeding for contempt, any particular form for the notice to the offender. Therefore, it is not necessary that a rule, which is made the basis of such a proceeding, should inform the party in general terms that he is charged with having committed a contempt; it is sufficient if it charges him with the specific acts which he has done which constitute the contempt.

2. *Conversion of attached property*—When personal property is attached, and is in the constructive possession of the court, it is a contempt of the court for a third person, who has notice of the levy of the attachment, though he may be the owner of the property, to take it into his possession and convert it to his own use; but it does not necessarily follow that he should be required to respond to the plaintiff to the amount of his debt, or the value of the property, as his ownership is a proper question for the consideration of the court in determining the punishment for the contempt. In this case, however, the evidence justifies the finding of the court that the property taken belonged to the defendant in the attachment proceeding.

3. *Practice in proceeding for contempt*—While the usual order made in such cases is to require the party charged with contempt to pay the money into court, and to enforce this order by attachment, a judgment ordering the appellant to pay the money to the plaintiff within sixty days, and if not

then paid, authorizing an execution against him, did not prejudice his rights.

4. *The court had jurisdiction of the proceeding for contempt*, although the rule was served in a county other than that in which the action was pending.

W. M. Beckner, Wood & Day and H. M. Woodford for appellant.

H. L. Stone for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Presiding Judge Barbour.

In the case of Chenault, receiver v. W. J. Reid, an attachment was issued, and was by the officer levied on a lot of lumber, as the property of Reid. The lumber was in ricks on a certain lot, and is sufficiently identified in the return. The order of attachment was returned to the court, and, after a protracted litigation, during which no steps were taken to dispose of the attached property, and no order made concerning its custody, judgment was rendered against Reid for the debt sued on, the attachment was sustained, and the commissioner of the court was ordered to sell the lumber. It appearing from the commissioner's report that the property had been taken and disposed of by the appellant, V. W. Bush, a rule was, on plaintiff's motion, awarded against said Bush, and the officers who levied the attachment, "to show cause, if they can, why they should not be adjudged to pay to plaintiff the damages he has sustained, by reason of the taking, removal and conversion of said lumber to their own use, to the extent of the value of said lumber, or to the amount of plaintiff's debt, to-wit, the sum of $500. Which lumber was attached as the property of W. J. Reid, and is described as follows:" * * * The proceeding was dismissed as to the officer, and there is no complaint made here on that account. But it is insisted for Bush that the rule is fatally defective in that it does not purport to be the inauguration of a proceeding for contempt; that it is simply an abortive attempt to recover for a conversion of the property. Though the rule does not, in express terms, require the appellant to answer and purge the contempt, still it sets out facts which in themselves constitute a contempt, and requires him to show cause why he should not be required to pay to the plaintiff the value of the lumber taken to the extent of the debt for which it was attached—a punishment which, in a proceeding for contempt, might be proper. It would be difficult to understand how the defendant could be prejudiced by the language used in the rule. If, after the property was levied upon, he took it into his possession and disposed of it, he was, unless he can explain his conduct, guilty of a contempt; and why he should complain, because he was informed of the specific acts which he had done, instead of being informed in general terms that he was charged with having committed a contempt we can not understand. We know of no rule of practice requiring, in a proceeding for contempt, any particular form for the notice to the offender. It seems to us that the rule is in all substantial particulars a sufficient basis for the proceeding and for the punishment for contempt, and it, therefore, follows that, though the rule was served upon the appellant in a county other than that in which the action was pending, the court had jurisdiction.

There was, perhaps, sufficient evidence on the part of the appellant to sustain his contention, but we can not, in view of the evidence to the contrary, say that it was of such a clear and convincing character as to justify us in reversing the judgment. When personal property is attached, and is in the constructive possession of the court, it is clearly a contempt of the court for a third person, who has notice of the levy of the attachment, though he may be the actual owner of it, to take the property into his possession and convert it to his own use; but it does not necessarily follow that he should be required to respond to the plaintiff to the amount of his debt, or the value of the property, as his ownership is a proper question for the consideration of the court in determining the punishment for the contempt.

But the question does not arise here, as we think the evidence justifies the finding of the court, that the lumber was the property of Reid, the defendant in the attachment proceeding. Though the officer did not remove the lumber, it was, nevertheless, in his constructive possession, and the evidence is conclusive that the appellant knew this before he removed it. The evidence is equally as conclusive that the lumber was worth greatly more than the plaintiff's debt.

While the usual order made by courts in cases like this is to require the party charged with the contempt to pay the money into court, and to enforce this order by attachment, we can not see how the judgment ordering the appellant to pay the money to the plaintiff within sixty days, and, if not then paid, authorizing an execution against him, can prejudice his rights in any way.

The judgment is affirmed with damages.

McMATH V. COMMONWEALTH, BY, &C.

(*Filed April* 30, 1890.)

1. *Proceeding against attorney for failure to pay over money*—If it is conceded that the motion provided for by section 444 of the Civil Code and that provided for by section 10, article 1, chapter 5 of the General Statutes, can not be embraced in the same proceeding and prosecuted under the same notice, the appellant can not complain that it was attempted, as on his motion the latter part of the notice was stricken out, and he was proceeded against for failure to pay over money collected, and for no other purpose.

2. *Same*—In a proceeding by a company, purporting to be a corporation, against its attorney for failure to pay over money he has collected for them, the attorney, having sued in the name given in the notice, obtained judgment and collected the money, can not raise the question whether the company was regularly incorporated or incorporated at all.

3. *Same—Amendment of notice*—It was not error to allow an amendment of the notice for the purpose of making it more specific as to the person of the complainant.

4. *Clerical misprision*—There can be no reversal for a clerical misprision, which there has been no motion in the lower court to correct.

L. T. Applegate for appellant.

J. T. Simon for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bowden.

1. If it is conceded that the motion provided for by section 444 of the Civil Code and that provided for by section 10, article 1, chapter 5 of the General Statutes, can not be embraced in the same proceeding and prosecuted under the same notice, the appellant can not complain that it was attempted, as on his motion the latter part of the notice was stricken out, and he was proceeded against for failing to pay over money collected, and for no other purpose.

2. The notice was probably sufficient on its face without amendment; but even if it was not, the amendment did no more than to make it more specific as to the person of the complainant whose claim it was alleged had been sent to and collected by the appellant. It affected the notice in no other way. Whether the company was regularly incorporated or incorporated at all, seems to be a question which can not be raised by an attorney whose client it was, and for whom he had sued in the name given in the notice, had obtained judgment, and collected money.

3. We can not say the judgment should be reversed because too large. It does seem to be for $4.75 too much, but the evidence is not here, and that might explain. But the error, if any, was a clerical misprision, unless sustained by evidence, and there was no motion to correct.

The judgment is affirmed.

CALVERT, &C. V. RICE, &C.

(*Filed May* 14, 1890.)

1. *Waste* is an act done by a tenant, without license or authority from his landlord, whereby a lasting damage is done to the freehold.

2. *A life tenant may cut down trees* for the necessary repairs of houses and fences on the land, provided only that the trees cut are such as are ordinarily used for that purpose.

3. *Where a tenant has committed waste*, and, in some cases, where it is probable that waste will be committed, the chancellor may enjoin the party from committing waste, and enforce that judgment by punishing the defendant for its violation. The person whose estate is injured may also maintain an action for damages, and, in some cases, judgment may be entered, under the statute, for three times the damages assessed.

4. *Waste*—The fact that a life tenant has committed waste by cutting down timber trees will not authorize a judgment restraining him from cutting down *any tree* on the land.

T. C. Campbell and Cochran & Son for appellants.

Wall & Worthington for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Ward.

The appellees, the owners of the reversionary estate, instituted this suit against the appellants, who owned a dower estate, to enjoin the latter from committing waste.

The court, on final hearing, perpetually enjoined the defendant from cutting down any trees growing on the dower land, and gave plaintiff judgment for costs, from which judgment this appeal is prosecuted.

If it was admitted that the defendant had committed waste, and that he would probably do so again if not restrained, we know of no principle upon which the judgment could be sustained which enjoin the defendant from cutting down *any trees* on the dower land.

When a tenant commits waste, the person whose estate is injured may maintain an action for damages, and, in some cases, judgment may be entered under the statute for three times the damages assessed. When the tenant has committed waste, and in some cases where it is probable that waste will be committed, the chancellor may enjoin the party from committing waste, and enforce that judgment by punishing the defendants for its violation. The facts alleged and given in evidence in the injunction proceeding generally furnishes a standard by which the defendant should regulate his conduct, and the injunction should also quicken his perceptions and conscience so that he should abstain from committing waste of any kind; but for the court to decide in advance that, because there had been waste in cutting trees, that it would thereafter be waste to cut *any tree* growing on the dower land, seems to be deciding a case in advance; certainly such is the result, unless it can be said that under *any* and *all* circumstances which may arise it would be waste for this dower tenant to cut any tree growing on the dower tract. That can not be said.

But the evidence fails to satisfy us that any waste had been committed.

The prominent facts deducible from the evidence are these:

That William Duvall died the owner of a tract of 325 acres of land, situated on the Maysville and Mt. Sterling turnpike. Seventy-five acres of the land, including the dwelling, was allotted to his widow for dower. She intermarried with appellant, Jesse Calvert. The residue of the tract was allotted to the daughter of decedent, who intermarried with appellee, W. H. Rice. On the dower tract there was a woodland of ten or twelve acres, part of it being in the yard between the residence and turnpike, and part in an adjacent lot. The timber consisted of ash, walnut and sugar trees. The trees were usually thrifty, not very large, and were useful for shade and ornament. The value of the place would be greatly injured by clearing the land.

The fences upon the dower land were in a bad state of repair, and it was necessary to the enjoyment of the present estate for them to be repaired. The testimony of one witness was that twenty-seven trees had been cut from this woodland within fifteen months before the institution of this suit. The weight of the evidence was that about fifteen had been cut. But be that as it may, there is no evidence whatever that any tree was cut, except two, that was not used to make rails, or that the rails so made were not used, or were not necessary, to the reasonable and comfortable enjoyment of the estate. As to the two not so used the evidence is that one was a hollow tree standing near the house, the cutting of which was apparently necessary to prevent its falling upon and injuring the house. The other one was used in making a sill to replace a rotten one in a house upon the land. There is no evidence that the selection of trees cut for rails was injudicious, much less wanton. There is evidence that there was no timber on the tract allotted to appellee, and that the woodland would not furnish timber to repair the fences on the entire or original tract, if so used, for but a few years. This we deem immaterial. We are aware of no principle by which the right of the dower tenant to use timber to keep the fences in

repair on the dower estate could be affected, by reason of the fact that there was not enough timber on that land to keep it and an adjacent farm in good repair.

There is some evidence that plank could be bought and fences made out of that as cheaply as to make fences out of timber growing on the land. There was no evidence of values in the locality where the land is situated, and, therefore, the court may consider the values of which it takes judicial notice.

Allowing that it would be worth $1.25 per hundred to cut and make the timber into rails, and that it would be worth 5 cents per pannel to haul and build the rails into a fence; that eight rails, two riders and two stakes, were necessary to each pannel, and that two pannels will make a rod in length, one rod of fence would cost complete 40 cents. A plank fence, consisting of five boards, each six inches wide, has forty-one and one-quarter feet of plank to each rod. The plank alone would cost more to the rod than the rail fence complete, to say nothing of posts, nails and cost of erection. So that the conclusion stated by the witnesses can only be sustained by placing a value on the timber in the tree. But the timber in the tree has no value to the dower tenant, unless she has the right to use it for the better enjoyment of her estate, and to enjoy that value she does not have to make an outlay of capital for it, she simply makes an outlay to convert a value which she has in a tree to a value in a fence.

The doctrine of waste is controlled by a few simple and well understood principles, so much so that but few cases have found their way into the appellate court of this State. In Loroder v. Warfield, 5 J. J. Mar., 196, waste is defined to be "an act done by a tenant without license or authority from his landlord, whereby a lasting damage is done to the freehold," but in the same case it is also said that the tenant may take sufficient estovers of common right for plow-bote, fence-bote and other house-bote, unless restrained by particular covenants or exceptions.

Testing this case by the rules applicable to the doctrine of waste, there can be no doubt but that waste was committed. But in this case the defendant did not rest his defense upon the ground that he had not committed waste, as ordinarily understood and applied, but upon the ground that he was entitled to convert the timber on the land, designed by nature, to keep the fences in repair, and that in so doing he was using his own in a lawful way.

In an effort to reconcile the apparent conflict between the rules applicable in an action of waste and the right to estovers, we have examined a number of text-books and adjudged cases, among others Ward v. Sheppard, 2 Am. Dec., 625; Pynchen v. Steans, 45 Ill., 207, and cases in notes 210. Bouvier's Dictionery, subject, Estovers and Waste; Bacon's Ab. subject, What shall be deemed Waste, volume 10, page 426; Kent, volume 4; Leet, 55, side page 73; Blackstone's Estovers, volume 2, pages 122, 144; 14 Col., 544; 7 Md., 415; 7 Johnson's Report, 232-3; 5 Page Ch., 522; 8 Alk., 216; Findley v. Smith, 8 Am. Dec., 738.

Without going into an extended comment it is sufficient to say that the result of the examination is the same as that expressed in the case of Loroder v. Warfield, *supra*, that is, that waste is committed when an act is done without license, which inflicts a permanent injury upon the freehold estate, and that a life tenant may, of *common right*, take upon the demised land reasonable estovers or botes.

In all the cases examined but one of them refers to, or considers,

the subject of estovers; in the other cases the only inquiry was as to whether waste had been committed, and that to be determined solely by the question of judicious use for farm purposes. And in some of these cases the conclusion that waste had been committed was made to rest upon the idea that the timber would be necessary to repair fences, buildings, &c. The cases also hold it to be the duty of the life tenant to repair the fences and buildings against the ordinary ravages of nature, or to provide against and prevent permissive waste.

The duty to preserve timber for repairs, and the duty to make repairs, in which the use of timber is necessary, would seem to confer the right to use that which is to be preserved for the purpose for which it is preserved; if not, it is not preserved for repairs necessary to the enjoyment of the life estate, as well as the remainder, but solely for the latter, and if the duty to repair exists, and the tenant is not allowed to use that which was designed by nature to make these repairs, then the law would compel him to refrain from using his own, and to buy other timber and bring it upon the land, and thereby impart to it additional value, without regard to the time that this added value might be enjoyed. Or, in other words, there is no right to estovers at all, for if estovers may be taken only when it would not amount to waste, then there is no right at all, since the right of the tenant to use the freehold as he may desire provided no waste is committed, exists without regard to his right to estovers.

It would, therefore, seem that the right to the use of timber for fence-bote must and should be determined without reference to the law of waste at all. The estover must be a reasonable one, that is, there must be the right to the thing, and the thing must be adapted to the purpose. If it is fire-bote, there must be a necessity for fire, and the thing to be taken must be such as is used for that purpose. If it is a house or fence-bote, there must be a necessity to repair the house or fence, and the thing to be taken must be such as was by nature intended for that purpose. If these conditions exist, then the right to the thing is unquestioned, and the right can not be denied upon the ground that the exercise of it will, in the nature of the case, injure some one else. Everyone has the right to use his own in a prudent and proper manner, and if, while so doing, injury results to some one else, the injury is without remedy. If you do not permit the prudent use of one's own for one's own benefit, then you injure him.

The only case we have been able to find in which the right to estovers as such was considered, is that of Finley v. Smith, 8 Am. Dec., 733, and in that case it is said: "A tenant, who is generally restrained, by the nature of his estate, from cutting down timber, may nevertheless, cut down timber for the purpose of repairing houses; nor is there any case, in the books which I have seen, showing that he may not use as much as may be necessary for such lawful purpose. even though he should cut down the only timber tree on the land. Where there is a right to use a thing at all, the right goes to all the extent which a lawful object may require."

The judgment is reversed, and the cause is remanded, with directions to dismiss the petition.

BRAUN V. MONROE.

(*Filed April* 30, 1890.)

Pleading—Payment—Reply—A plea of payment is admitted by the failure to reply, notwithstanding the averment of the petition that no part of the debt has been paid. Such an averment in the petition can not be treated as a traverse.

John B. Barker for appellant.

L. T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bowden.

The new Code is a departure from the general plan of Code pleading; it is half modern, half mediaeval. The general plan is not to allow any pleading beyond a reply, and to require that only when the answer presents a set-off or a counter-claim. The result of this abandonment of the simplicity of the old Code is that we can derive almost no help from the decisions of other Code States.

In this case an action was brought to recover money alleged to have been lent to the firm of which the defendant was a member, the petition averring (as was necessary to show a breach of duty) that no part of it had been paid, except a conceded credit. The defendant pleaded that all of it had been paid. There was no reply.

Section 126 of the Code provides that "every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed, excepting" certain allegations not important here. A traverse is a denial. The allegation of payment is new matter, and is material; and there can be no doubt it must be denied. The only question, therefore, is whether the averment of the petition that "no part of the debt" has been paid can be treated as a traverse. A former reply to a plea of payment need state no more; it would be but a reiteration of that which is alleged in the petition.

A petition on a writing signed by the defendant need not be sworn to; whereas the reply to the answer must ordinarily be verified. If the allegation of the petition is in all cases to be treated as a traverse of the allegation of payment, then in some cases the plaintiff will get the benefit of a reply without verification, and thus be permitted to make an issue without oath, which would seem to thwart the purpose of section 116. That section places great value on the required oath as a part of the system of pleading, tending to prevent false pleas. At every step it appeals to the conscience and stimulates the memory, warning the pleader not to deny a true statement.

If to a petition on a writing the answer sets up various credits, the plaintiff would be relieved of the duty of considering each partial payment claimed, and of admitting such as he may remember to be just; thus casting on the defendant the burden of proving what otherwise might have been admitted, and the peril of not being able to make the proof.

The pleadings would always stand the same, whether the plaintiff meant to deny the credits or payment claimed, or did not mean to deny them. Thus the plaintiff's formal averment, intended only to allege a breach of duty, would shield him from making confessions as to subsequent specific statements of his adversary, which the

Code manifestly purposed he should make, if a good conscience so required.

It, therefore, seems to us that while *an* issue would be made by treating the formal averment of the plaintiff that no part of the debt has been paid, as a traverse of the subsequent averment of payment, total or partial, it would not be *the* issue which the Code demands; an issue to which the oath of the plaintiff must stand pledged.

There was no reply in this case, and, therefore, the payment alleged was admitted.

The judgment is affirmed.

GEORGETOWN & DRY RIDGE TURNPIKE ROAD CO. V. CANNON.

(*Filed Nov.* 25, 1885.)

1. *Turnpikes—Erection of barriers*—It is the duty of a turnpike company to make its road reasonably safe, and if the road has to be made along a precipice, it is the duty of the company to erect such barriers as will protect travelers from danger, having reference to the foreknown fact that horses are apt to get scared and start suddenly, and where a traveler is injured by reason of his horse becoming scared and running over the precipice, the company having erected no barrier, is liable.

2. *Evidence*—Evidence of other accidents at the same place was competent to show the dangerous character of the place, and to show that the attention of the company's officers was called to the fact.

3. *Pleading*—It was not necessary that the petition should give such a particular description of the place on the road where the accident occurred as would, appealing to common experience, justify the conclusion that it was dangerous. That is a conclusion of fact, not law.

W. S. Darnaby, Jas. F. Askew and A. Duvall for appellant.

J. E. Cantrill and Geo. E. Prewitt for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Bowden.

The appellee sued to recover damages for personal injuries, caused by the alleged negligence of the appellant in constructing and maintaining its road within three feet of a dangerous declivity, without any barrier to prevent accidents to travelers; and in making its road only thirty feet wide, the metaled part being less than fifteen feet, whereas the charter, it was alleged, required the road to be not less than fifty feet wide, and the metaled part to be twenty feet wide.

The petition alleged that there was along the road where the accident occurred, "in less than three feet of the metal and traveled part of the road, a rough, rocky and dangerous declivity; the road, at said point, running along said abrupt and dangerous declivity for the distance aforesaid, and which, without the protection of said guards or barriers, is unsafe and dangerous to travelers;" that the mare drawing the spring wagon, frightened by an object in a yard adjoining the pike, "ran precipitably down said embankment and declivity, there being no side guards or barriers to prevent her from so doing," and that the wagon was turned over, inflicting the injuries of which she complained.

We do not think it was necessary to give the angle of the declivity, or to give such particular description as would, appealing to common experience, justify the conclusion that it was dangerous. That would be a conclusion of fact, not of law.

The ultimate fact to be established by evidence was that the declivity, within three feet of the road, was such as to render it dangerous to travel on the road without protecting barriers.

It is, however, insisted that the injury received can not be traced through the line of causation to the failure of the company to erect a barrier. The argument runs this way: The object in the yard caused the mare to be frightened; the fright caused her to run; the velocity of the wagon, partially arrested by the ledge of rocks, suddenly changing the line of motion, caused it be upset. The objection to the argument is, that it starts from the wrong ground. By the same process it could be shown that no one can ever be held liable for injuries that he does not actively cause, but in regard to which his act, failure to act, is incidental merely. A city digs a deep ditch across a street for a necessary purpose; the act of making the ditch is lawful, and is done in discharge of a duty; but if it leaves it uncovered at night, or does not in some way give notice to warn the traveler, it is held liable for any injury done him. Yet the city is not liable because it dug the ditch, but only because of its failure to do what was necessary for the protection of those going that way. Here the company had a charter authorizing it to construct a turnpike for the public to travel over; its plain duty was to make the road reasonably safe; if dangerous pitfalls lay in the way, it was bound to fill them up securely; if the road had to be made along a precipice, its duty required it to protect the traveler against the consequences of such sudden frights as made the appellee's mare unmanageable for the moment. It was not only easily foreseen, but it was positively foreknown, that horses, in every way trustworthy, driven over the road by careful drivers, would get scared and, under the impulse of sudden fear, would wheel, or back, or run. The cause of the danger lies in the nature of the animal; the object at which he takes fright puts it in motion; it may be a flitting shadow or a leaf eddying in the wind; it may be one of a thousand trifles. The foreseen and foreknown fact that horses are apt to get scared, and to start suddenly, made it the duty of the company to provide protection against such sudden starts; if, without that protection, they would probably result in the traveler going over a precipice before he could get his horse in hand. The duty of the company was to make the road reasonably safe for travel, and what was requisite to make it safe was to be determined by reference to the use to which it was to be put. A barrier might not be necessary for pedestrians where, without a barrier, it would be extremely perilous to ride or drive a horse.

We think the demurrer to the petition was properly overruled.

The fact that Brown owned the land on both sides of the road at that place was no reason why the company should not have made the road safe for travel. Even if he had the right to drive his cattle across the road to get water, it was easy to make a gate for him, and thus respect both his right and that of the traveler. The demurrer to the second paragraph of the answer was properly sustained.

That the company had erected barriers at other places deemed by it more dangerous was no excuse for a failure to have barriers where the accident occurred, if necessary for the security of travelers.

The first seven assignments, relating to the pleadings, and involving the questions we have considered, are now disposed of.

But little need be said in regard to the action of the court in admitting and rejecting evidence. While Peak's statement as to seeing Fleming on the road, and as to what Fleming told him, was not competent, its only value was to show that the place needed a barrier for security, and the other evidence was such that it can not be supposed a jury would have reached a different conclusion if Peak had not testified.

It was not competent to prove that there never had been barriers at the place where the accident occurred, or elsewhere on that road, or on any other road. Negligence in one matter, or by any one else, is no excuse for the negligence complained of.

James Long's evidence was clearly competent to show the dangerous character of the place, and to show that the attention of the company's officers was called to the fact.

The testimony that it would have been expensive to erect barriers was properly rejected.

Instructions 1, 2, 4, 5 and 6 were the formal expressions of the principles and rules we have considered and approved.

Instruction 3 told the jury that if the injury was the "direct and necessary result" of the failure of the company to make its road as wide as the law required, which requirements were given, they should find for the plaintiff. If this instruction is open to criticism, it is that it is too favorable to the company in requiring the jury to find that the injury was the *necessary* result of the failure. It can not be doubted that a road only fifteen feet wide, lying within three feet of a precipice, is more dangerous than if it were further off. If the law required the company to make its road fifty feet wide, and it made it only fifteen, and on the perilous edge of a sheer descent, the failure to comply with the law increased the danger to the traveler; but if that failure renders the injury inevitable, there can be no doubt that the company is liable for consequences resulting necessarily from its disregard of the law.

The judgment is affirmed with damages.

FIREMAN'S INSURANCE CO. V. CECIL & CO.

(*Filed May* 7, 1890.)

1. *Insurance*—A policy of insurance is to be construed most strongly against the insurer.

2. *Same—Increase of risk*—Policies of insurance, like other contracts, should have a practicable and reasonable interpretation. Therefore, where it is apparent that an act was prohibited for the purpose of preventing an increase of the risk, the doing of the prohibited act will not work a forfeiture, unless it appears that the risk was thereby increased, especially if the contract fails to provide that the doing of the act shall work a forfeiture.

A policy of fire insurance granted the privilege of keeping kerosene oil for lights, but provided that the lamps should be put out at close of day's business. *Held*—That the mere fact that at some time during the life of the policy the insured failed to put out lamps at the close of day's business is not sufficient to prevent a recovery. The answer should have set out such fact as would have enabled the court to determine whether there was any increase in the risk.

E. A. Gaither, C. A. Hardin and S. G. Williams for appellant.

Poston & Jacobs and T. C. Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Presiding Judge Barbour.

By the terms of appellant's policy it insured appellee's stock of hams and other meats, kept by him in his meat store in Harrodsburg, against loss from fire. The store and the meats insured having been destroyed by fire during the life of the policy, this action was instituted upon the company's refusal to pay the loss.

In subsection 6 of section 1, under the head of "Warranty of Assured," it is provided that if "benzine, * * * burning fluid, chemical oil, fireworks, gasoline, gunpowder, naptha, nitro-glycerine, * * * petroleum and its products, * * * or any article, subject to legal restriction, be kept, stored or used in or on the premises, this policy shall become void, unless consent in writing is indorsed by the company hereon."

In subsection 1 of section 4, under the head of "General Privileges," it is provided that "kerosene or refined petroleum oil of the legal standard may be used for lights only in any building covered by this policy, other than manufactories, lamps not to be filled and trimmed within two feet of artificial light, and, in business houses, to be put out at the close of day's business."

The only defense relied upon is, that the plaintiffs had violated these provisions of the policy in, as the answer alleges, "that they kept a lamp or lamps burning in their said business house at night, and did not put out said lamp or lamps at the close of day's business." A demurrer was sustained to this answer, and the only question presented on this appeal is, as to the correctness of this ruling.

Where the policy provides that it shall be void if certain hazardous articles are kept or used upon the premises, the keeping or using of the articles upon the premises, *per se*, avoids the policy, without reference to the questions whether the risk was thereby increased or not, and the fact that the loss did not result from the keeping or using of the articles is a matter of no consequence. Wood on Insurance, section 227. This is the general rule. But policies of insurance, like other contracts, should have a practical and reasonable interpretation. Conditions of forfeiture in a policy of insurance, as include the entire instrument, are to be construed most strongly against the insurer. The company prepares it, and is familiar with its details and many conditions. Its ambiguities are to be resolved against the insurer. 10 KY. LAW REP., 258. The keeping, storing or using of the prohibited articles upon the premises work a forfeiture of the policy, or, as expressed, render it void. The policy so provides. But when the subsequent provisions of the policy are considered, the keeping of kerosene or refined petroleum oil for the purpose of lights is excepted from these provisions. The privilege of keeping kerosene oils for lights is granted, but annexed to this privilege is the condition that the lamps shall not be filled * * * and trimmed within ten feet of artificial lights, and shall be put out at the close of day's business. * * * The contract does not provide that if the prohibited act is done, it shall operate as a forfeiture. And in the absence of such provisions the courts would be slow to adjudge a forfeiture, unless the act was such as was calculated to increase the risk.

Independent of the privilege granted in subsection 1 of section 4, a mere technical violation of the conditions of subsection 6 of section 1 should not have the effect of working a forfeiture. As, for instance, the taking of a prohibited article upon the premises for a mere temporary purpose, with the intention of removing it and the

actual removal of it during the day with no injury resulting. Maryland Fire Insurance Co. v. Whiteford, 31 Md., 219; 1 Am. Rep., 45. Nor independent of the express privilege would the mere keeping of a reasonable amount of kerosene oil on the premises for the purpose of lights avoid the policy. Morse v. Buffalo F. & M. Ins. Co., 30 Wis., 534; 11 Am. Rep., 587. But this is not the question presented by the answer. It is not claimed that the assured violated the provision against the keeping, storing and using of any of the prohibited articles. The contention is, that they abused or exceeded the privilege granted them; "that they kept a lamp or lamps burning in the house at night, and did not put out said lamp or lamps at the close of day's business."

Construed strictly against the pleader, as we, in support of the judgment, must do, the effect of the averment is, that the assured kept a lamp burning at the close of a day's business. When or how long after the close of the day's business is not stated. Proof that upon one occasion a lamp was allowed to burn for a short time after the close of the day's business would sustain the allegation. Is that the reason and spirit of the contract? On the other hand, is not the restriction placed upon the privilege simply for the purpose of preventing the increase of the risk; and where there is no increase of risk, and the loss can not be attributed to the act, is there any substantial violation of the contract? We think not; and, therefore, it was necessary that the answer should have set out such facts as would have enabled the court to determine whether there was any increase in the risk. In the grant of the privilege it is provided "that lamps shall not be filled and trimmed within ten feet of artificial light." We hardly think that any court would hold as good a plea that upon an occasion, months before the fire, the assured had filled and trimmed a lamp within ten feet of an artificial light. Yet it seems to us that such a plea would be no more unreasonable than the one now relied on.

There are other objections urged to the answer, and we think some of them are well taken, but as they are technical in their nature, we have preferred to decide the case upon the grounds stated, and which are the grounds chiefly relied upon by counsel in argument.

The judgment is affirmed, but without damages, there being no supersedeas in the record.

SUPERIOR COURT ABSTRACT.

MANLY v. BITZER, &c.

Filed May 7, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Judge BOWDEN, affirming.

Assignment of unearned salary—When a party has entered into a contract or arrangement by the ordinary and legitimate and natural operation of which he will acquire property, and has entered upon the performance of his contract, or of his duties under the arrangement, his existing right thereunder is assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession.

A policeman was elected for four years. His salary was fixed by the city council at $2 a day, payable monthly. On the first day of a particular month he assigned his salary for the month for a valuable consideration. After the salary for the month was earned it was attached by a creditor. *Held*—That the right of the assignee is superior to that of the attaching creditor.

Helm & Bruce for appellant; Kohn, Baird & Speckert for appellee.

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KENTUCKY COURT OF APPEALS.

SOUTHWICK V. GREUZENBACH, &C.

(*Filed June* 10, 1890—*Modified Sept.* 6, 1890; *Not to be reported.*)

1. *Judicial sales—Appraisement*—In an action by devisees for the sale of land on account of its indivisibility, no appraisement was required before sale.

2. *Parties to actions*—Devisees of land were parties to an action to sell land on account of its indivisibility, to which infant heirs of a deceased devisee were properly made parties defendant, and an amended petition was filed, making a mortgagee of the deceased devisee a party defendant, o which he answered, setting up his claim, and asking that his debt be paid out of the proceeds arising from the sale of the interest of said devisee. The purchaser objects to the confirmation of the sale, because the answer of the mortgagee was not made a cross-petition against the two infant heirs of the mortgagor. *Held*—That it was unnecessary to make said answer a cross-petition against said infants.

3. *Limitation—Dower*—A married woman having joined in the conveyance with her husband of a tract of land in 1837, which was not recorded until nearly two years thereafter, it will be presumed, after fifty years' silence, that she is dead, and a purchaser of the property will not be disturbed about her claim of dower.

4. *Decedent's estates*—After five years from the testator's death, it will be presumed that his estate has been settled, and that real estate left by him is not required for the payment of his debts.

Barrett, Miller & Barrett for appellant.

O'Neal, Jackson & Phelps for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

A portion of the devisees of Valentine Greuzenbach brought this

action against the others for a sale of the lot devised by him to them upon the ground of its indivisibility. Under the decree of sale which was obtained, the appellant, Charles Southwick, became the purchaser; and failing to comply with the terms of the sale he was cited by rule to show cause why he should not do so. His response presents many grounds for his non-compliance. They were overruled, and he has appealed.

It is unnecessary to consider all of them. Only those mainly urged, and which seem to us to be the principal objections to the sale, will be noticed. One of the devisees died after mortgaging her undivided interest. It passed to her two children, who were named as defendants in the petition, and as being over fourteen years of age. A summons, so describing them, was issued and properly served upon them. Owing to their age the service of process under our Code of Practice was only required to be upon them. Their father was also a defendant, however, named as such in the same summons, and it was also served upon him. A guardian *ad litem* was, after the service of the summons, appointed for them, and he filed his answer.

After all this had occurred, and various other steps had been taken in the action, an amended petition was filed, making the mortgagee of the undivided interest a party defendant. He answered, consenting to the sale, setting up his debt, and asking that it be paid out of that portion of the proceeds of the sale pertaining to the interest mortgaged to him.

It is now urged that the sale should be set aside, because the answer of the mortgagee was not made a cross-petition against the owners of the mortgaged interest, and they brought before the court upon it. This objection can not avail. The ground of the suit was the indivisibility of the property. This was proven, and the sale was, therefore, authorized, the devisees having been properly brought before the court upon the petition. The judgment orders the sale upon this ground. Moreover, it properly protects the interest of all parties concerned in the proceeds of the sale, and whether so or not the purchaser could not complain upon this score, the mortgagee having consented to the sale, and the object of the amended petition being to provide merely for the payment of his debt out of the proceeds. It is also urged that the property was not appraised. One sale had previously been made, and by consent set aside. Prior to it the property had been appraised. Some fifteen months intervened between the two sales. It is unnecessary to consider, however, whether, owing to the lapse of time, another appraisement would have been necessary, if it had been a sale for debt. It was not. It was being sold for the purpose of division at the instance of its owners, and no appraisement was, therefore, required. Woolridge v. Jacob's gd'n, 79 Ky., 250; Graves & Wells v. Long, Apee, &c., 87 Ky., 441.

In a conveyance of the property, made in 1837 by a remote vendor, his wife had joined and acknowledged the deed, but it was not recorded or lodged for record for nearly two years thereafter.

It is urged that her inchoate right of dower did not, therefore, pass, and that the title is defective.

There is nothing in the record tending to show whether she is living or dead.

Section 4, article 1, chapter 71 of the General Statutes, providing that the period within which an action may be brought for the recovery of real estate shall in no case be extended by reason of any death, or the existence of any disability, beyond thirty years from

the time of the accrual of the right to sue, does not conclude the right of the widow to sue after the lapse of thirty years from the time of the conveyance, without regard to when the husband may have died. The right of a remainderman to sue does not accrue until the termination of the particular estate. So too, the widow can not sue until the death of the husband. Hence the statute, *supra*, is not decisive of the point urged.

In this instance, however, over a half a century has elapsed since the *feme* united in the deed. She was then a married woman. Under these circumstances it can not well be presumed that she is yet alive. The long silence as to any claim from this quarter raises the presumption that no such danger to the purchaser will arise.

The record does not show that Manze, another prior vendor, had a wife at the time of the conveyance by him; nor does it contain any testimony showing any right in "Mrs. Jarvis," or that any such person ever lived.

Speaking from the evidence in this case, she is altogether mythical. There is no competent testimony, recorded or otherwise, upon this point.

Five years had elapsed from the death of the testator before this suit was brought.

There is nothing in the record tending to show that his estate has not been settled, or that the property in question is needful for the payment of the debts. Certainly the appellant's title is not, therefore, in danger, even if it be true.

The petition avers that the daughter, Margaret Greuzenbach, died single and intestate since her father's death, and the judgment of sale fully and definitely describes the property.

We see no reason for reversing the judgment of the lower court, and it is, therefore, affirmed.

CHAPMAN V. W. U. TELEGRAPH CO.

(*Filed June* 14, 1890.)

1. *Telegraph company—Delayed telegram—Damages*—A telegraph company, failing to deliver a telegram to appellant announcing the dangerous illness of his father, also failing to deliver a subsequent telegram announcing the death of his father, and when he would be buried, was sued by appellant for damages alleging, *first*, that by reason of the failure of the company to deliver said telegram he missed a donation from his father of a promissory note, which he says his father would have given him if he had seen him in his last illness; *second*, that he was also damaged in his feelings and affections by being prevented from attending upon his father in his last illness, and from attending his funeral. The lower court rejected the first claim for damages as being too remote, and substantially instructed the jury as to the second claim to find nominal damages. On appeal, *Held*—That the lower court properly rejected the first claim for damages, as the same was too remote, but should have permitted the jury to consider the injury to the feelings and affections as *actual* damages, resulting to appellant as the *natural* and *proximate* consequence of the failure of the company to deliver the telegrams.

A telegraph company is a *quasi* public agent, and it was the duty of the company to use ordinary diligence to deliver the telegrams, and a failure to perform this duty entitles the injured party to compensation in damages, whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it, the source is the same, and the violator should answer for all the proximate damages.

2. *Parties to actions*—A person to whom a telegram is sent may maintain an action against the company for damages resulting from a failure to deliver it, as the contract was made for his benefit.

T. G. Covington and N. A. Porter for appellant.

Wright & McElvoy and W. F. Browder for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

This is an action against the telegraph company for damages for negligently failing to deliver to the appellant, Joseph Chapman, two telegrams, the one sent on February 12, 1888, announcing to him the dangerous illness of his father, and the other, sent on February 16, informing him of his death, and when he would be buried. They were sent from Franklin, Kentucky, to Bowling Green, Kentucky, a distance of about twenty miles. The appellant then resided in the latter city, and, learning upon the street of the death of his father, he called at the telegraph office on February 17, and received the two telegrams.

The jury found one cent and the costs of the action.

Inasmuch as it must be tried again, we shall not discuss the evidence relating to the question of negligence.

The appellant claims that by reason of it he sustained a pecuniary loss by missing a donation from his father of a promissory note, which he says his father would have given him if he had seen him in his last illness, and that he was also damaged in his feelings and affections by being thereby prevented from attending upon his father in his last illness, and from attending his burial.

The claim for the first item of damage was rejected as being too remote for recovery. The second was ruled out, upon the ground that damage to the feelings, not blended with physical pain arising from actual injury, or not connected with pecuniary loss, can not be a subject of recovery.

The lower court substantially instructed the jury that the appellant, if entitled to recover at all, was limited to nominal damages. The company insists that as the appellant was not the sender of the telegrams he can maintain no action whatever. The contract under which they were sent was, however, made for his benefit. He was to be the sole beneficiary. The sender had no interest in them. This the company knew from their character.

In such a case the party for whom a telegram is intended may sue the company for negligence as to it.

It is said, in Sherman & Redfield on Negligence, section 560: "We think, therefore, that upon the principle of these decisions a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often sustain great damage without any means of redress." This is not the English, but it is the American rule, and is, in our opinion, supported by reason, necessity and a proper policy. Gray on Telegraphs, section 65; Wadsworth v. Western Union Telegraph Company, 86 Tenn., 695.

The lower court properly rejected the first item of damage. It was too uncertain and remote.

Greenleaf on Evidence, volume 2, section 256, says: "The damage to be recovered must always be the *natural and proximate* conse-

quence complained of. This rule is laid down in regard to special damage, "but it applies to all damage."

It does not naturally follow if the appellant had received the telegram promptly that he would have received the donation.

Perhaps his father would have given him the note. It would not, however, have been a natural consequence of his going to see him. He might, and might not have done so.

No such loss could have been contemplated by the parties to the sending of the message, if their minds had, at the time, been drawn to the contingency of its not being properly delivered.

Considering the nature of the dispatch, they could not have contemplated that such a loss would arise from a breach of the contract. As well might one claim from a railroad company the amount of a stake in a race, upon the ground that if the train had not been negligently delayed his horse would have arrived in time and won the race.

The remaining question is one of some difficulty. It has, upon the state of case now presented, been little before the courts, and but few authorities can be found. Indeed, so far as we have been able to find, but two or three courts of last resort have considered it. One of them has, at least, to some extent varied in its opinion, while the members of another have been divided as to it. It is, can one, in a case like this, recover damages for an injury to his feelings, unaccompanied by any pecuniary loss or physical suffering from bodily injury?

Many of the text-writers say that a person can not recover damages for mental anguish alone; and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases of personal injury.

If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for *some* damage, though it may be nominal only. It has violated its contract, and whenever a party does so, he is liable at least to some extent.

Every infraction of a legal right causes injury in contemplation of law. The party being entitled in such a case to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate?

Why, being entitled to *some* damage by reason of the other party's wrongful act, should not the complaining party recover *all* the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end can not yet be seen.

A telegraph company is a *quasi* public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public.

If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damage.

Is it to be said or held that as to matters of far greater interest to a person it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for a $100, or even less, it is responsible for the damage.

It is said, however, that it is guilty of like fault as to a message to the husband that the wife is dying, or to the father that his son is dead and will be buried at a certain time, there is no responsibility, save that which is nominal. Such a rule at first blush merits disap-

proval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the *actual* damage, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so it may be said of any case where mental anguish enters into the estimate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us it should equally be considered in cases of this character. If not, then most grievous wrongs may often be inflicted with impunity, and legal insult added to outrage by the party by offering one cent, or the cost of the telegram, as compensation to the injured party, whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages.

In Sherman & Redfield on Negligence, section 605, it is said: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with more nominal damages, on account of the want of strict commercial value in such messages. *Delay in the announcement of a death*, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings, which can not easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written messages."

This seems to us to be the true rule. One which is in accord with reason, and necessary to a proper protection of individual right and the interests of the public.

The cases of Stuart v. Western Union Telegraph Company, 66 Texas, 580, and Wadsworth against the same company, *supra*, support this view of the question; and the instructions of the lower court being *contra*, the judgment is reversed and cause remanded for a new trial consistent with the views herein expressed.

DUFOUR V. STUCEY, &c.

(*Filed June* 19, 1890.)

Ferries—Constitutional law—Subsection 3, section 9, chapter 42, General Statutes, which provides that "a non-resident owner of a ferry right shall sell the same to a resident citizen of this State within a year after his removal or accrual of his right, with leave of the court, and the purchaser give such new covenant, and upon failure to comply with any requisition of this subsection the court shall revoke the grant," &c., does not apply to a ferry right vested in a non-resident in 1843, as no such law regulating the residence of owners of ferries was then in existence, and non-resident vendees of a ferry right from a non-resident, who obtained it in 1843, can not

be proceeded against under the statute cited under penalty of forfeiture of such ferry right in case of non-compliance, for said statute seeking to affect same is retroactive and unconstitutional.

W. P. D. Bush and H. M. Winslow for appellant.

Geo. C. Drane and H. Cox for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1843, by an order of the Carroll County Court, a ferry was established across Ohio river from the town of Ghent to the Indiana shore, and the ferry right was granted to J. F. Dufour, at the time owner of the land where site of the ferry was.

In 1850 he conveyed to his wife, Polly Dufour, the land and ferry right during her life, remainder to his sons, including appellant, Julius Dufour.

In 1853 Polly Dufour filed the bond required by statute in such cases, which was approved by the court, and she continued to use and enjoy the ferry right, but executed no other bond until 1863, when she tendered one to the county court, which was not, however accepted, nor any action taken by the county court in regard to it previous to 1868.

At the last named date the county court overruled her motion then made to file a bond, made an order revoking the grant of the ferry right to her, and another order granting the same ferry right to the trustees of the town of Ghent. An appeal from each of the orders was taken to the Carroll Circuit Court, where judgment was rendered reversing the order establishing the ferry upon motion of, and granting the ferry right to, the trustees of Ghent, and directing the county court to take the bond tendered by appellant and continue the ferry in her name.

In 1877 Julius Dufour purchased and became owner of the land and ferry right, executed the required bond, and continued to operate the ferry until April, 1888, when a rule was awarded against him by the county court to show cause why he should not sell the ferry right to a citizen resident of this Commonwealth, or forfeit the same. And the trustees of Ghent being subsequently made parties plaintiff in the proceeding, a judgment of court was rendered overruling the response made by the defendant, and revoking the "ferry franchise granted in 1843 to John F. Dufour, and renewed and continued in 1877 to, and in the name of, Julius Dufour."

From that judgment an appeal was taken to the Carroll Circuit Court, where judgment was rendered affirming "the judgment and order of the Carroll County Court, forfeiting the ferry franchise claimed to be owned by the defendant, Dufour."

The authority upon which the order of the county court was made is found in subsection 3, section 9, chapter 42, General Statutes, as follows:

"A non-resident owner of a ferry right shall sell the same to a resident citizen of this State within a year after his removal or accrual of his right, with leave of the court, and the purchaser give such new covenant. Upon failure to comply with any requisition of this subsection, the court shall revoke the grant," &c.

It appears appellant was not, when this proceeding was begun, nor had he ever been, a resident citizen of Kentucky. Nor was either J. F. Dufour, original grantee, or Polly Dufour, ever such resident citizens.

As the appellant had failed to sell his ferry right within a year from accrual of it, the order of the county court revoking the grant can not be regarded either premature or erroneous, if legislative power to divest him of the franchise, for the sole cause, stated in the order, existed when that part of the statute quoted was enacted.

When the ferry was established in 1843 the statute did not make it a condition the owner of such franchise should be a resident citizen of this Commonwealth, and, consequently, the grant to J. F. Dufour, though at the time a non-resident, was valid and effectual.

The only causes for which a ferry could, before adoption of the Revised Statutes, be discontinued, which is equivalent to a revocation of the franchise, as held by this court in McCauly v. Gwin, 1 Dana, 259, were: One. A failure for six months after establishment of a ferry to provide "the necessary boats and ferrymen." Two. The fact that the ferry shall have been for two years "wholly disused and unfrequented."

By subsection 5, section 8, Revised Statutes, the same provision was made as the one in the General Statutes under consideration, except that it applied to non-resident owners of ferry rights thereafter granted.

But there was not, by the terms of the order granting the ferry right to J. F. Dufour in 1843, nor did the statute then provide there should be, any limit as to duration of the franchise, as is now the case, and has been since adoption of the Revised Statutes. It, therefore, follows, if he acquired such an estate or interest in it as is alienable, the statute of 1873 can not be regarded any more effectual to divest the appellant than such one, passed before 1850, would have been to divest the original grantee.

In regard to ferry franchise Kent, on page 459, volume 3 of his Commentaries, says: "The obligation between the government and owner of such franchise is mutual. He is obliged to provide and maintain facilities for accommodating the public at all times with prompt and convenient passage. The law, on the other hand, in consideration of this duty, provides him a recompense, by means of an exclusive toll. An estate in such ferry, and an estate in land rest upon the same principle, being equally grants of a right, a privilege for an adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant of a ferry * * * * that the government will not, directly or indirectly, interfere with it, so as to destroy or materially impair its value."

In Trustees of Maysville v. Boon, 2 J. J. M., 225, this court thus defines a ferry franchise: "Nor can we admit, conclusiveness of the argument, that the grant of a ferry is always a personal privilege which ceases with death or alienation of the grantee. As no one can be a recipient of such grant on the Ohio, except owner of land on the river, the grant to him is a franchise incident to, and growing out of, his title to the land. It is a hereditament which descends with the land to his heirs, and passes to his vendee by alienation of the right to the land. It is, therefore, not like a tavern license, which is personal, but is like a right of way, or a right to a toll bridge."

And again it was said in Lythe, &c. v. Breckinridge, 3 J. J. M., 663: "The right to a ferry on the Ohio is a franchise incident to a freehold in the land. It passes with title to the land."

In Carter, &c. v. Kalfus & Watts, 6 Da., 43, it was said: "A right to ferriage, like that to *portage*, is valuable *property*, and requires

on the Ohio river, large expenditures of money by the grantee of the franchise, and is founded on a valuable consideration."

It is true this court, in Brown v. Givens, 4 J. J. M., 28, said: "A ferry is a public highway, and is established more for the public good than for individual advantage of the grantee." Nevertheless, that fact at the same time serves to show a ferry franchise is the subject of contract between the Commonwealth and grantee, and that a valuable consideration passes from the latter to the former, whereby a property right becomes vested.

It seems to us as J. F. Dufour legally and regularly acquired, for a valuable consideration, title to the ferry franchise, which this court has held to be property alienable and descendible, that the Legislature has no power by statute, retroactive in its operation, to divest his vendee or prevent the full enjoyment of it by him for the sole cause he is a non-resident of the State.

It is needless to refer to the particular clause of the Constitution the statute contravenes, because it being conceded, as is the case, that appellant has a vested interest in the land and in the franchise as an incident of his title thereto, he can no more be deprived of it by a retroactive statute, because he is a non-resident of this State, than he could, in the same manner and for the same reason, be deprived of a right of way, or any other hereditament of a real nature.

Whether the power exists to pass such statute, applicable to ferries to be thereafter established, is a question not now before us.

The judgment is reversed and cause remanded, with directions to the circuit court to reverse the order of the Carroll County Court, and remand the case for that order to be also set aside.

Judge Pryor not sitting.

ROBINSON'S COMMITTEE, &C. V. ELAM'S EX'TX.

(*Filed June* 19, 1890.)

1. *Executors and administrators—Limitation*—An administrator having made a settlement of the estate of his intestate in 1866, and having been credited therein with an amount set apart to pay the debts of the intestate, in an action brought in 1866 against the executrix and on the bond of the administrator, alleging failure of the administrator to pay out the amount allowed him in the settlement of 1866, and asking that said fund be distributed among the heirs of the administrators intestate, *Held*—That the claims are barred by the statute of limitation.

2. *Same—Trusts*—Section 20, article 5, chapter 71, General Statutes, excepting trusts from the operation of the statutes of limitation does not apply to this case. The trusts embraced in that section are those of an exclusively equitable character, where the trustee has a right to hold the estate and the *cestui que trust has no right to sue and recover it.*

In this case the cause of action accrued against the personal representative nine months after his qualification, and the statute applying as well to equitable as ordinary actions, was a complete bar to recovery against the personal representative after fifteen years and against the surety after five years. The period allowed a personal representative in which to make his settlement does not affect the running of the statute, but only affects the right to collect interest from him.

R. H. Cunningham for appellants.

John Young Brown, Montgomery Merritt and S. B. & R. D. Vance for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

W. S. Elam qualified as the administrator of John J. Smith on March 10, 1864. The latter had been the administrator of his brother, William P. Smith.

Elam made a settlement in the county court on April 21, 1866.

In it he was credited with "by amount set apart to pay W. P. Smith's debts—$3,428.73."

The balance in his hands was fixed, apportioned among the heirs, and, as the evidence shows, paid to and receipted for by them. It was not, however, a final settlement.

He made a second settlement in 1869, with a like distribution among the heirs, and a final one on February 24, 1874.

In the two last settlements no notice was taken of the fund that had been left in his hands to pay the debts of Wm. P. Smith.

Elam died in August, 1883; and on September 2, 1886, the heirs of John P. Smith brought separate actions, but which were subsequently consolidated, against Elam's executrix, upon his bond as administrator of John J. Smith, for their respective portions of the $3,428.73, which had been left in his hands, claiming that he had never paid it out, and that it, in fact, belonged to them.

A plea of the statute of limitation, and also that Elam had, in fact, paid the money to those entitled to it, was interposed to a recovery.

If the first defense is valid, it is, of course, unnecessary to consider the other.

Over twenty-two years elapsed from the qualification of Elam as administrator until these suits were brought, and over twenty years from the time of his first settlement, in which he was credited with the money now sought to be recovered.

It is urged that he held it in trust, and that the statute of limitation, which in this State is fifteen years to an action upon an administrator's bond, after the accrual of the cause of action, did not, therefore, run against the party entitled to it.

It has been long well settled that the statute of limitatian applies in equity as well as at law.

Our present statute applies to all actions, and, when properly pleaded, it must prevail even where the jurisdiction is exclusively equitable. It was so applied by the courts even before the adoption of the Revised Statutes in 1852, although the then existing statutes did not in terms so provide.

Any other rule would largely defeat the policy of the law.

It is contended, however, that this case is embraced by section 20, article 5, chapter 71 of the General Statutes, which provides:

"The provisions of this chapter (as to limitation of actions) shall not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in possession thereof to obtain a conveyance."

The term "trust," is a very broad one. In its most comprehensive sense it embraces every deposit; and it, of course, would not do to hold that in all such cases the statute does not run, even though the claimant is invested with the power and right to sue. Such a rule would evidently defeat the legislative purpose, and render nugatory in a great degree our "statute of repose."

The trust intended to be embraced by the statute, and to be excepted out of the limitation, are those of an exclusively equitable

character, where the trustee has a right to hold the estate, and the *cestui que trust* has no right to sue and recover it.

Where, however, the latter may do so, and forbears to exercise the right, the letter of our statute, as well as the policy of our law, gives the opposing party the right to rely upon the lapse of time.

The time, by the terms of the statute, begins to run from the accrual of the cause of action.

Our present statute provides:

"A personal representative, nine months after qualification, may distribute the estate of a decedent." General Statutes, chapter 31, section 19.

The Revised Statutes provided that he might do so nine months after the death of the decedent. 1 Revised Statutes, chapter 30, section 12.

The distributee has a right to sue at law, even upon the bond of the personal representative, for his distributable share nine months after the qualification of the personal representative.

His cause of action then accrues, and, unless exercised within fifteen years following, time bars him of an action upon the bond of the representative.

He has this right of action, regardless of whether the administrator has settled his accounts, because he might not do so at all, and if this would prevent the operation of the statute, then it would be inoperative as to his sureties, who are released by another section of the statute in the event the suit is not brought within five years from the accrual of the cause of action. Commonwealth, &c. v. Hammond, &c., 10 B. M., 62.

It was held in Murrell's adm'r v. McAllister, 79 Ky., 311, that a cause of action accrued to a distributee against a surety upon an administrator's bond nine months after his qualification; and this being so it must also then accrue against the principal, because an action can not accrue against a surety until it accrues against the principal.

Of course a court, where the circumstances authorize it, may delay the prosecution of the suit by the distributee.

The estate may be in such condition, owing to inability to realize its assets or otherwise, as to necessarily delay the judgment; but the right of action nevertheless accrues nine months after the qualification of the personal representative.

The provision of the statute that he shall be presumed after the lapse of two years to have used the surplus assets of the estate, and shall be chargeable with interest thereon from the time, unless he proves its non-use, only fixes his liability for interest, and has no bearing upon the question of when he may be sued for the principal.

These actions were clearly barred by the statute, and the judgment is, therefore, affirmed.

TURNER, &C. V. COMMONWEALTH.

(*Filed Sept.* 30, 1886.)

1. *Constitutional law—Appeals in criminal cases*—The right to an appeal in felony cases is not a constitutional right, and the accused, having had his trial below, must conform to the rules prescribed by law for bringing his case to this court, and to the practice adopted here as to its final disposi-

tion, and where there is a failure to prosecute the appeal a dismissal necessarily follows.

2. *Non-suit—Re-instatement*—While a suggestion that a prisoner is without counsel, or unable to employ counsel, would require the interposition of this court in his behalf, yet after the lapse of many years the court can not re-hear a case which was dismissed for want of prosecution, simply because counsel neglected the case, or the condemned was unable to employ counsel, although the condemned has all the time been confined within the walls of a prison.

The court, after the lapse of twelve years, refuses to re-hear this case, which was dismissed for want of prosecution, but has examined the facts and discusses them for the purpose of showing that the court must have had a knowledge of the case by an inspection of the record before the non-suit was entered.

Ira Julian for appellants.

P. W. Hardin for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Pryor.

James Turner, having been indicted for the murder of William Middleton in the Harlan Circuit Court, was tried in the Clay Circuit under a change of venue, and, upon the hearing, was convicted and sentenced to the penitentiary for life. The trial was had in February, 1875, and the case brought to this court on the 8th of March, 1875, and set for hearing on the 19th of the same month. The case was then passed, to be heard on the 25th of March, and again to be heard on the 3d of April, and finally set for hearing on the first day of the succeeding June term of this court, and on the 11th of that month a new suit was entered and the appeal dismissed. On the 16th of the present month, September, 1886, a motion was made to redocket the case, and the case redocketed, and counsel for the accused has been heard on the motion to redocket (that question being reserved at the instance of the attorney for the State) and on the merits. The prisoner has been confined in the State prison for more than eleven years since the new suit was entered, and for the first time seems to have discovered that he was not represented by counsel in this court on the appeal, and claiming that many errors were committed to his prejudice during the trial in the court below, is now asking this court to reverse the judgment of conviction, and grant him a new trial.

Without determining the extent of the power of this court over its orders in a criminal case after the expiration of the term at which the case has been finally disposed of, it is plain that some limitation must be placed upon the exercise of such a discretion, and it is neither reasonable or proper that after such a lapse of time this court should indulge a motion like this, and reopen the case for the purpose of passing upon the objections made to the judgment below. The right to an appeal in such cases is not a constitutional right, and the accused, having had his trial below, must conform to the rules prescribed by law for bringing his case to this court, and to the practice adopted here as to its final disposition. Instructions in the trial below may have been erroneous and prejudicial to the accused, still certain rules of practice must be observed with regard to exceptions before such errors can be corrected, and where there is a failure to prosecute the appeal the rules of practice in this court must be observed, or a dismissal necessarily follows.

A suggestion that the prisoner is without counsel or unable to employ one would require the interposition of the court in his behalf, but after the lapse of so many years, although confined within the walls of a prison, it would be a dangerous precedent to entertain such motions, or to rehear cases by reason of the neglect of counsel or the want of ability on the part of the condemned to make an employment.

The condemned was living in the county where the indictment was found, with no doubt friends, or those interested in his behalf, surrounding him. The testimony so indicates; and, besides, the court, before entering a new suit, may have looked into the case with a view of ascertaining the nature of the charge and the character of the proof to sustain it. We have read the testimony in this case when considering the motion, and we do not see, upon the facts, that either an instruction for manslaughter or self-defense should have been given.

That there was a deadly feud existing between the Middletons and the condemned is manifest. The affiant here had waylaid Middleton more than once for the purpose of killing him, and while there is proof showing that the Middletons had attempted to induce others to kill Turner, their personal attacks on the latter were made in an open and undisguised manner.

That they would have killed Turner whenever an opportunity offered is plain, and equally as manifest that Turner was seeking an opportunity to kill the Middletons.

On the day and at the time of the killing the deceased was riding along the highway, with one or two of his neighbors, going to the county seat, and when arriving at a bend in the road, about two miles from Middleton's house, those who were with Middleton heard the report of a gun, perhaps two, and saw Middleton falling from his horse, having been shot in the back.

The parties shooting Middleton were in ambush, and fired evidently without word of warning to Middleton or those with him. Neither Turner or Pace were in company with the parties, or known to be at the place where the deceased was shot. They were seen afterwards going from the place, and their tracks and other circumstantial testimony of a strong character tended to the conviction.

There is no case establishing the doctrine that the one has the right to pursue his adversary until out of danger, except the Phillip's case that has been overruled, and certainly no case that would justify or excuse one for lying in wait and slaying his adversary without or with warning, although he had been previously threatened and assaulted with a deadly weapon by the deceased. Such a ruling would not only invite but encourage guerilla warfare, where the wicked and reckless desperado could select his victims, and from some secluded spot take his life, and then by proof of antecedent threats, or former assaults by the deceased, demand an acquittal. Such is not the law of the Bohannan case, or any other authority referred to by counsel.

Such a light estimate of the nature of human life by the courts of the country would be a mockery of justice, and a license to those who have no regard for the laws of their State to continue their assassination and murder. We see no reason for entertaining the motion further, and nothing but the zeal of counsel that is commendable has induced the court to examine the facts with a view of showing that the court had a knowledge of this case by an inspection of the record before the non-suit was entered.

The case is ordered to be stricken from the docket.

CORNELISON V. STEPHENS.

(*Filed Nov.* 11, 1886—*Not to be reported.*)

1. *Attorneys—Notice of motion*—As the notice of the motion to reinstate the case on the docket was given to an attorney whose name appears more than once on the records, the notice was sufficient to authorize the re-instatement of the case.

2. *Homestead—Purchaser at judicial sale*—Several notes falling due at different times were secured by the same mortgage. In an action to enforce the mortgage lien as to the first note, a judgment was rendered for the sale of the land, which was reversed, upon the ground that the defendant was entitled to a homestead. Before the homestead was set apart, pursuant to the decision of this court, the mortgagee proceeded to coerce payment of the remaining notes secured by the same mortgage, and obtained an order for the sale of the land, which he purchased at the sale, which was made after the reversal of the first judgment. *Held*—That the plaintiff had full notice of the right of the defendant, and acquired no title by his purchase of the homestead.

Cornelison & Mitchell for appellant.

Wood & Day and W. H. Holt for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The notice of the motion to reinstate the case on the docket was given to an attorney, whose name appears more than once on the record, and, therefore, the court below very properly overruled appellant's motion.

The purchase of the land or homestead by the appellant was made after this court had determined that as between the appellant and the appellee the latter was the owner of the land, and, therefore, no title passed. All three of these notes were executed for the same debt, and secured by the same mortgage, but falling due at different times.

The action on the first note resulted in a judgment to sell the land. That judgment was reversed by this court, on the ground that the appellee was entitled to a homestead, regardless of the mortgage. It then became the duty of the court to set apart the homestead to the appellee, but the appellant, proceeding to coerce payment of the second or remaining notes secured by the same mortgage, obtained an order for a sale of the land, and purchased it after the reversal of the judgment on the first note, deciding that the homestead could not be sold under the mortgage. He had full notice, therefore, of the right of the appellee, and acquired no title by his purchase of the homestead.

The judgment below disregarding his puschase is, therefore, affirmed.

Judge Holt not sitting.

WIGGINS V. JOHNSON, &C.

(*Filed Oct.* 12, 1886—*Not to be reported.*)

1. *Husband and wife*—All the personal property of the wife at her marriage, or which she may thereafter acquire during marriage, unless it be her separate estate, belongs to the husband.

2. *Feme sole*—A decree of court empowering a married woman "to buy and sell, contract, &c., and do business as a *feme sole*," is broad enough to embrace the right upon her part to hold and enjoy the proceeds of her own land.

3. *Profits of wife's general estate*—If the husband desires to convert the wife's earnings, or the profits arising from her general estate into her separate estate to be used by her, to his exclusion, he can do so by the aid of the statute authorizing courts of equity to make her a *feme sole*. Therefore, land purchased by a married woman, who had been made a *feme sole* by decree of court, is not liable for the husband's debts, although it was paid for with the profits arising from her general estate prior to the date of the decree.

Wingfield Buckler for appellant.

A. Duvall for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Holt.

All the personal property of the wife at her marriage, or which she may thereafter acquire during marriage, unless it be her separate estate, belongs to the husband. This is the common law rule, and it has not been changed by our statute.

It was, therefore, held, in Bell, &c. v. Weatherford, 12 Bush, 505, that stock or produce raised upon land, which was the general estate of the wife, belonged to the husband.

In this instance the legal title to the forty-four acres of land, which the creditor of the husband is seeking to subject to his debt, is in the wife. It is, however, alleged that the husband, in fact, paid for it, and then had it conveyed to her; and that it was, in truth, a voluntary conveyance. If this be true, then it is, of course, liable for his debts existing when it was done.

It appears that the land formerly belonged to the husband; that the wife purchased it at a decretal sale on January 21, 1878, it being sold for a mortgage debt on him; that she paid for it with produce, or the proceeds thereof, raised upon land which was her general estate, and which she had owned since 1861; and with money loaned to her, and which she subsequently repaid out of the rent or profit arising to her from the land last named, and that the deed from the commissioner to her for the land so purchased was made on November 8, 1878.

The debt of the appellant was created sometime prior to June, 1877. This suit, to subject the forty-four acres, was brought on September 3, 1883.

Upon this state of case, and nothing further appearing, the law would seize it for the creditors; but it is alleged in the answer and undenied that prior to its purchase the wife had, by a decree of the Robertson Chancery Court, been authorized "to buy and sell, contract, &c., and to do business as a *feme sole*."

This allegation is broad enough, in our opinion, to embrace the right upon her part to hold and enjoy the proceeds of her own estate.

She paid for the forty-four acres with means derived from her general estate, and which the husband had never reduced to possession. It is urged that as it is only alleged that she was made a *feme sole* "prior" to the purchase, without naming the exact time, that it must be held that it was done *immediately* prior to the purchase, as the pleading is to be most strongly construed against the

pleader; and that as the land was, in part at least, paid for with proceeds arising from her general estate before this was done, or with the crop of 1877, that it is liable for the appellant's debt.

To this we can not assent, because, granting that the allegation should be so construed, yet the purchase was made after the wife had been made a *feme sole*, upon the petition of herself and husband, and the purchase money was paid, after this had been done, with the proceeds of her land, and which the husband had not reduced to possession.

It is true that the husband, for the wife, took the money borrowed by her and paid it upon the price of the land; but she subsequently repaid it to the party who had loaned it to her, with the proceeds of her land.

The court, without making her a *feme sole*, would, upon a proper showing, have given her the proceeds of her general estate, which had not been reduced to the husband's possession. Here both of them invoke the aid of a court of equity, as they had a right to do, to give her, as her separate estate, her own earnings and the profits of her own estate.

If a husband desires to convert the wife's earnings, or the profits arising from her general estate, into her separate estate, to be used by her to his exclusion, he can do so by the aid of the statute authorizing courts of equity to make her a *feme sole*. Penn v. Young, 10 Bush, 627.

Judgment affirmed.

McClelland v. Hamilton's Adm'r.

(*Filed Oct.* 23, 1886—*Not to be reported.*)

Husband trustee for wife—A husband was made trustee for his wife, and authorized to purchase with the trust fund real or personal estate and engage generally in business for the benefit of the wife under her direction. The husband, being insolvent, traded and operated exclusively upon the trust fund, and added largely to it, but, as he states, seldom consulted his wife when making trades affecting the trust fund. In an action to subject the trust fund to the payment of a note executed by the husband as trustee, he claims that he had no authority to execute the note. *Held*—That he will not be allowed to contract debts as trustee, and to execute notes in that capacity under the power given, and then deny the liability of the funds in his hands for their payment; nor can the beneficiary be allowed to reap all the benefits of the trustee's speculations and then repudiate a single transaction, because she did not consent to it.

Ed. M. Wallace and J. W. Rodman for appellant.

D. L. Thornton for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Pryor.

The question involved in this case does not, it seems to us, require a construction of the statute as to the power of the wife to bind her general or separate estate.

By a deed of trust made to the husband he held the wife's money, $1,600, and was authorized to purchase with it real or personal estate; make loans or investments, and engage generally in business

for the benefit of the wife, and under her direction, the power conferred being so general in its character as to enable the husband, as trustee, to use the trust fund in any manner the wife might direct. The husband seems to have been an active business man, engaging in trading and other business pursuits, that enabled him in a short time to accumulate means sufficient to purchase a farm at a cost of $10,000 or $11,000. He paid nearly $4,000 in cash in the year 1864, and from that until 1870 made the last payment on the land. He kept his bank account as trustee, and conducted the business as such for the benefit of his wife, and with this small capital, as the basis of his operations, he seems to have accumulated quite a large sum of money.

The proof shows that during all this period he was insolvent, and without credit, except when acting in his capacity as trustee. His bank account was kept in his name as trustee, and that he traded and operated on that money, with no other capital to aid him, except such credit as was given him as trustee, is manifest.

From his own statement he never or seldom consulted his wife when making trades affecting the trust fund. The husband, who had been thus using the trust fund, and having executed the note in controversy, as *trustee says now* that the debt out of which the note originated had no connection with the trust fund, but was created for himself and Pollard Elbert, of Fayette county, and that his wife had no knowledge of its existence, and was not consulted with reference to it.

The original note was executed for hogs purchased of Hamilton, and the proof conduces to show Elbert was interested in the speculation. The note upon which Callahan, the surety, was sued, is signed by McClelland, as trustee, and John Callahan. This note is dated 25th of September, 1872, and was paid off by Callahan, the surety, and the note in controversy, taken with the name of J. F. McClelland, as trustee, signed by his wife and children, as sureties, payable to Callahan.

Besides the original note for $972 was executed as trustee, if not so signed, as McClelland states, that note was executed in 1868, December 16th.

In January, 1868, the husband, McClelland, as trustee, gives a check to Elbert for $1,000, and then follows checks, running down to April, 1869. One of these checks, dated April 7, 1869, is signed by McClelland, as trustee, and payable to Elbert on settlement of partnership. One of the checks was on account of mules, and another for growing stock, and, while checks were given in McClelland's own name, it is plain that his business was conducted as trustee, and appropriated to the benefit of the trust fund.

He states that in his trading for the benefit of the trust estate he did not obtain the consent of the wife to the business transactions, and certainly, under the execution of such an unlimited power as is given the trustee by the terms of the trust, as to the use of the trust fund, the chancellor will not be disposed to give to the beneficiaries of the fund all the benefits derived from the skill and success of the trustee in his speculation, and, at the same time, relieve the trust from any liability for the losses sustained.

We find, in January, 1869, the husband accepting a draft drawn by Elbert for $400. The acceptance being in his name as trustee. The fact, however, that we think is conclusive of this case is, that during the entire period of this trading by the trustee, and the husbanding of means enabling him to purchase and pay for a farm costing $11,000, he seems never to have accumulated any property of

his own, or found himself in a condition where his credit was maintained or recognized, except when acting as trustee, and, in the very nature of things, the result of all his efforts must have been gone to building up a trust estate, where was deposited the fruits of his own industry beyond the reach of his own creditors. While the trust or the trust fund is not assailed by the creditor, or attempted to be reached on the ground of fraud, the manner in which the fund was enlarged, and the power given the trustee for that purpose, must be considered in determining the liability of the trust estate to the payment of that debt.

The trustee had the power "to sell, charge and reinvest, from time to time, the trust fund and its accumulations, and to use the same in business for the sole and separate use of his wife, as fully as though said Margaret was an unmarried woman, so far as by law such power can be granted."

They were attempting to create, by this provision of the trust, the wife as a *feme sole*, and while her power to contract could not be enlarged by its provisions, still the power of the trustee was ample to charge the whole estate. The trust was created for that purpose, and, although the wife may not have expressly consented to the appropriation of any money for the purchase of hogs, the result of the conduct of the trust being for her benefit, and managed alone by the husband for years as he saw proper, she will not be allowed, as against this surety, or the debt paid off by the surety, to hold the trust property accumulated by her husband, upon the idea that she did not know of, or consent to, the particular transaction. This is not a question as to the liability of the wife, but a question as to the power of the chancellor to coerce the payment of this debt out of the trust fund, by reason of the obligation of the trustee to pay it. He will not be allowed to contract debts as trustee, and to execute notes in that capacity, under the power given, and then deny the liability of the funds in his hands for their payment. This is simply a case where, if the appellee's claim is defeated, the trust fund derives all the benefits, and those crediting the trustee must bear all the loss. Such would neither be, conscientious or equitable, nor should the trustee, under such circumstances, be allowed to contract or give notes in fiducial capacity, and then say he had no authority for such action.

While the testimony should be received, but little weight is to be attached to it, when inconsistent with all the circumstances surrounding this case.

Judgment affirmed.

BROWN, &C. v. BROWN.

(*Filed Feb.* 21, 1889.)

1. *Fraudulent conveyance—Limitation*—Appellant in 1878 sold and conveyed his land to his co-appellant, and in 1882 appellee obtained a judgment against appellant for $1,105 on a debt that existed before, and at the time of, the conveyance, and execution on this judgment having issued and been returned no property found, in 1884 the appellee instituted this action in equity for the purpose of setting said conveyance aside, on the ground that it was made without any valuable consideration, and with the design to defraud creditors. Appellants plead the statute of limitation of five years as a bar to the action, and the reply seeks to avoid the plea by averring that appellee's cause of action only accrued upon the return of *nulla bona*, and

said return was made within five years next before the bringing of this action. *Held*—That the statute of limitation constitutes a bar to the action. If a party, who is injured by the fraud or mistake, is apprised of it at the time it is perpetrated, he must bring his action within five years thereafter, but if he is not apprised of it at the time it is perpetrated, he must bring his action within five years after the discovery; but in no case can he bring his action after the lapse of ten years from the making of the contract, or the perpetration of the fraud. If more than five years have elapsed since the perpetration of the fraud or mistake the plaintiff, in order to maintain his action, must allege and prove that he discovered the fraud or mistake within five years next before bringing the suit, and that he could not, with the use of reasonable diligence, have discovered it sooner. In the absence of these allegations it will be presumed that the plaintiff was apprised of the fraud or mistake at the time of its perpetration.

2. *Same*—The time that may have elapsed prior to obtaining a return of *nulla bona* can not stop the running of the statute of limitation. The appellee was not compelled to wait until she obtained a return of *nulla bona*. She had the right to an attachment at the commencement of her common law action, upon the same grounds she relies upon to set aside the conveyance, or upon the ground that appellant had not enough property in this State to satisfy the debt, or an execution in her favor may have been levied upon the property fraudulently conveyed.

Harrison & Belden for appellants.

Russell & Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

There has been no brief filed for the appellee.

The appellant, M. F. Brown, on the 9th day of February, 1878, conveyed to his brother, the appellant, W. S. Brown, all his property, consisting of real estate lying in Marion county, Kentucky. The conveyance was by deed, which was duly recorded.

In February, 1882, the appellee obtained a judgment in the Marion Circuit Court against the appellant, M. F. Brown, for $1,105. Said judgment was rendered on a liability that existed at the time, and for a long time before, said conveyance was made. Execution was issued on this judgment and returned no property found.

On the 13th day of February, 1884, the appellee instituted this action in equity for the purpose of setting said conveyance aside, on the ground that it was made without any valuable consideration, and with the design to defraud M. F. Brown's creditors.

The action having been commenced more than six years after said conveyance had been made, the appellee relied, among other defenses, upon the statute of five years' limitation as a bar to the action.

The appellee, in avoidance of this plea, relied upon the fact that her right to proceed by an equitable action to set the conveyance aside did not accrue until she obtained the return of *nulla bona*, which she obtained within five years next before bringing her action.

Article 3, section 2, chapter 71, General Statutes, provides: "An action for relief, on the ground of fraud or mistake, shall be commenced within five years next after the cause of action accrued."

The sixth section of the same article provides: "An action for relief for fraud or mistake shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the making of the contract, or the perpetration of the fraud."

If the party, who is injured by the fraud or mistake, is apprised of it at the time it is perpetrated, he must bring his action within five years thereafter; but if he is not apprised of it at the time it is perpetrated, he must bring his action within five years after the discovery; but in no case can he bring his action after the lapse of ten years from the making of the contract or the perpetration of the fraud.

If more than five years have elapsed since the perpetration of the fraud or mistake the plaintiff, in order to maintain his action, must allege and prove that he discovered the fraud or mistake within five years next before bringing the suit, and that he could not, with the use of reasonable diligence, have discovered it sooner.

In the absence of these allegations it will be presumed that the plaintiff was apprised of the fraud or mistake at the time of its perpetration.

Therefore, as the appellee failed to allege that she discovered the fraud complained of within five years next before the bringing of her action, it must be presumed that she was apprised of its perpetration at the time it occurred; and the right to set aside the conveyance is barred, unless it is saved by the fact that she did not obtain a return of *nulla bona* until within five years next before she instituted this action.

It seems to have been contended in the lower court that as an equitable action to set aside the conveyance could only be maintained upon a return of *nulla bona*, the fact that such return was had within five years entitled the appellee to maintain her action, notwithstanding more than five years had elapsed before it was instituted. In other words her cause of action, upon her return of *nulla bona*, first accrued, and the statute of five years limitation was suspended until such return was obtained.

If it be conceded, which is not, that the property conveyed could only be reached by an equitable action, based upon a return of *nulla bona*, it does not follow, as an unqualified proposition, that the statute would be suspended until such return might be had.

For, if the plaintiff should delay to cause his execution to issue until the last day of the time allowed by law—fifteen years—it would not be contended that the statute of five years' limitation would be suspended all of that time. So also, if the plaintiff, being cognizant of the fraud, should delay to cause his execution to issue for five years, his right to institute his equitable action, upon a return of *nulla bona*, would be barred. So the true rule seems to be that, if the plaintiff desires to procure a return of *nulla bona*, as a foundation for attacking a fraudulent conveyance, he must, if the fraud was known to him at the time of its perpetration, obtain his common law judgment and cause an execution to issue, and a return of *nulla bona* thereon, and commence his equitable action within five years from the time of the perpetration of the fraud. Also he must go through the same routine within five years after the discovery of the fraud; but in no case can the equitable action be commenced after ten years from the perpetration of the fraud.

But the appellee was not confined to her equitable action in order to set said conveyance aside. She had a right to an attachment at the commencement of her common law action, upon the same grounds that she relies upon to sustain her equitable action, and which would have authorized the setting aside and the subjecting of said land to the payment of her debt. She was also entitled to an attachment, upon the further ground that M. F. Brown had not property enough in this State subject to execution to pay the appel-

lee's demand, and that the collection of her debt would be endangered by delay, &c.

Both of which grounds existed at the time she commenced her ordinary action. But it is said that an attachment is only an incident to the action, and, therefore, the plaintiff loses no right, in a case like this, by his failure to obtain the attachment. An equitable action, on a return of *nulla bona*, is only in aid of a common law action for the purpose of reaching further than an execution can reach, thereby furnishing remedies that the execution can not furnish. So an attachment is allowed as an aid of the action, at the beginning of it, for the purpose of securing the plaintiff in his rights in advance of either an execution or an equitable action on the return of execution, indorsed no property found; which attachment, in its remedial capacity, reaches further than the execution, and is nearly, if not quite, co-extensive with the remedial capacity of an equitable action on a return of *nulla bona*. Also it is the settled law of this State that in a case like this the plaintiff, having obtained a common judgment, may have his execution levied upon the property fraudulently conveyed. Yankey v. Sweeney, &c., 8 KY. LAW REP., 944.

So the appellee's remedy was ample to reach the property fraudulently conveyed, and as she delayed for more than five years, her right of action was barred.

The judgment of the lower court is reversed, and the case is remanded, with directions to dismiss the appellee's action.

BROWN V. U. S. HOME AND DOWER ASSOCIATION.

SAME V. SAME.

(*Filed June* 19, 1890—*Not to be reported.*)

1. *Jurisdiction—Amended judgment*—In an action to enforce satisfaction of a note secured by mortgage, by subjecting the undivided joint interest of the mortgagor to sale, the court having first rendered judgment directing that the land be sold on account of its indivisibility, at the same term it set aside so much of the order as directed a sale of the whole land, and ordered that it be divided, and the order of sale withheld until the report of division should be made. The court had control over its orders and judgments during the same term, and the action of the court was not prejudicial to the rights of appellant.

2. *Personal judgment—Estoppel*—Appellant, in an action to enforce satisfaction of a note secured by mortgage on land situate in McCracken county, having been served with process in Jefferson county, and having appeared in McCracken Circuit Court and contested the amount of the note, can not object to personal judgment being rendered against him.

Stone & Sudduth for appellant.

Campbell & Wheeler and E. W. Hines for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Pryor.

Bell, as assignee of the Home and Dower Association, brought an action to recover judgment on a note executed by Brown, the appellant, for $2,000, and to foreclose a mortgage on real estate in the

county of McCracken. The land was owned jointly by the appellant and Mrs. Dorsey, who was a defendant to the action. It is urged, by way of defense, that the association had no power to assign the note, and that it contained usury. The usury was purged by the chancellor, and it appears, from the testimony, that before Bell purchased the note he was informed by Brown that it was all right. The fact that the company may not have had authority, by its charter, to loan money in this State (if that be conceded) does not relieve Brown from liability to the assignee, who has taken it for value. There is nothing vicious in the consideration. Brown obtained the money, and the mortgage lien was properly enforced for its payment. Nor does it appear that there were two judgments, final in their character, rendered at different terms of the court.

It does appear that there was a judgment directing a sale of Brown's undivided interest, on the ground that it could not be divided without materially impairing its value. It then appears that the judgment was amended, the record showing that the court thought the land could be divided, and an order entered directing the commissioner to make division and report, and the order of sale was withheld until the report was made of the division, or until the further order of court.

There is nothing showing that all this was not done at the same term of the court, and this court must assume that such was the fact. The commissioners, in September, made their report of division that was confirmed, and in October following a judgment was entered, directing a sale of the land. The sale was made and report confirmed.

The court had the power to amend its judgment during the term at which it was rendered, and this amendment worked no hardship on the appellant; but whether so or not the right to amend existed, and the court, instead of selling the undivided interest, sold the interest, when set apart, to the defendant.

The appellant also objects to a personal judgment against him. The defendant appeared, and not only contested the lien, or the right to enforce it, but reduced the amount of the note by equitable set-offs, and should not be heard now to say that as he was served in Jefferson county no personal judgment should have been rendered against him in McCracken county.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

AMERICAN MUTUAL AID SOCIETY V. BRONGER.

(*Filed Nov.* 27, 1889.)

1. *Insurance—Materiality of representations a question of law*—**Whether a misrepresentation by an applicant for insurance is material is a question of law when the facts are ascertained.**

2. *False answers by applicants*—A false answer in a written application for life insurance to the question as to whether any other company had declined to grant a policy on the applicant's life was a material misrepresentation, and avoided the policy. And the fact that the company made the contract, although upon its examination it found the same unsoundness to exist that had been the cause of the applicant's rejection by another company, does not destroy the material effect of the false answer.

3. *Same*—In life insurance it is the duty of the applicant to make truthful answers to all questions relating to his health, and if he makes an answer, knowing it to be false, or conceals a fact known to be important, either will amount to a fraud as matters of law, and avoid the policy.

Simrall & Bodley for appellant.

O'Neal, Jackson & Phelps for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Ward.

The policy of insurance on which this suit was based contained, among others, this provision: "If the statements made in the application for this certificate of membership, which application, it is hereby agreed and understood, shall form the basis of, and become a part of, this contract, should be untrue in any respect, or * * * * then, in every such case, this certificate shall be null and void, and of no effect whatever."

The appellant relied upon this provision in avoidance of any liability. The facts relied upon in its pleading, so far as found by the court in its conclusions, were these:

That the application for insurance contained, among others, this question:

"Has any life insurance company, order, society or association declined to grant a policy or certificate of membership on your life?" The answer to which was: No.

It was found that this answer was untrue; that five or six days before the above answer the insured had applied to the Southern Mutual Life Insurance Company for a policy, and it had been refused, on account of the physician's report that there was irregularity in the action of applicant's heart.

It was further found that appellant, company, sometimes accepted as members persons who had been rejected by other companies, if the cause of objection had been removed, or was without cause. But when the applicant had been rejected by another company he was subjected to a more rigid medical examination.

It was also found that appellant, company, subjected this applicant to two examinations, and that the physicians, who examined him first, found the same difficulty as was found by the physicians who rejected him for the other company, and refused, on that examination, to accept him as a proper risk, but told him to come again. He did so; and after a second and thorough examination by the same physician and the company's medical director, he was recommended, and the certificate of membership issued.

Upon these facts the court, as matter of law, found that the misrepresentation was neither material or fraudulent, and so rendered judgment against the company. Other questions were made, but the ruling upon these is the principal, if not the only material, one in the case, and is, in our opinion, decisive of it one way or the other.

Whether a misrepresentation is material is a question of fact, if

it depends upon inferences to be drawn from circumstances. It is a question of law, if it depends upon the construction of a writing. May on Insurance, section 195.

From analogy it would seem that when the facts are ascertained, as they were in this case, it is a question of law. One of the decisive tests of materiality is to ascertain whether it affects the risk, that is, whether the risk would have been taken at all, or only at an increased premium, if the facts, as they existed, had been truly stated. Insurance Company v. Lawrence, 10 Peters, 516.

Whether this insurance would have been taken, if the facts had been disclosed that another company had rejected the application, on the ground it did, is not found as matter of fact, and could not be so found, because it is a conclusion of reason or law to be deduced from the facts found.

We are of the opinion that the facts show conclusively that it would not. The finding is that this company would not have taken the risk, unless it found that the cause of objection did not exist, or had been removed. Now this company did not find that the cause for which he had been rejected by the other company did not exist, or had been removed; on the contrary its medical examiner, without knowing that the applicant had been examined by another company, or rejected, found the same difficulty or diseased condition of the applicant, and on the first examination refused to recommend him as a proper subject for insurance. But that no injustice might be done, requested him to call again. It can hardly admit of doubt or question that no request for a second examination would have been made, if the physician had been informed that five days before the applicant had been examined by another physician, and had been pronounced unsound, because of an irregular action of the heart.

The fact that this company, by its examination, ascertained the same unsoundness to exist on its first examination, which was the cause of his rejection by the other company, and, notwithstanding this, did make the contract, is by no means conclusive that it would have insured him if it had known of the rejection and its cause, nor does it destroy the material effect of the false answer. The question had a two-fold meaning. Its object was to inquire into the physical condition of the applicant, if he had been under examination, and to get the results of the examination, and also to test the anxiety of the applicant for insurance. All of these objects were frustrated by the false answer. To say that the company, without having obtained any information on the subject named, acted as though it had known the facts that there had been both a previous application and a rejection for cause within five or six days before, is to convict it of having asked a question, without any purpose, to be controlled by an unfavorable answer. This, it seems to us, the courts have no right to assume. In ascertaining the meaning of a contract the court must look to the language employed, and if a question is asked as to a matter so material as is the health of a person to a contract of life insurance, and upon a matter so peculiarly within the knowledge of one of the contracting parties, who has been examined by a physician, as that subject must be, then it would seem that the question is a material one, and the contract avoided by an untruthful answer.

It is often a difficult task to distinguish between a material misrepresentation and a fraudulent purpose to procure the contract of insurance, because the first is itself a fraud in law, whether intended to be one in fact or not. It is so in this case, and we are satisfied

from the facts found, not only that there was a false statement as to a material matter, but that it was made with the hope that the contract of insurance would more certainly be procured by the false answer than if the facts had been stated.

The test as to whether the contract was void for fraud, as applied by the lower court, was that there must have been a purpose to procure the contract, and a purpose on the part of the insured to kill himself, as he afterwards did, in order to procure the indemnity provided for, for the benefit of the person named. This is not the proper test. A fraudulent purpose in procuring a policy of insurance renders the contract void, and, in that event, it is immaterial, as matter of law, whether the condition upon which the indemnity is to be paid is brought about by natural forces or not. So may the contract be a good one, yet if the loss is brought about by fraud there can be no recovery. A contract of insurance is peculiarly one of good faith upon the part of the contracting parties at every stage of its existence, and this is not only because the interests of the contracting parties are involved, but often the interests of many others are directly affected.

In life insurance it is the duty of the applicant to make truthful answers to all questions having relation to his health, and if he makes an answer, knowing it to be false, or conceals a fact known to be important, either will amount to a fraud, as matter of law, and avoid the policy. May on Insurance, section 204.

The law is not capable of attributing a proper or innocent motive to a falsehood about a matter, material in its character, to one party and unknown to the other.

The judgment is reversed, and the cause remanded for a new trial, and for further proceedings.

CHRISTIAN, TRUSTEE, &C. V. BYARS.

(*Filed May* 7, 1890.)

Commission of county attorney—County attorneys are entitled to 30 per cent. of fines and forfeitures by virtue of section 9, article 3, chapter 5, General Statutes, only in prosecutions, of which the magistrate has jurisdiction to, and does, dispose of finally. Therefore, where a justice of the peace acts as an examining court and permits the accused to give bail for his appearance before him at a future day, and the accused fails to appear, and the forfeiture of the bond is imposed and recovered in the circuit court, which alone has power to enforce the forfeiture, the county attorney is not entitled to any thing by virtue of the statute referred to. He is entitled, by virtue of the act of April 28, 1884, to 15 per centum of the amount recovered, provided he assisted the Commonwealth's attorney in the circuit court, but to nothing more.

P. W. Hardin for appellants.

J. E. Byars and Byars & Terry for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Presiding Judge Barbour.

This is an agreed case, the object of which is to determine what per cent. of the money collected upon a forfeited bond the appellee, as county attorney, is entitled to.

One Bigbee was brought before a justice of the peace of Todd county, charged, as expressed in the warrant, with having "committed the offense of shooting with intent to kill another in Todd county." He was allowed to and did give bail in the sum of $5,000 for his appearance to answer the charge before the justice at a stated time. Failing to appear, in accordance with the conditions of the bond, it was forfeited, and was so indorsed by the justice and returned by him to the circuit court, and, subsequently, judgment was rendered in that court against the sureties in the bond, and the greater part of it was collected. The appellee, as county attorney, represented the Commonwealth in the proceedings had before the justice, and also assisted the Commonwealth's attorney in the proceedings to enforce the forfeiture in the circuit court, and insists that by virtue of section 9, article 3, chapter 5, General Statutes, he is entitled to 30 per cent. of the amount collected, and by sections 1 and 2 of the act of April 28, 1884, to 15 per centum of the amount in addition, not quite half the amount of the bond.

The first statute referred to is: "That all prosecutions for misdemeanors before any county judge, police judge, justice of the peace or other magistrate, the county attorney shall receive 30 per cent. of all fines and forfeitures, imposed or recovered in such prosecutions, provided said attorney is present and prosecutes the offenders, but in no other event.

And the act of 1884 is:

SEC. 1. "In addition to the duties now enjoined by law on county attorneys, it is hereby made the duty of county attorneys to attend each circuit or criminal court held in their respective counties, and to assist the Commonwealth's attorney in all prosecutions in said courts for violation of the criminal or penal laws of this State."

SEC. 2. "That for such service the county attorneys shall, in addition to the compensation now allowed them by law, receive 15 per centum of all judgments in favor of the Commonwealth for fines or forfeitures recovered or imposed in said prosecutions: *Provided*, Said county attorney attends and assists in said prosecutions, but in no other event."

The offense with which Bigbee was charged is not distinctly defined in the warrant, but we will treat the case as if the accused was charged with a misdemeanor. It is evident that the "fines and forfeitures imposed or recovered in such prosecutions," mentioned in the first statute, refer to and embrace only such fines and forfeitures as are imposed by or recovered before the justice (or other magistrate, as the case may be) in prosecutions of which he has jurisdiction to, and does, dispose of finally. In prosecutions for misdemeanor, within the jurisdiction of a justice of the peace, the accused may, as in other courts, enter into bond for his appearance for trial before the justice at some future day, and in the event of his failure to comply with the conditions of the bond the justice may forfeit it, and proceed against the sureties, and of the amount recovered of them, the county attorney, who has prosecuted the case, will, under the statute, be entitled to 30 per cent. But when the justice acts as an examining court, and has permitted the accused to give bail for his appearance before him at a future day, and the accused fails to appear, the justice has no power to enforce the forfeiture. He is simply authorized to indorse the forfeiture on the bond, and transmit it to the circuit court, which alone has the power to enforce the forfeiture. In such case there is no forfeiture imposed or recovered in the justice's court; the forfeiture is imposed and recovered in the circuit court.

While it is not expressly stated in the agreed facts that the justice in this instance was acting as an examining court, that is the clear inference, not only from the amount of the bond, but from the facts stated, and it was so regarded by the court below, as stated in the judgment.

We are of opinion that the appellee is entitled to no part of the money recovered on the bond by virtue of this statute. But as the appellee assisted the Commonwealth's attorney in the circuit court, he is entitled to the 15 per cent. of the amount recovered under the provisions of the act of 1884. He has been paid this amount, and is entitled to no more.

The judgment is reversed and the cause remanded, with directions to dismiss the proceeding.

OVERBY V. ROGERS, &C.

(Filed May 7, 1890.)

1. *A landlord has no lien* upon the tenant's property for damages sustained on account of the tenant's failure to comply with his contract. The lien given to the landlord is purely statutory, and the courts are not disposed to enlarge his rights.

2. *Pleading*—An allegation that one has a lien is a mere conclusion of the pleader.

3. *Cross-appeal*—An appellee can not obtain a cross-appeal against a co-appellee. The cross-appeal of an appellee must be against an appellant.

Jno. P. Norvell for appellant.

Kennedy & Kennedy for Galbreath.

Ross & Owens for Rogers.

Appeal from Nicholas Chancery Court.

Opinion of the court by Presiding Judge Barbour.

The court below assumed, in its judgment, that the writing filed with Taylor's deposition was the contract of renting under which Lewis cultivated Rogers' land, and upon that assumption based the judgment in favor of Rogers against the appellant, Overby. In this the court was in error, as the terms of this writing are entirely different from the contract relied upon by Rogers in his answer and cross-petition; and his pleading and not his proof must control. If he made a mistake in setting out the contract in his pleading, he should have made the correction by an amendment. But this he did not do, choosing rather to rely upon the contract as pleaded by him. By his answer he asserts claim to one-third of the tobacco raised on the three acres in the bottom as the part of the crop belonging to him under his rent contract, and a lien upon all the tobacco, including Lewis' two-thirds of this three acres, as well as the tobacco raised by Buckler on the hill. This is the extent of the claim he, by his pleading, asserts against Overby, the purchaser of the tobacco. Overby, in his answer, does not state that the tobacco grown on the three acres of bottom land bought by him, and which we will, for convenience, call Lewis' tobacco, amounted to $274.56. It is apparent, from the answer, that that sum has reference to all the tobacco bought by him in which Lewis had an

interest, and includes both Lewis' and Lewis & Buckler's tobacco. The evidence shows that the Lewis tobacco sold for $130.44, and this, added to one-half the sum, $288.74, at which the Lewis & Buckler tobacco sold, makes the amount, within a few cents. Rogers retained of the Lewis tobacco 500 pounds, worth $25. This, added to the $130.44, which Lewis' tobacco delivered by him to Overby brought, makes $155.44. One-third of this $155.44 Rogers was entitled to under the contract relied upon by him, which would be $51.81⅓. He has in his possession, according to his own version of the contract, $25 worth of this tobacco. This, taken from the $51.81⅓, leaves $26.81⅓, which he is entitled to and for which the court should have rendered judgment for him on that account. In regard to the $96.50, adjudged him by the arbitrators, Rogers has no lien superior to that of Galbreath, the mortgagee. The arbitration was subsequent to the mortgage. While he, in his pleading, alleges that he has a lien, that is but a mere legal conclusion of the pleader. The lien given to the landlord is purely statutory; the courts have never been disposed to enlarge his rights.

We know of no statute which gives to the landlord a lien, excluding creditors of the tenant for damages sustained by the landlord on account of the tenant's failure to comply with his contract; and, clearly, he has no lien upon the crop raised upon the rental premises for demands which the landlord may have against him on account of other matters. The question of priority between the appellees, Rogers and Galbreath, is not raised on this appeal. Rogers, it is true, has prayed and obtained a cross-appeal against the appellant, but, as we have intimated, he has no grounds of complaint. He has already obtained judgment for more than he is entitled to. Galbreath prayed a cross-appeal against Rogers, which we refused to allow. For an appellee can not obtain a cross-appeal against a co-appellee. The cross-appeal of an appellee must be against an appellant.

Therefore, the question of priority between Rogers & Galbreath is not presented to us, except to the extent that it is necessary to pass upon the questions to determine whether the judgment against the appellant is for too much.

Buckler's tobacco sold for $288.74, one-half of which Lewis was entitled to, *i. e.*, $144.37. Lewis' tobacco sold for $130.44, which, added to the $144.37, makes $274.81. Of this sum the court adjudged that Galbreath was entitled to $199.15. That judgment must stand. This leaves $75.66 which Rogers is entitled to, and for which sum the court will render judgment for Rogers against Overby, with interest from June 18, 1881.

The judgment is reversed and the cause remanded, with directions to enter judgment in accordance with this opinion. Rogers will pay all the costs of this appeal.

Upon Rogers' cross-appeal the judgment is affirmed.

Judge Ward delivered the following extended opinion:

This court did not decide, as counsel for Overby seems to have concluded, that Rogers or any of the other parties was entitled to a judgment against Overby, on the return of the case, for $75.66, or any other sum.

What we decided was that Overby was liable, in the first place, to pay for the tobacco, which he had received $274.81, with interest from the day it was due, and subject to the credits on the days they were made, first, for the $178.06 paid to Galbreath; and, secondly, to credit for the sum paid into court. If these two sums paid the

$274.81, and interest and cost incurred against Overby, then there was no longer ground of complaint against him; if they did not, then judgment should be entered accordingly.

Of the sum paid, and to be paid, by Overby, the lower court decided that Galbreath was entitled to the $178.06, which he had received, and to the further sum of $21.09, with interest from June 18, 1881. Whether he was entitled to more we can not decide, as Galbreath has not complained, by appeal, that Rogers had been adjudged too much and he too little. Whether Rogers or Galbreath gets too much or too little does not affect Overby, if he is not made to pay more than he owes.

It seems that the $132.55, which was paid into court by Overby, has been paid over to Rogers, this he is entitled to retain to the extent that it may not be necessary to pay the sum adjudged to Galbreath, to-wit, the $21.06, and its interest. To the extent that any part of it is necessary, he should be made to refund. He can not be made to refund without leaving in his hands the balance due him for rent, to-wit, $26.81½, with interest from March 1, 1881, to the date he drew the money from court.

The opinion heretofore rendered is now extended as herein indicated, and the case remanded for judgment in accordance with the opinion and this extension of it.

SUPERIOR COURT ABSTRACTS.

DONAN v. DONAN'S ADM'R.

Filed September 3, 1890. Appeal from Hart Circuit Court. Opinion of the court by Judge YOUNG, affirming.

***In the absence of a bill of exceptions*, the court must presume that the evidence was sufficient to authorize the verdict.**

W. P. D. Bush for appellant; George W. Craddock for appellee.

KENTON INSURANCE COMPANY v. ADKINS.

NORWICH UNION SOCIETY v. ADKINS.

TRADERS' INSURANCE COMPANY v. BREDEN & ADKINS.

Filed September 5, 1890. Appeal from Oldham Circuit Court. Opinion of the court by Presiding Judge BARBOUR, affirming.

1. *Special verdict*—A party who has consented to the jury finding a special verdict will not be heard to raise the objection here that the court had no power to order a special verdict.

2. *Evidence*—While carpenters and practical mechanics may give a more accurate estimate of the cost and value of a building, any man of observation, acquainted with the property, is competent to testify as to its value.

3. *Insurance—Proof of loss*—The making of the proofs of loss within the time prescribed in the several policies of insurance in these cases was not a condition precedent to the liability of the companies, the provisions of

the policies being essentially the same as those of the policy in the case of Kenton Insurance Company v. Downs, 12 Ky. Law Rep., 115.

Collins & Fenley, Montgomery, Lindsey & Botts and D. H. French for appellants; Thomas R. Gordon and J. W. Greene for appellees.

M. & O. R. R. Co. v. Roark & Hays.

Filed September 10, 1890. Appeal from Ballard Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

Railroads—Negligent killing of stock—In this action against a railroad company to recover damages for the alleged negligent killing of a horse, testimony showing where the horse escaped from the plaintiffs, and where he was found, and the nature of his injuries, tended to show that the horse was struck by one of defendant's trains, and, therefore, the court properly refused a peremptory instruction to find for defendant. And while the evidence is not satisfactory, the verdict for plaintiff is not so flagrantly wrong as to authorize this court to say that the lower court abused its discretion in refusing a new trial.

Lansden & Leek for appellant; J. M. Nichols for appellees.

Johnson v. Keel.

Filed September 10, 1890. Appeal from Christian Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

New trial—Remission of part of judgment—The court, having granted the defendant a new trial, had no right thereafter to set aside the order granting a new trial upon the plaintiff's remitting a part of his judgment. The court thus in effect assessed the damages, thereby depriving the defendant of her right to an assessment by a jury.

H. J. Stites for appellant; C. H. Bush and James Breathitt for appellee.

Lawson v. Marshall & Co.

Filed September 10, 1890, Appeal from Whitley Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, affirming.

Separation of conclusions of law and fact—When, in an ordinary action, the law and facts are submitted to the court, without the intervention of a jury, and the court fails to state in writing the conclusions of fact found separately from the conclusions of law, the only question for consideration upon an appeal from the judgment is as to the sufficiency of the pleadings.

Hill & Durham for appellant; Perkins & Harding for appellee.

Crutcher's heirs v. Cavanaugh's adm'r.

Filed September 17, 1890. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Exceptions to commissioner's report*—An objection to a commissioner's report of settlement of the insolvent estate of a decedent can not be considered, unless specifically pointed out by the exceptions to the report.

2. *Decedent's estate—Preferred claims*—Section 33 of article 2, chapter 39 of the General Statutes, which gives a preference to certain claims against the insolvent estate of a deceased person, does not embrace the claim of a *cestui que trust* for the amount of the trust estate in the hands of the decedent as trustee. Although the trust may have been created by will, the trust estate can not be regarded as the estate of a dead person within the meaning of the statute.

Ira Julian for appellants; John B. Lindsey for appellee.

Pierce v. Brown.

Filed September 17, 1890. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Introduction of testimony*—After the parties had closed their evidence,

and had concluded, or nearly concluded, the argument to the jury, the question whether the defendant should be allowed to re-open the case and introduce additional evidence was addressed to the sound discretion of the trial judge, and the court can not hold that this discretion has been abused, as no reason is given why the statement was not made when the witness was on the witness stand.

2. *Reversible errors*—There can be no reversal on account of the refusal of the court to allow a witness to answer a question, when it does not appear what the answer of the witness would have been.

3. *Instructions to jury*—The appellant can not complain of the court's failure to instruct the jury upon a certain point, unless he asked the court to give the instruction.

4. *Verdict*—As the evidence of each party sustains his contention, and there have been two verdicts for plaintiff, the court will not disturb the verdict upon the ground that it is against the evidence.

Blue & Blue for appellant; Nunn & Cruce for appellee.

King v. Nichols.

Filed September 17, 1890. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *In an action by a surety against a co-surety for contribution*, the insolvency of the principal should be alleged. But where there is no demurrer to the petition, and the case is tried out on another issue, the defect in the petition in failing to allege the insolvency is cured by the judgment.

2. *Limitation—New promise*—An unqualified acknowledgment of a debt is sufficient to prolong the statutory period of limitation. An express promise to pay is not necessary.

One of two sureties having paid off the debt for which both were bound, the other executed to him a writing reciting that fact, and agreeing that he might sell privately certain personal property of the principal, upon which he held a mortgage to indemnify him in part, and agreeing that his own responsibility as co-surety should not be affected thereby to a greater extent than if the mortgaged property had been sold under legal proceedings. *Held*—That this was a sufficient acknowledgment by the co-surety to extend the period of limitation in a suit for contribution.

George T. Duff for appellant; J. P. Nuckols for appellee.

Hays, &c. v. Coffee.

Filed September 17, 1890. Appeal from Russell Circuit Court. Opinion of the court by Judge Yost, affirming.

Action for delivery of personal property—Right of plaintiff to dismiss—After the plaintiff in an action for the recovery of personal property has given bond and obtained possession of the property, he has no right to dismiss his action, and thus prevent a judgment against himself for a return of the property.

Joseph E. Hays for appellants.

Louisville & Nashville Railroad Company v. Grundy, &c.

Filed September 17, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Railroads—Duty to passengers—Punitive damages*—A passenger on a railroad train is entitled to the care and protection of the company and its employes from the time he purchases his ticket and enters the cars until he arrives at his destination; and it is the duty of the company to protect a female passenger from the insults and wanton approaches of men while she is under its care, whether in its cars or depots.

The conductor of a train refused to carry a female passenger to the station to which she had purchased a ticket, which had been taken up by

another conductor, unless she would pay her fare. Having no money, she was unable to do this, and was, therefore, compelled to leave the train and spend the night in a depot, where, the testimony tends to show, she was insulted, both by an employe of the company and by others. In this action against the company to recover damages, *Held*—That the court properly instructed the jury that they might award punitive damages if they believed "that any of defendant's agents or employes, on duty as such, were insulting in conduct or manner toward plaintiff while she was in or about defendant's train or depot, or that defendant wilfully exposed plaintiff to insults or wanton approaches of other persons in its depot." To authorize punitive damages it was not necessary that the action of the first conductor in taking up plaintiff's ticket, or that of the second in refusing to carry her to her destination should have been wanton, wilful or malicious.

2. *Prejudicial errors*—The failure of the court to limit the jury in awarding damages to the amount claimed in the petition was not prejudicial, as the amount found by the jury was less than that claimed.

W. J. Lisle for appellant; Rives & Spalding for appellees.

L. & N. Railroad Company v. Blair.

Filed September 17, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Second appeal—Res adjudicata*—This court will not now notice an objection to an instruction passed upon by this court on a former appeal in this case and approved.

2. *Prejudicial errors*—The appellant was not prejudiced by the refusal of the court to give an instruction, the substance of which was embraced in an instruction which was given.

W. J. Lisle for appellant; Rives & Spalding for appellee.

City of Pembroke v. Waugh.

Filed September 17, 1890. Appeal from Christian Court of Common Pleas. Opinion of the court by Judge Young, reversing.

Jurisdiction to enjoin judgment—An injunction to stay proceedings on a judgment can not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered. Therefore, the Christian Court of Common Pleas had no jurisdiction of an action to enjoin a judgment rendered by the Pembroke City Court. The petition shows that the object of the suit was to relieve plaintiff from judgments already rendered, and not to prevent threatened prosecutions.

Henry J. Stites for appellant; Wood & Bell for appellee.

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SUPREME COURT OF VERMONT.

WILLIAMSON v. JOHNSON, &c.

(*Filed July*, 1890.)

When gifts made in contemplation of marriage may be recovered—Plaintiff gave to defendant, who was then under promise of marriage to him, a certain sum of money to buy clothing in anticipation of the marriage, and also another sum to enable her to defray her traveling expenses to the place of the intended marriage. There was no condition annexed to these gifts, but both parties understood that they were in anticipation of marriage. Defendant used the money sent to her to buy clothing for that purpose, and retained the money sent for traveling expenses. She, then, without good cause, broke off her engagement to plaintiff. *Held*—That the gifts being made in anticipation of marriage, were conditional, and that the money sent, both for clothing and traveling expenses, could be recovered by plaintiff in an action for money had and received.

Hunton & Stickney for appellant.

J. B. Phelps and W. E. Johnson for appellees.

Appeal from Windsor County Court.

Opinion of the court by Judge Tyler.

The facts, as found by the court below, were as follows:

"The plaintiff and Caroline F. Johnson entered into a marriage engagement at Minneapolis, in August, 1878, and she was to come to Vermont, where the plaintiff resided, to consummate the engagement, as soon as she could get ready to come. In view of this arrangement the plaintiff sent to her, from time to time, the several sums of money, set forth in the plaintiff's specification, to the extent of $275, for the purpose of buying her wardrobe, in preparation

for her marriage, it being left with her to write to him for any amounts needed for the purpose. She did write, from time to time, and stated the sum to be required to be $275. We further find that the plaintiff let her have the money sent by him without any expectation that it would be refunded; that he intended, when he sent the money, it should be a gift to be used by her for the purpose named, to the amount of $275. He also sent her, in addition to that sum, $55, to be used by her in defraying her traveling expenses to Vermont, for the purpose of being married according to their engagement, and she knew that the $55 were sent for that purpose. She used the $275 in buying clothes in preparation for marriage, pursuant to the foregoing arrangement. She did not come east to be married, as agreed, but, in November after, broke the engagement entered into, and subsequently, in 1882, married the defendant, Johnson. We do not find that she had any good and sufficient reason for breaking the engagement. She subsequently offered to send the clothes she had so bought to the plaintiff. In reply to said offer the plaintiff wrote her that he hoped she would reconsider the matter, and come to him in fulfillment of their engagement. The plaintiff never requested her to return the money until this suit was brought. Plaintiff intended, in like manner, that the $55 should be a gift, to be used for her traveling expenses in coming east, as above stated, but she never so used it. When she received and expended the money so sent to her, as above stated, she expected to marry the plaintiff. There were no conditions attached to the gift of the money, but it was given and received on the expectation of both parties that they were soon to be married, and was given to be used in the manner above stated."

It is a general rule of law that a gift by a competent party made perfect by a delivery and acceptance is irrevocable by the donor; that to constitute a gift *inter vivos* the donor must deliver the property, and part with all present and future dominion over it. It is a voluntary, gratuitous transfer of personal property by one person to another. A true and proper gift or grant is always accompanied by delivery of possession, and takes effect immediately; as, if A gives to B £100, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense, unless he were under a legal incapacity—as infancy, coverture, duress, or the like—or if he were drawn in, circumvented or imposed upon by false pretenses, ebriety, or surprise. 2 Bl. Comm., 441. In accordance with this rule it was held in Stauffer v. Morgan, 39 La. Ann., 632; 2 South. Rep., 98, that a donation by a man to his intended wife, on the eve of their marriage, of a check on a banking firm was revocable at any time before actual collection by the donee; but, after it had been presented and honored by placing the amount to her individual credit, the donation was complete; that the *locus pœnitentiæ* continued until the delivery was perfected. In the note to Drew v. Hagerty (Me.), 3 Lawy. Rep. Ann., 230; 17 Atl. Rep., 63, it is said that, in order to render a gift of money by a grandmother to certain children and their father as their trustee effectual for any purpose, it is not only necessary to show an intention to give, but also an actual delivery of the thing given. There must be a parting with the possession and all control over the property, and a vesting of the possession in the donee or in a third person in trust for the donee. A gift of personal property, made with intent to take effect immediately and irrevocably, and executed by complete and unconditional delivery, is

binding upon the donor as a gift *inter vivos*. Love v. Francis, 29 N. W. Rep., 843; 6 Amer. St. Rep., 290, and note. See also *in re* Crawford, 113 N. Y., 560; 21 N. E. Rep., 692.

All the definitions come to this: That to constitute a valid gift it must be voluntary, gratuitous and absolute. Applying these tests to the facts relative to the gift of the $55, it is apparent that they fall short of showing a perfected gift of that money in the donee. The court below found the facts that the plaintiff let the defendant, Caroline, have both sums of money without any expectation that they would be refunded, which was certainly quite natural in the circumstances of the case; that both sums were intended as gifts; and that no conditions were attached thereto. It is further found that the gifts were made in the expectation by both parties of marriage, and that they were given for specific purposes, the $275 for the purchase of the defendant's marriage wardrobe, and the $55 to defray her expenses in coming to this State to be married. The court would have fully complied with the requirements of the act of 1888 if it had stated the facts in the case without denominating the transaction. That act requires that "in all cases hereafter tried in the county court, where any question of fact shall be tried by the court instead of by a jury, and in which a jury trial might have been had by either party, before any bill of exceptions shall be allowed, the facts found by the court upon which judgment is rendered shall be reduced to writing, and signed by a majority of the members of the court and filed with the clerk." If the plaintiff had given or sent these sums of money to the defendant without any direction or designation as to their use, as gratuities, they would have been perfected, irrevocable gifts upon delivery. In a general sense they were gifts, but in a strict legal sense they were not gifts, though called so by the court, for the reason that they were made in expectation and under an arrangement that they were for specific purposes. The law is well settled that where money is delivered by one person to another for a particular purpose, to which the latter refuses to apply it, the depositor may recover it back in an action for money had and received. 2 Greenl. Ev., section 119; De Bernales v. Fuller, 14 East, 590, note.

In a valuable note to Hasser v. Wallis, 1 Salk., 28, it is said: "If one man takes another's money to do a thing, and refuses to do it, it is a fraud, and it is at the election of the party injured either to affirm the agreement by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use."

In Berry v. Berry, 31 Iowa, 415, a father gave to his son certain personal property, upon the condition that he should keep sober and attend to his business. It was held that to entitle the donee to claim that the gift was irrevocable, and invested him with a right to the property, it must be shown that he had complied with the conditions which the gift was made. And in Stewart v. Phy, 11 Or., 335; 3 Pac. Rep., 443, it was held that assumpsit for money had and received would lie to recover money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when it was not so applied, and the obligation was otherwise discharged.

Several English cases, cited by the plaintiff's counsel, go beyond the rule above indicated, and hold that marriage gifts, or their value, are generally recoverable of the donee after breach of the engagement by her. In Fonbl. Eq., Bk. 1, chapter 6, section 15, it is said: "But that which helps us most in the finding out the true

meaning is the reason or cause which moved the will. And this is of the greatest force when it evidently appears that some one reason was the only motive that the parties went upon, which is no less frequent in laws than in facts. And here that common saying takes place, 'that the reason ceasing the law itself ceases.' So a present made in prospect of marriage may be revoked and demanded back if the marriage does not take effect, especially if it sticks on that side to whom the present was made." "A made a present of a jewel to a lady whom he courted, but, the marriage not taking effect, he brought an action of detinue against her, and she, taking it to be a gift, offered to wage her law, but the court was of the opinion that the property was not changed by this gift, being to a specific intent, and, therefore, would not admit her to do it." 14 Vin. Abr. tit. "Gift," pl. 7.

The case of Young v. Burrell, Cary, 77, is as follows: "The defendant confesseth by her answer the having of a tablet or pomander in gold, demanded by the plaintant; and as to the £20 likewise demanded by the plaintant, by him left with the said defendant as a token at such time as he was a suitor for marriage to the defendant, she confesseth the same was left with her against her will, and she delivered the same over unto one Sydole, her brother, who a dealer with her on the plaintant's behalf, to the end he should deliver the same over to the plaintant. It is ordered that the tablet be forthwith delivered by the defendant to the plaintant, which was done presently in court, and as to the £20, the plaintant shall call in the said Sydole by process."

In Robinson v. Cummings, 2 Atk., 409, Lord Chancellor Hardwicke laid down the rule "that if a person has made his addresses to a lady for some time upon a view of marriage, and upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him; but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favor, I look upon such person only in the light of an adventurer." See also 1 Com. Dig., 313.

The case of Griggs v. Austin, 3 Pick., 20, bears upon the same rule of law. There freight had been paid in advance upon an agreement for the carriage of goods from Boston to Liverpool, and the goods were not delivered in consequence of the vessel being stranded. The court said: "It is certainly a clear principle of the common law that when money is paid or a promise made by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded upon such consideration may be avoided between the parties to the contract. This general principle is the foundation of perhaps the largest class of cases which have been sustained under the action for money had and received."

The $275 stands differently from the $55 in this respect, that it was literally applied to the purpose for which it was given; yet it stands precisely like the $55 in that it was to be applied by the defendant toward the consummation of the marriage engagement. She received both sums for a specific purpose, and when she broke the engagement the law raised a promise on her part to refund them. The plaintiff did not give them to her "as an adventurer" to help him win her favor, but in consideration of the engagement, and to enable her to perform it. When she broke it he was entitled

to have his money refunded. We hold that the gifts were not absolute, but conditional, and that when the condition failed, a right of action accrued to the plaintiff to recover the money. That it may be recovered *in assumpsit* for money had and received is well established in Wiseman v. Lyman, 7 Mass., 288; Calais v. Whidden, 64 Me., 249, and Bates v. Quinn., 56 Vt., 49. This action lies whenever one person has money in his hands which *ex æquo et bono* belongs to another Barnett v. Warren, 82 Ala., 557; 2 South Rep., 457. The amendment brought no new party and no new cause of action into the suit, and was, therefore, properly allowed. Myers v. Lyon, 51 Vt., 272.

The judgment is reversed, and judgment for the plaintiff for both sums, and interest from November 30, 1878.

KENTUCKY COURT OF APPEALS.

HAYNES V. WILEY & CASSELL'S ASS'EE.

(*Filed Jan.* 20, 1887—*Not to be reported.*)

Attachments—Evidence—On the trial of an attachment obtained under subsection 2, section 194, Civil Code of Practice, the court will not presume that the price that would be realized from the sale of property under execution would be less than if sold at private sale, as the views of witnesses must, in either event, satisfy the court that the marketable value of the property of the debtor is not sufficient to pay the debt. Under this section the integrity of the debtor is not involved, and the court will only inquire as to the value of the debtor's property, and if there is much doubt as to the value of same, it will reluctantly permit the debtor to seize the property.

Breckinridge & Shelby for appellant.

Hunt & Darnall for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The appellants were creditors of the firm of Wiley & Cassell, and as such held the firm note for $1,911. Under the belief that their debtors were not the owners of property sufficient to pay their debts they procured an attachment under section 194, subsection 2, Civil Code.

Cassell, as assignee of the debtors, on the hearing of the case, filed an answer controverting the grounds of the attachment, and, upon the testimony adduced, the court below discharged it.

The burden of proof was on the plaintiff seeking the relief, and on the trial testimony was introduced by the appellants conducing to show that neither the firm property, or that of Cassell or Wiley,

individually, was sufficient, after satisfying the liens upon it, to pay appellants' debt, while, on the other hand, the defendants introduced proof conducing to show that the property of the debtors was sufficient to pay the liens, as well as the appellants' debt, even if sold under execution.

The testimony, in detail, is not before us, but upon this bill of evidence this court must necessarily affirm the judgment, as it is immaterial whether or not the court below adopted the true test as to the nature of the debtor's estate. The marketable value of personal property should depend, at last, upon the views of witnesses, and we see no reason why it might not sell for as high a price under execution as when offered at private sale.

Its fair vendible value would necessarily enter into the estimate placed upon it by witnesses, although forced sales sometimes result in a great sacrifice of the property. The court too, where there was much doubt as to the value, would be reluctant to take that view of the question that would enable the creditor to seize his debtor's estate, for the reason only that his property was not of sufficient value to pay the debt. The integrity of the debtor is not involved, but the poverty, or misfortune, of the debtor is alone the ground for the provisional remedy, and on such a case the facts adduced must establish the right of the creditor to have the property of the debtor seized by the sheriff before the remedy will be enforced. Here was conflicting proof, and the court below having adjudged against the validity of the attachment the judgment will not be disturbed.

The credit was given to the firm. The firm name is alone signed to the note. The court has said the firm property was sufficient to pay the debt, as well as the liens upon it, and, therefore, the attachment was properly discharged.

As to the separation of the legal question from the facts by the court upon rendering the judgment, the attention of counsel is called to the case of Farris v. Bennett, M. S. opinion, delivered in February, 1886.

Judgment affirmed.

DOLL V. REED.

(*Filed June* 19, 1890—*Not to be reported.*)

Principal and surety—A debtor became the purchaser of property sold to enforce satisfaction of mortgage debts against him, and having induced another to become his surety on the sale bonds, and the surety paid off the sale bonds and purchased the lands to indemnify him from loss, the principal can not claim that the property, which has been purchased by the surety to save himself harmless, is held in trust for his benefit, or that he be permitted to redeem the same, the only grounds for such claim being that the surety was to assist him in some litigation with third parties.

E. E. McKay, J. R. M. Polk and A. Kutzleb for appellant.

Simrall & Bodley and F. W. Morancy for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The appellant, Doll, had executed two mortgages on certain lots of ground in or near the city of Louisville, and, failing to meet the debts secured by this lien, his creditors brought an action to fore-

close, and the property mortgaged was sold under a judgment of the Louisville Law and Equity Court, and Doll himself (the original debtor) became the purchaser. The mortgages were executed to Gheens and to Carter Bros. & Co. Doll applied to the appellee, Reed, to become his surety on the purchase money notes, being three in number, and each note calling for $1,870.90, bearing interest. Reed became Doll's security, and when the first note fell due Doll failing, and, in fact, having no means to pay with, applied to Reed to indorse his note in bank to raise the money with which to meet the note. This the appellee, Reed, refused to do, and Doll failing to pay, Reed, the surety, paid off the note, and brought his suit, with an attachment, to secure himself in the liability he had assumed. The grounds of the attachment were, that his judgment would be endangered by delay, &c. In a few days after this action by Reed, Mueller instituted his action and sued out an attachment. Reed, having paid the first purchase money note, also obtained a rule against Doll to pay him the amount. The rule was made absolute, and an attachment against the person granted, but Doll could not be found. When the second bond matured, and rule was awarded against Reed and Doll, and still Doll could not be found, and an attachment having been issued from time to time, Doll was at last arrested and put in jail. He finally surrendered the property in controversy to pay the second note and also the first note, the same to be sold, subject to the lien of the third note.

The property was sold and purchased by Goodloe for Gheens, his client.

There was some misunderstanding about the terms of the sale or the amount to be paid for the property, and this sale was set aside, and Doll says without his consent. It is apparent, from the proof, that Doll knew all about it, and his subsequent conduct, with reference to the resale, shows this fact; and if not, certainly gave him every opportunity to have the error corrected, if any existed, in setting the sale aside. When the property was resold Reed bought that on Breckinridge street and on Preston and Lee streets for $2,400, and assumed to pay the last note. The sale was made, reported and confirmed. The lot on Chestnut street had been sold or purchased by Gleason to satisfy a lien for street improvement, and Reed afterwards acquired Gleason's title by purchase Reed is out of pocket $1,767, amount paid on first bond, and $65, paid on second bond, and which the purchase by him of the property sold failed to pay, as well as some costs. He claims to own the Breckinridge street lot and the Preston and Lee lot, bought by him in the case of Gheens and from Gleason, and these lots he does own, unless an agreement between him and Doll existed, as Doll alleges. He is seeking to secure by the sale of the property upon which the attachment is levied what is still due him by Doll for money paid as Doll's surety. Doll alleges that there was an agreement by which Reed was to aid him in some contemplated litigation with Caldwell & Standiford in regard to some real estate that they, or one of them, had agreed to sell him; that Reed was to pay off these purchase money notes, and give him indulgence greater than the law would allow him for payment, and that he neglected or failed to notice or appear in the litigation after Reed had become bound as his surety in any way, having full confidence that Reed would, in good faith, carry out his agreement.

Reed denies that any such agreement was made, and says that, having involved himself as the surety, he attempted to secure the liability as best he could, and was endeavoring, by all the means

afforded him by the law, to coerce payment from Doll, the real debtor. We have been unable to conjecture what the claim against Caldwell had to do with this case, or Reed's becoming surety; and, in fact, that claim, if any existed, was more imaginary than real, or at least there was nothing in its execution or results, when executed, that would benefit Reed, or cause him to involve himself as Doll's surety. Nor do we perceive that degree of intimacy or friendship between Reed and Doll that would induce Reed to invest his own means for Doll's benefit, giving him such indulgence as would relieve him from debts without any other consideration; that Doll was embarrassed, and his appeals to Reed to aid him in his troubles, with the assurance that Reed would have nothing to pay, caused, no doubt, Reed to sign the bonds, but that he proffered such acts of friendship to one who had no claims upon him whatever, as Doll states, and says was agreed on when the bonds were executed, is a fact inconsistent with the entire controversy from the time the first note became due until the litigation ended. There is testimony conducing to show that Reed, after all his efforts had been made to secure himself, admitted, in effect, that such an agreement as Doll claims was entered into. This occurred in the presence of the attorneys of those adverse to Reed, and when they tendered to him the money to redeem some realty that had been purchased under a judgment in favor of the German Bank, and that was, in fact, redeemed. They say, however, that they tendered or offered to pay Reed all he had advanced, and that the conversation related to the purchase in the Gheen's case, &c. This Reed denies, and while some of the parties are evidently mistaken as to what took place at Reed's farm, it is singular that if this agreement was made, as Doll contends, when Reed signed the bonds, that he should have refused to go on Doll's paper to meet the first note, or that Doll should have called on him if he, Reed, was to advance the money. Besides, Reed was having rules awarded against Doll to bring the mortgage into court, with attachments based on them that enabled the marshal finally to take Doll into his custody, and lodge him in jail. To escape confinement in person for contempt he surrendered the property, saw or knew it must necessarily be sold, and made no effort whatever to compel Reed to comply with his agreement. He was evidently hiding from the collecting officer when Reed, who was amply able to raise this money, had agreed to pay it off and hold the property for him.

The confidence reposed in Reed, if such was the fact, is so unnatural as well as unreasonable, under the circumstances, that no chancellor could well adjudge that any such arrangement had been made.

The entire theory of the appellant indicates an effort to make a defense on an imaginary state of facts.

The property purchased by Reed was bought for more than two-thirds of its value, and while there is conflicting proof on this subject the testimony authorized the chancellar to so adjudge. The appellant was insolvent. Reed had become his surety, and as such had been left to fight his way out in the best manner possible. This he seems to have done, and his debtor, who placed Reed between himself and the chancellor, when this debt had to be paid, ought not to be heard to complain. The attachment, or the grounds of it are, as were stated in the pleadings of Reed, and then sworn to as the law requires, and, we think, were sustained by the testimony.

The judgment below is affirmed.

HARE, &C. V. ANDERSON, &C.

(Filed June 21, 1890—Not to be reported.)

1. *Conveyance—Redocketing case—Jurisdiction—Pleadings*—In 1860 K. brought suit in the Wolfe Circuit Court for the enforcement of his vendor's lien on land situated in Wolfe and Powell counties. In 1867 T. and B., by purchase of various interests, became owners of 40-48 of the land, and in 1868 B., by consent of T., conveyed 20-48 to J. H. Trimble, and Trimble, at the same time, gave his obligation to reconvey to B. 10-48 of the land, upon payment of certain money. Shortly thereafter Trimble made a deed of assignment for the benefit of his creditors, but by a compromise his property was restored to him.

In 1870 Trimble sold and executed title bond for 5-48 of the land to Turley, who, in 1875, transferred and assigned the bond to appellant, Fisher. Prior to 1874 Trimble was bound as surety upon the bond of a sheriff of Montgomery county, who defaulted, owing the county a large sum, and in order to indemnify his co-sureties, H. and M. Trimble executed to them a mortgage on his land, including the 5-48 of the land in Wolfe and Powell counties, remaining after the sale of 5-48 to Turley, to indemnify them in the payment of the balance on sheriff's bond, which was a note for $2,400, which H. and M. afterwards paid.

In 1873 Trimble, by the directions of B., conveyed the 10-48, held for the benefit of B., to A., who afterwards attempted to convey 20-48 to E.

In 1875 the action of K., in the Wolfe Circuit Court, was redocketed, without notice to the parties in interest, and conveyances of this land were ordered to be made to various parties who, by subsequent conveyances, attempted to vest the title to the land in appellees.

In 1881 Fisher and Hare and Marks instituted in the Powell Circuit Court their two separate actions, asking that their respective titles to the land be quieted, to which actions some of the persons claiming title to the land under conveyances executed after the action of K. in the Wolfe Circuit Court was redocketed, were made parties defendant.

A general demurrer was filed, both to the jurisdiction of the court and for want of a statement of a cause of action. A special demurrer for defect of parties was filed, but no action was taken by the court on the demurrers.

Both actions were dismissed by the court. *Held*—That as to the special demurrer the non-action of the court will be regarded as a waiver, but the question of jurisdiction can be made in this court, though not passed on in the lower court, and as the land lay partly in Powell and partly in Wolfe county, the jurisdiction was in either county, and that the order redocketing the case in the Wolfe Circuit Court nine years after its dismissal, without notice to the parties in interest, and under circumstances indicating fraud, was absolutely void, and no title conveyed thereunder was valid; therefore, Fisher has an equitable title to 5-48 of the land, and H. and M. are entitled to an enforcement of their lien upon 5-48 of the land under their mortgage lien, after proper parties are made to the actions, and it appearing that Trimble, after having become a bankrupt, attempted to convey title to some of the appellees, such conveyances were absolutely void, as whatever title he may have then had vested in his assignee.

2. *Parties to actions*—An objection, made for the first time in the Court of Appeals, that an action instituted in the name of a plaintiff was unauthorized, comes too late, no motion for a rule to show cause by what authority the action was prosecuted, having been made in the lower court.

Wm. H. Holt and Wood & Day for appellants.

H. C. Lilly and J. B. White for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Lewis.

About 1852 Kincaid, being the owner, sold and conveyed a large tract of land, situated in the counties of Wolfe and Powell, to Moses Spencer, who, being unable to pay for it, a new contract was made by which the land was sold to Moses Spencer, W. T. Spencer and Wm. Congleton, Kincaid giving to them a title bond dated in 1853.

About 1860 Kincaid brought suit in the Wolfe Circuit Court to enforce his lien for the purchase price, which was, after his death, revived in the name of Edward Kincaid, administrator, and the heirs at law, and in 1866 judgment was rendered for a sale of the land, and at the sale P. C. Bedford and Thomas Turner became the purchasers, at $450. But at the fall term of the court, to prevent opposition to confirmation of the sale, they made a written agreement with Kincaid's administrator, and through him for all the heirs, and with Moses Spencer, W. T. Spencer and Congleton, by which no opposition was to be made to the confirmation of the sale. Turner and Bedford were to pay $800 for an undivided half of the land; two-thirds of the other half was to be the property of W. T. Spencer, and the remaining one-third of that half to be the property of Congleton, and all the other parties executed to Turner and Bedford bond for title. And thereupon an order was made dismissing the action.

In 1867 Turner and Bedford purchased the interest of W. T. Spencer, and thus were owners of 40-48 of the land, and A. C. Tenney became owner of Congleton's interest, 8-48.

In 1868 Bedford, with consent of Turner, conveyed by deed, recorded in the proper office, his entire interest, being 20-48, to J. H. Trimble, who, however, at the same time, gave his obligation to reconvey one-half thereof, or 10-48, to Bedford upon payment of certain money.

Shortly thereafter Trimble made a deed of assignment for benefit of his creditors, but, by a compromise between his trustee and creditors, his property was restored to him.

In February, 1870, Trimble sold and executed title bond for 5-48 of the land to James Turley, who, in July, 1875, transferred and assigned the bond to appellant, Permelia Fisher.

It appears that prior to 1874 C. G. Ragan was sheriff of Montgomery county, and by an arrangement Josiah Anderson and J. H. Trimble were to furnish the bond and attend to the duties of the office as his deputies. But in 1874 Ragan defaulted to the amount of $29,000 to the county, for which judgment was rendered against them and their sureties. Of that amount Anderson, and the sureties he had procured to go on the bond, agreed to and did pay $9,000, and Trimble and his sureties agreed to pay $20,000, and did pay all of it, except $2,400, for which the county held a note, taken after the judgment was rendered, and that sum having been paid by appellants, Hare and Marks, the note therefor was transferred to them by the county. At the time that note was given to secure payment of Trimble's part of the judgment, which was in 1874, he executed to his sureties a mortgage on his property, including the 5-48 of the land in Wolfe and Powell counties, left after his sale to Turley, but except that all the mortgaged property had been sold before the note for $2,400 was paid by Hare and Marks. And they, therefore, claimed benefit of the mortgage lien on the 5-48 held by the other sureties, about which there does not appear to be, or to have been, any dispute on part of either the county or other sureties.

It appears that in 1873 there was an arrangement by which Josiah Anderson, J. J. Anderson and J. W. Clay became owners of the 10-48 of the land, which Trimble had agreed, in 1868, to reconvey to P. C. Bedford, and by their written directions he conveyed it to T. C. Anderson, a son of J. J. Anderson, who afterwards conveyed, or attempted to convey, the entire 20-48, originally owned by P. C. Bedford, to one English, his brother-in-law.

In May, 1875, the Andersons and Bedford, by their attorney, Corneilison, caused the action of Kincaid v. Spencer, which had been dismissed in 1866, to be reinstated on the docket of the Wolfe Circuit Court, and a commissioner of court to be appointed, who made a deed for the entire tract, as follows: To Turner for 20-48 thereof; to Wm. Mitchell and B. F. Chenault for 20-48, and to Tenney for 8-48.

Subsequently Mitchell, by quit-claim deed, conveyed his interest to Chenault, and the latter, by quit-claim deed, conveyed three-fourths of 20-48 to M. L. Anderson. And February 4, 1881, Chenault and M. L. Anderson, in consideration of three lots in Paris, conveyed to appellee, J. M. Thomas, the 20-48 interest undivided in the land.

The appellants, Permelia Fisher, and Hare and Marks, in May, 1881, instituted separate actions in the Powell Circuit Court, which were subsequently consolidated, to each of which J. H. Trimble, P. C. Bedford, Josiah Anderson, M. L. Anderson, B. F. Chenault, Wm. Mitchell, J. M. Thomas were made defendants.

The plaintiffs in the two actions, respectively, pray that any of the defendants setting up claim to 5-48 of said land be adjudged to release such claim, and that they be quieted in each of their titles to 5-48 of the land, and that such special and general orders as their cases demand be made, and general and special relief be granted.

And the plaintiffs, Hare and Marks, say, in their petition, the parties to the mortgage mentioned are numerous, many of them dead and insolvent, and, therefore, ask permission to prosecute the action without making them parties.

By the judgment appealed from both actions were dismissed absolutely.

Before proceeding to the merits of the case it is proper to dispose of some preliminary questions.

A general demurrer was filed both to the jurisdiction of the court and for want of a statement of a cause of action. And a special demurrer for defect of parties was also filed. But the demurrers were not, after being filed, called up by the defendants nor acted on by the court, the effect of which non-action is as respects the special demurrer equivalent to a waiver.

But the question of jurisdiction can be made in this court, though not passed on in the lower court.

The large tract of land, undivided interests in which are the subjects of controversy, lies partly in Wolfe and partly in Powell county, and, consequently, the circuit court of the latter, where the action was brought, as well as the former, has jurisdiction, unless the judgment rendered in the Wolfe Circuit Court for conveyance of the land in 1876 gives it exclusive cognizance of the question involving validity of that judgment. But we think, as the question is whether that judgment is absolutely void, and not whether it is merely erroneous, there is no reason why the Powell Circuit Court may not exercise jurisdiction.

It is also attempted to be shown by testimony, and counsel argue, that Permelia Fisher did not authorize the action in her name to be

brought, but was instituted upon motion alone of one Turley, who states he is her trustee, and, therefore, it ought to be dismissed. No rule was asked for against the attorney to show cause by what authority he prosecuted the action, and, consequently, it is not the province of the court to make inquiry on the subject.

The deed from P. C. Bedford to J. H. Trimble conveys 20-48 of the land in terms about which there can be no mistake. Bedford, as well as the Andersons, in writing recognized the right of Trimble to 10-48, and, by their written direction a deed was made by Trimble to T. C. Anderson for the other 10-48. Trimble paid taxes on, and claimed, 10-48, and the first attempt to deprive him of it was when T. C. Anderson, who had no pretense of claim to more than 10-48, attempted to pass title to his brother-in-law, English, in ——, for 20-48.

At the time Bedford made the deed to Trimble, in 1868, they were both solvent, and no attempt was ever made by Bedford, or any other person, to recover from him, or call in question by suit, his title to 10-48 of the land.

Moreover, Trimble sold and gave a bond for title for the 5-48 interest to Turley, under whom appellant, Fisher, claims as early as 1870. And, although some attempt is made to show the transaction was *not bona fide*, we perceive no motive, other than a good one, actuating the parties, for at that time Trimble was solvent, and no creditor of his has complained, nor has the defendants a right to call in question the transfer before showing want of title in Trimble.

The claim of Marks and Hare arises from payment of debt due by Trimble, for which J. Anderson was also bound, and to secure which a mortgage was given that Anderson, Clay and Bedford had notice of, and in which Trimble mortgaged the identical 10-48 now in dispute.

A question is made, and a good deal of testimony was taken, as to whether Thomas had actual notice of the title of appellants claiming through Trimble.

We do not think it necessary to bring home to him actual notice. The judgment procured by Anderson and others in 1875, redocketing the case of Kincaid v. Stephens; having commissioner appointed, and deed made by him to Chenault and Mitchell, was, in our opinion, absolutely void, because the action had been dismissed nine years before, and the Wolfe Circuit Court had no power to reinstate or make any orders in it, without notice to, and consent of, all parties interested in the land. Besides, we think the circumstances under which the case was reinstated, and the orders were made, make it clear it was done in a fraudulent manner, and for a fraudulent purpose.

At that time the title of 10-48 was in English, vendee of T. C. Anderson, to whom Trimble had conveyed it, yet the entire 20-48 was conveyed to Mitchell and Chenault, a son-in-law of Josiah Anderson. Though very soon Mitchell transferred his claim to Chenault, who conveyed part of it to Mrs. Anderson, wife of Josiah Anderson, and they afterwards sold to Thomas. English also made a deed to him.

It seems to us, even if, under the circumstances, Thomas was entitled to notice, there was enough to have put a prudent man on inquiry that would have resulted in showing that the commissioner's deed to Mitchell and Chenault was void, and also that P. C. Bedford had by deed, recorded in the proper office, conveyed his entire interest of 20-48 to Trimble, while the latter had re conveyed to T. C.

Anderson only 10-48, and that Chenault and Mrs. Anderson had title to no more than 10-48, if anything.

It seems that Thomas has since his purchase procured a conveyance from Moses Spencer. But the action of Kincaid v. Spencer shows that Moses Spencer had been divested of title in 1866 by the commissioner's sale, which was confirmed.

It seems to us appellant, Fisher, has an equitable title to 5-48 of the land, which is superior to, and should prevail against, the title of Thomas to that extent. And that appellants, Hare and Marks, being entitled, by substitution, to the benefit of the mortgage lien mentioned, have a right to enforce it upon the other 5-48 of the land for satisfaction of the note for $2,400, paid off by them to Montgomery county.

It appears they each claim under a deed executed to them, respectively, by Trimble in 1881. We think, as contended by appellees' counsel, neither deed is valid and effectual to enable them to recover the land, because Trimble, having been, in 1878, adjudged a bankrupt, whatever title or interest he may have had passed to his assignee.

But before he was adjudged a bankrupt he had sold and transferred 5-48 of the land to Turley, the vendor of appellant, Fisher, whose title was not divested or affected by his conveyance to the assignee. And the mortgage lien, the benefit of which appellants, Hare and Marks, have, was likewise created before Trimble was adjudged a bankrupt, and there is nothing to prevent the enforcement of it on the other 5-48 that once belonged to Trimble.

We are of the opinion appellants have shown themselves entitled to equitable relief in each case. Fisher, by having her title adjudged superior to Thomas', and having the legal title conveyed to her when proper parties are made, and Hare and Marks, by having their alleged lien enforced. And the lower court, therefore, erred in dismissing the two actions.

Consequently, the judgment is reversed and cause remanded, that the petitions in each case may be amended in respect to necessary parties, and for further proceedings consistent with this opinion.

Judge Holt not sitting.

WILLIAMS, &C. V. MURRELL'S ADM'R.

(*Filed June* 14, 1890—*Not to be reported.*)

1. *Attorney's fee Questions of fact*—In an action by administrators against attorneys to recover moneys collected by them, to which the defense is offered that the employment was not by the administrators, but by an heir of the estate, and that the amount held by them belonged to them as fees for services rendered. The question as to whom the employment was by having been decided by a jury on special findings against the defendants, and that verdict being set aside, and the finding of the facts by the court had to the same effect, this court will not disturb such finding; but the lower court, having erroneously charged the attorneys with about $700, the amount of an outstanding judgment, which is not in issue in this case, and nothing showing that the attorneys have collected the same, the judgment should be corrected to this extent.

W. P. D. Bush, G. W. Jolly and R. A. Miller for appellants.

Weir, Weir & Walker, C. U. McElroy and J. B. Grider for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The record in this case is so voluminous, by reason of extended pleadings and a mass of record evidence that has no relevancy to a plain issue, that the mind becomes confused in its consideration, and at the same time hours of unnecessary reading is required.

The action was at law by the administrators of Sallie D. Miner against Williams & Brown to recover of them $221.30 cost; that as their attorneys they had collected for the administrators, and the further sum of $2,600, moneys collected by them as their attorneys on a claim placed in their hands against one Stirman; that as their attorneys they collected this money, and on demand made, &c., refused to pay it over. Another count, to the effect that the claim against Stirman was for $3,217, and the attorneys, after judgment and without any authority from them, had compromised the claim by receiving the $2,600 in full satisfaction of the judgment. They seek to make them liable for the difference.

This is the claim of the plaintiffs. The defendants (now appellants) deny that they collected this cost for the plaintiff, or that they were employed by them as attorneys to prosecute the claim against Stirman, but that one Brown, who was the heir and only child of the intestate, Mrs. Murrell, employed them, and in the course of the employment it was necessary to have administration on Mrs. Murrell's estate, and these plaintiffs merely administered that their names might be used for the benefit of the heir-at-law, Brown; that they had settled with Brown or made a contract, fixing their fees, in which the plaintiffs had no interest; nor have they any interest in the sums recovered. The sole question was, whether the administrators had employed these attorneys or Brown; and if employed by the plaintiffs as administrators, what their services were worth, as no contract had been made in reference to the fees.

The pleadings in the issues cover sixty or seventy pages, and contain the history of much important litigation in the Henderson Circuit Court for many years past, the records of which are also filed as a part of the present case. The case was transferred to equity over the objections of the plaintiff, with the reservation that the questions of fact should be submitted to the jury. Upon special findings it appears that the jury ascertained that the attorneys had been employed by the administrators of Mrs. Murrell. The jury also fixed the fees of counsel entirely at variance with the testimony, and their verdict was set aside.

On the next trial the court assumed, over the objections of the plaintiffs, to determine the questions of fact, and finding, as the jury did, against the defendants on the issues of fact, they have appealed. The important inquiry in the case was to ascertain whether the defendants were employed by the administrators or by Brown, and as both the jury and the chancellor have determined that they were employed by the administrators, and the testimony authorizing the finding, this court will not disturb it. The proof really conduces to show an employment by both Brown and the administrators, not a joint but a several employment, for the administrators did not agree to pay a sum equal to fifty per cent. of the recovery as the fee. The administrators, therefore, had the right to this money. Its collection was conceded, and the attorneys, the defendants, in settling with Brown fixed the fee at $2,628.50. The fees were in cases involving large sums of money, and in which the estate of Mrs.

Murrell was greatly interested, and really the only question before us is as to the value of the services rendered by the appellants. This question, like the one in regard to the employment, is one of fact, and the court's finding would be sustained but for a credit of an unpaid judgment of $700 against one Scott, as administrator of Dugan. It does not appear that the attorneys have collected this money, or that on a settlement of Dugan's estate that Brown would be entitled to it. The administrator of Dugan may have converted this sum to his own use, or may have wrongfully appropriated it to Brown. Besides, there is no claim in this court for that money; and if the appellees claim the benefit of the settlement with Brown by their attorneys, they can't reject so much as is to their benefit and reject that to their disadvantage. It seems to us the question in this case is: What moneys the appellants have received and failed to pay over that these administrators, appellees, were entitled to.

The judgment charging or crediting the appellants' claim for services by this judgment being erroneous, is reversed, for that reason alone, and remanded that the judgment be corrected to that extent, and no further.

As this case is in equity at the defendant's instance, if they have received the amount of the judgment, it should be charged to them, if a proper case is made out on an amended pleading. This, however, is the only issue to be made.

Cross-appeal affirmed.

CLARK, SHERIFF, &C. V. LOUISVILLE WATER CO.

(*Filed Oct.* 9, 1890.)

Constitutional law—Exemption of water company from taxation—The first section of the charter granted to the Louisville Water Company by the Legislature on April 22, 1882, recites that it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns, and public fire plugs or hydrants of the city of Louisville free of charge. The second section provides that the sinking fund of the city of Louisville, being the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville; therefore, said company is exempted from the payment of taxes of all kinds of whatever character, State, municipal and special. The sheriff of Jefferson county, having in his hands the tax bills for State revenue against said company, and being about to levy upon the property of the company to collect same, a temporary injunction was sued out against said sheriff, which, upon the hearing, was made perpetual, from which judgment this appeal is prosecuted by appellant, contending that so much of said legislative act as exempts the property of the company from State taxation is unconstitutional. *Held*—That the only intent acted on by the Legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the water company. This was not a valid consideration. The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State will not support the exemption, as this privilege was not granted for governmental purposes, but it was granted to the sinking fund, the money-making branch of the municipal government, which discharges no governmental duties, and was created merely to make money for the city. It occupies the attitude of a private corporation merely, and stands upon the same footing as would any individual or body of persons, if like privileges had been conferred upon them, and can not be constitutionally exempted from State taxes, save in consideration of

public services. The city, in its private, and not its governmental, character, owns the stock of the water company, and this ownership is not necessary to the execution of its duties as a political or governmental power. It is evident that the duty enjoined upon the company to furnish water for fire protection free could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny be paid for this service, because it was the owner of the rights and property of the water company, and it would, therefore, be but a payment to itself.

The question as to whether the rendition of a local public service as to furnish the city of Louisville with water free for fire protection is a valid consideration for an exemption from State taxation, is not decided.

Judge Pryor, dissenting, holds that the furnishing of water free for fire protection to the citizens of Louisville is such public service as will uphold the exemption of the company from taxation, as the city of Louisville is a subordinate agent of the State government, and the legislative act has imposed on the company the duty of furnishing water free of charge for the protection of property from fire, and the duty thus imposed is such as would authorize an action against said company by one suffering loss from fire by its failure to perform the duty imposed by the act. Where there is an exemption the court looks to the act to see if there is a public service to perform, and if none, the exemption will be held invalid, and if there is such a consideration, the statute must stand, however impolitic the legislation may be.

Helm & Bruce for appellants.

Wm. Lindsay, L. T. Burnett and Lane & Burnett for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

The real estate and improvements thereon of the appellee, the Louisville Water Company, were assessed for State and county taxes for the year 1887, at the value of $2,215,000. The taxes amount to $11,371.07, and the tax bills thereof being in the hands of the sheriff, and he about to seize and sell thereunder certain property of the appellee in use in its business, it, by this suit, enjoined him from so doing; the principal ground upon which it claims relief being that its property is, by law, exempt from assessment and taxation. This claim is based upon an act of the Legislature of April 22, 1882, and which reads as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, free of charge."

2. "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville; therefore, the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal and special."

Upon the hearing in the lower court the appellee moved to make the temporary injunction, which had been granted, perpetual, while the appellant, inasmuch as the property of the company in use can not be seized and sold, thus depriving the local public of the benefits derived from it, moved that it be compelled, by rule, to pay the taxes into court, or, failing to do so, that its property be placed in a receiver's hand until enough should be realized to pay them. This relief was also asked in the answer, to which a demurrer was sustained.

The motion of the appellant was overruled, and the injunction perpetuated, the court, not only holding that the property of the company could not be seized and sold, but that it was not liable for the taxes.

The constitutionality of the act, *supra*, is involved. It is claimed, for the company, that it has valid rights to the exemption, resting in contract; that by the passage of the act of the Legislature, and its acceptance by the company, a contract was entered into which entitles it to the exemption. As such a privilege is in derogation of the common right; as the exemption of one person from taxation places an additional burden upon the other tax-payers of the State, it will not be presumed, but must appear by clear grant.

It is true, as has often been said, that exemption is the exception, and not the rule. Upon the other hand, however, where the Legislature clearly grants this privilege, or attempts to do so, its action must be presumed to be constitutional.

As the language of the act in this case is plain, it becomes the delicate duty of the court, keeping in mind the presumption in favor of legislative action, to determine whether, in its enactment, the Legislature has gone beyond its constitutional limit.

The first section of the Bill of Rights provides: "That no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

The appellant contends, first, that if it were true the Legislature was moved to the passage of the act, upon the idea of the rendition of a public service, yet that, in fact, the company rendered no such public service as the Constitution contemplates; and, second, that this was not the reason for its enactment, and that it is altogether unsupported by any valid consideration, or such as the Constitution recognizes.

We shall pass by the question, whether the rendition of a local public service, as to furnish the city of Louisville with water, is a valid consideration for an exemption from State taxation, thereby imposing an additional burden upon all the balance of the people of the State; or whether it is the governmental duty of the State to furnish to a city water for fire protection and sanitary purposes, free of charge, either by direct taxation upon all the people of the State, or indirectly by an exemption from taxation in favor of one doing so; and if so, being, therefore, a valid consideration for such an exemption.

This is a question as to which there is a difference of opinion, and in view of the conclusions we have reached as to the second position taken by the appellant, it is unnecessary to consider it.

We think it evident that the furnishing of water by the company to the city for fire protection, free of charge, was not what induced the passage of the act. Its recital, aside from the express statement in it of the reason, makes this quite plain. It says: "The sinking fund of the city of Louisville, being the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville; therefore, the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal and special."

According to the legislative recital, the sinking fund of the city owned the entire stock of the water company. There is nothing in the record showing otherwise, and it must, therefore, be assumed to be true.

While the sinking fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities.

We see, therefore, that the property and rights of the water company belong to the city. While, therefore, the act recites that it shall be the duty of the water company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny be paid for this service, because it was the owner of the rights and property of the water company, and it would, therefore, be but a payment to itself. It can not be supposed, therefore, that the Legislature intended to relinquish over $10,000 of taxes annually in consideration that the city would not charge itself for water furnished by itself.

It is useless to inquire why the act declared that the water company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking fund department and the city proper.

The reason which induced the attempted granting of the exemption must, therefore, have been, as, indeed, the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all of the water company stock. It says: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company and said water company, by virtue thereof, is the property of the city of Louisville; therefore, the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal and special."

We have, therefore, an express recital by the Legislature of its reason for the attempted exemption; and that this was the true and only one is confirmed beyond question by the other recitals of the act.

The question, therefore, is: Did the fact that the sinking fund, or, in other words, the city, owned the water company stock constitute a valid consideration for the exemption? A municipal corporation has a double character. In one it acts strictly in its governmental capacity; in the other, for the profit or convenience of its citizens. Considered in the latter light it occupies the attitude of a private corporation merely; while in the former it is an arm of the State government or a part of its political power. It is an *imperium in imperio*. The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation; but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely.

While the sinking fund of the city of Louisville is a distinct corporation, yet it is owned by the city and merely controls its funds. It discharges no governmental duties, and was created merely to make money for the city. It may invest the funds in stocks of any character, if they are likely to bring good returns, like any other private corporation. It will hardly be contended that if it were to invest surplus money in a private manufacturing company that the Legislature could constitutionally exempt that company from taxation.

In short the city, in its private and not its governmental character, owns the stock of the water company, and this ownership is

not necessary to the execution of its duties as a political or governmental power. This being so, it stands upon the same footing as would any individual or body of persons if like privileges had been conferred upon them, and can not be constitutionally exempted from State taxes save in consideration of public services.

The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State, will not support the exemption. The privilege was not conferred, as the Legislature declared, and as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and pecuniary advantage of the city, and in which the State at large has no interest.

It was said in Bailey v. City of New York, 3 Hill, 539: "But if the grant was for the purpose of private advantage and emoluments, though a public company, *quoad ad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred."

If it be said that the exemption should be upheld, if it be a fact supported by any valid consideration, although the recited one be invalid, we reply that the real consideration and the one which moved the parties to the transaction is to be regarded.

The one acted upon by the Legislature and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the water company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings does not aid the matter.

The so-called contract was, therefore, void at its inception. Instead of being impaired or in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the same privilege. A statute exempting one is certainly open to the objection of impolicy, if, indeed, it be not such unequal and partial legislation as is forbidden by law.

The appellee, by this suit, came into court asking equitable relief by injunction, or the exercise of an extraordinary remedy. Asking equity, it may well be required, first, to do equity; and being in court and liable for the tax, and the chancellor being in possession of the same, while its property in use in its business could not be seized, it should have been required to pay the taxes into court; or, failing to do so within a reasonable time, the amount of it should have been intrusted to a receiver until enough was realized to pay them and the cost of the proceedings. Louisville Water Company v. Hamilton, 81 Ky., 517.

The judgment is reversed and cause remanded, with directions to render a judgment as above indicated.

Judge Pryor delivered the following dissenting opinion:

In determining the constitutionality of the act in question, it is only necessary to consider sections one and two.

Section 1 provides "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns, and public fire plugs or hydrants of the city of Louisville for fire protection free of charge."

SEC. 2. The sinking fund of Louisville being the owner of the stock of the Louisville Water Company and the said water com-

pany, by virtue thereof, is the property of the city of Louisville, therefore, the Louisville Water Company is hereby exempted from the payment of all taxes of all kinds, of whatever character, State, municipal and special."

It is the settled doctrine of the State that no exemption of one's property from taxation is valid where like property of another is taxed unless the exemption proceeds from the consideration of public service. Such legislation in the absence of this consideration, is in violation of the Bill of Rights that prohibits the granting of such a special immunity. Nor can it be maintained that the public service, constituting the consideration, must be for the discharge of a duty for which an appropriation from the State treasury might be made, or that the public service should directly benefit the whole people of the State, for if this be the correct rule, seminaries of learning and all charitable institutions could receive no support in the way of legislative exemption.

It is not necessary, however, to review the cases on this subject, as the opinion of the majority of the court is based on the idea that no consideration exists in this case for the exemption, and I shall, therefore, consider that question alone, being satisfied, after a careful examination of the record, that the exemption is not only valid, but was an act of justice, on the part of the law-making power, to the tax-payer of the city.

It is admitted, or, if not, the fact exists, that the water company received payment for providing water to the public fire cisterns and fire plugs up to the year 1882, and at that date the act was passed making the exemption. The city of Louisville purchased, or was the owner of all, or nearly all, the stock of the water company, and was, at the time the exemption was made, the sole owner of the property with the exception of one or two shares of the stock. It is, therefore, argued because the city owned the entire stock it was immaterial whether it received a penny or thousands of dollars for supplying water, as it was a charge in the first place to the city, and then a payment back to it of the money expended, and, therefore, the supply of water for the public fire cisterns and hydrants could not have constituted the consideration for relieving the company from taxation, and the only motive inducing the Legislature to grant the privilege consisted in the fact that the city owned the water company, as recited in the second section of the act. It is further argued, and so adjudged in the principal opinion, that the city can only be regarded as a stockholder in a private corporation, and not as the owner of this stock in a governmental capacity. The city of Louisville contains nearly two hundred thousand inhabitants, and has, within its corporate limits, public buildings, belonging to the Federal government, with its own court buildings, and other property necessary to the conduct of State affairs. It acquired the stock of the water company from revenues collected from the tax-payers within the city limits, and made expenditures of large sums of money for that purpose, and when invested for both public and private use is now sought to be made liable for taxes by the collecting officer with the legislative exemption remaining in full force. It is not the water company or the sinking fund that is called on to pay these back taxes, amounting to near $75,000, but the tax-payer of the city, represented in name only, by the two corporations. The tax-payer has been already taxed to enable the city to own the stock of the water company, and after being taxed for that purpose, is again taxed for the water he drinks and uses on his premises, receiving no other compensa-

tion than the convenience that becomes a necessity in every densely populated city.

"A plain distinction is manifest between a private company furnishing water to a city and its population at certain specified rates, and the city taxing the property owner in order that he may obtain water for his own use, and then applying the right to the use in part to the protection of the public property located within the city, or if taxed for more than will supply, the additional tax finds its way to the sinking fund for the payment of the debts of the municipality. Nor is the protection afforded the public or the public buildings of the city merely incidental, as the act of April 22, 1882, makes it the duty of this corporation to furnish the water to the public fire cisterns and public fire plugs and hydrants free of charge. If this water company, therefore, owned by the city, should refuse or fail to furnish this water, and a public building is destroyed by fire on account of this neglect, it is evident that the company would be responsible for the loss. A public duty required to be performed for which an action would lie for the failure to discharge it, and still, it is insisted, that the reason prompting the Legislature to make the exemption was because the city of Louisville, in part, owned the stock of the corporation. I have no doubt that such was the inducement, and why? because the tax-payer had assumed heavy burdens to obtain the stock, and the benefit of those burdens having been applied for the protection of both public and private property, it was deemed equitable and proper that the exemption should be made. The city has assumed the discharge of a duty that not only affords incidental protection, but by the express terms of the charter, it is made obligatory on the city to discharge that duty, and in the very next section following the exaction of the duty, is the section making the exemption.

Where there is an exemption, we look to the act to see if there is a public service to perform; and if none, the exemption will be held invalid; and if there is such a consideration, the statute must stand, however impolitic the legislation may be. After the imposition of its duty and its full performance by the city, the collector of taxes, in behalf of the State, levied on the property of the water company for the State taxes—levied his writ on property that the citizens had been taxed to purchase in order to supply an absolute want, that he is again taxed for as the water enters his dwelling; and required to maintain, by taxation under the power of the municipal government, the existence of the water-works, for the purpose of discharging the public duty imposed by the act under consideration. It seems to me neither just nor equitable to treat this question as if it was a private corporation, relieved from taxation without any consideration of public service. The tax-payer is the real party in interest, and receives nothing but the water he uses and drinks in the way of private gain.

The Legislature, viewing the question in this light, granted the exemption, and to make it binding on the State, at least so long as it stands unrepealed, required the performance of a public duty, a compliance with which is not questioned. The Supreme Court, in 115 United States, 691, in the case of the Louisville Gas Company, held that the distribution of gas in densely populated districts was a matter of which the public could assume control, and in supplying it for public and private use, was such a public service as authorized the grant of the exclusive privilege. The same doctrine was recognized by that court in the case of the New Orleans Water-works, reported in the same volume. The municipality of Louis-

ville is but a subordinate agency of the State government, and I see no reason why the State may not impose upon this agent the performance of a public service for the public good. In this case the entire expense of furnishing water is placed upon the tax-payers of the city, and this is proper, because they are the real beneficiaries; but the Legislature, knowing the oppressive burdens that pertain to the administration of municipal government, has attempted to relieve the tax-payers by releasing the State taxes upon a consideration resulting in the public good, and for a failure to comply with, or to continue the performance of, the duty, if loss should occur, a legal liability would at once arise to discharge, which a resort to the tax-payer must be again had.

There is no constitutional inhibition to such legislation, and to assign another motive on the part of the Legislature for the exemption, than the consideration expressly stated in the act, is no argument against its validity, or a sufficient reason for declaring the act unconstitutional and void.

I am, therefore, unwilling to impose on the tax-payer the sum of $75,000 for back taxes (and this is the effect of the decision) in the face of a legislative exemption standing unrepealed, based upon the consideration of public service.

KENTUCKY SUPERIOR COURT.

KENTUCKY MIDLAND RAILWAY CO. V. STUMP.

(*Filed Sept.* 17, 1890.)

1. *Trespass—Punitive damages—Excessive verdict*—It is the duty of a railroad company to point out to its employes the land upon which they may rightfully go in the construction of the road, and the lines and limits of the company's right of way. And as the defendant company in this case not only failed to do this, but, after plaintiff's land had been pointed out to its chief engineer, its employes, against plaintiff's protest, tore down his fence, and took possession of a part of his premises, the plaintiff was entitled to recover punitive damages for the trespass. And while the actual damage to plaintiff's property was very little, a verdict for four hundred and sixty-five ($465) dollars was not, under the circumstances, excessive.

2. *Same—Evidence in mitigation*—The fact that the president of the company, as soon as he learned the facts, ordered the removal of the trestles which had been erected by defendant's employes on plaintiff's land, in no way excused the action of the company in committing the trespass, and can not be considered in mitigation of damages.

3. *Instruction to jury as to incompetent evidence*—Defendant can not complain of the refusal of the court to instruct the jury not to consider evidence, which was brought out by defendant's counsel, and received without objection from them. And the court will not infer that this evidence, which had reference to the damage suffered by plaintiff from the operation of the road, was considered by the jury, when the evidence introduced as to the trespass complained of authorized the verdict.

J. E. Cantrill, Wm. Lindsay and D. W. Lindsey for appellant.

Owens & Finnell for appellee.

Appeal from Scott Court of Common Pleas.

Opinion of the court by Judge Yost.

Stump, the appellee, was the owner of a house and lot in Georgetown, which adjoins the right of way of the appellant, railway company.

In this action he complains that the appellants unlawfully and forcibly tore down his fencing for about forty-five feet; entered upon his lot; dug holes therein, and erected on it trestles for the use of appellant, railway company.

Appellants, admitting the trespass, plead that it was committed by mistake.

The facts were, that appellee, about the middle of March, 1889, saw two or three men "lighting around his premises," as he put it, and notified them that the property was his, and they must not enter it. That he then saw Douglass, appellant's railway engineer, and notified him that the lot was his, and warned him to keep his men from encroaching upon it, but that after such notice and warning, and still against his consent, appellant's agents and employes committed the trespass complained of, and that the trestles remained on his lot until about the 4th of April following, when they were removed and the holes filled up.

On cross-examination appellee made the following statement: "The actual damages done to my property was very little. The fence was taken down and three holes were dug in the ground; the railroad is not now on my land, but runs close to my house. I am damaged by the road running there, and by liabilities to fire and smoke from the running of trains."

This evidence was brought out by appellant's counsel, and received without objection.

One Lair, who owned property adjoining appellee's on the north, west and south sides of it, and who had arranged with appellant, railway company. for the right of way over it, testified that he went over the line of said appellant's right of way with its chief engineer, Douglass, and pointed out to him his (Lair's) lines, and told him that appellee, Stump, owned the lot where the trespass complained of was afterwards committed.

Gov. Cantrill testified for appellant that he was employed by appellant, railway company, to secure rights of way, and that as soon as he heard that the trestle was built upon appellee's lot, and that he was threatening to bring suit, he had it removed.

Upon this issue and proof the jury returned a verdict for appellee for $465 in damages.

Appellants moved the court for a new trial, and assigned as grounds that the verdict of the jury and the judgment of the court gave excessive damages, appearing to have been given under the influence of passion or prejudice. That the court erred in refusing to give the instruction offered by appellants, and had misinstructed the jury.

This motion was overruled, and from this judgment this appeal is taken. We will first consider the question as to whether the judgment should have been for the actual damages sustained by the appellee only, or whether the circumstances connected with the commission of the trespass were of such a character as to entitle ap-

pellee to punitive damages, and, if so, were damages assessed by the jury excessive?

It is well settled that one is entitled to exemplary or punitive damages, not for redress or compensation, but by way of punishment, and as a preventive of wrong-doing when there has been a tortious invasion of his rights. The courts have repeatedly held that a party may make himself liable for exemplary damages in the commission of a rightful act, if such act be done in a manner to indicate a disregard of the rights of another. If this be true in the performance of a rightful act, how much more is it true when the offender invades the property of another, without right and without law, and injures it.

In this case it was clearly the duty of appellant to designate and point out to its employes the land upon which they could rightfully go in the construction of the road, and the lines and limits of appellant's, railway company's, right of way. They not only seem to have failed to do this, but after appellee's land has been pointed out to Douglass, appellant's, railway company's, chief engineer, their employes, against appellee's protest, tore down his fence and took possession of a part of his premises.

From all of the circumstances connected with the case we can not concede that the trespass was committed by mistake, especially in face of the fact that appellee notified appellant's agents not to encroach upon his premises, and in face of the significant fact that not one of their agents appears to justify their actions. While the action of appellant's, construction company's, president, in ordering the trestles removed, as soon as he learned of the facts, is creditable to him, it in no way excused the action of appellant in committing the trespass, nor should it have been considered in mitigation of damages.

The damages awarded appellee by the jury were not excessive.

We see no error in the instructions given to the jury by the court below.

Appellants complain that the court erred, to their prejudice, in refusing to give the following instruction: "The jury are instructed to find for plaintiff, as actual damages, such a sum as will actually compensate plaintiff for the defendant entering upon plaintiff's land, breaking down his fence, digging holes for trestles and erecting trestles thereon, between the 16th day of March, 1889, and the 4th day of April, 1889; but in no event are the jury, in estimating the damages done, to consider, for any purpose in this case, any damage that plaintiff might sustain by defendant operating train on their railway located over the lands of adjacent property owners."

This instruction asked the court to instruct the jury not to consider evidence which the record shows was brought out by appellant's counsel, and received without objection from them.

We are not prepared to say that the court erred in refusing to give it, when we consider the fact that the jury, in the instruction given, were *limited in their finding to the damages complained of.*

This court will not infer that this jury did consider this evidence, when, in fact, the evidence introduced on the trespass complained of authorized the verdict.

Judgment affirmed.

FARMER, &C. V. SLACK, &C.

(*Filed Sept.* 17, 1890.)

1. *A judgment against a married woman*, and another being void as to the married woman, her co-defendant had no right to give up to the officer, to be sold in satisfaction of the judgment, personal property owned by the defendants jointly, and the fact that he did so, and that the property was sold, does not preclude his co-defendant from setting up her claim to the property.

2. *Sale of property owned jointly by execution defendant and another*—When an officer levies an execution upon personal property held by the execution debtor jointly with another, he has no right to deprive such person of the possession of the property without his consent in writing, except for the purpose of having it appraised; and after it has been appraised he has no right to sell it, but must proceed as provided by section 660 of the Civil Code.

S. H. Bush for appellants.

H. T. Wilson for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Yost.

The judgment, and all proceedings under it, against appellant, Bersheba Farmer, a married woman, under the authority of which the mare was sold, are void as against her.

Accepting this hypothesis as true, it is unnecessary to notice in this opinion the question of exemptions, which arose on the trial in the court below.

Appellee, Slack, recovered a personal judgment in the Hardin Quarterly Court against the appellants, Bersheba Farmer, her husband, Thomas Farmer, and James McCartney; sued out an execution of *fieri facius* thereon, which was placed in the hands of appellee, Reid, a constable, who levied it upon a mare, which the proof in this action tends to show belonged jointly to Bersheba Farmer and James McCartney, and sold her at public outcry, when appellee, Slack, the plaintiff in the execution, became the purchaser.

Appellants then instituted this action against appellees, Slack and Reid, to recover the possession of the mare. Appellees relied upon judgment and sale as a defense, and alleged that appellant, McCartney, was the sole owner of the horse, and that he had given her up to the constable to be sold.

The evidence of appellants, Thomas Farmer and James McCartney, show that Farmer, his wife and James McCartney, her father, lived together as one family, and that McCartney and his daughter, Mrs. Farmer, were the joint owners of the land upon which they lived, and all of the personal property on the premises, and that they, McCartney and Mrs. Farmer, had bought the mare in controversy about two years before the institution of the action, and paid for her with money belonging to them jointly.

This evidence was controverted by the statement of appellee, Reid, who said that McCartney claimed the horse.

The evidence upon the point as to whether or not McCartney had given up the horse to be sold is conflicting, Reid testifying that he had so done, while McCartney said that after Reid had levied on the mare he left her in his possession, and notified him of the day of sale, and that on that day, acting under the instruction of Reid,

he brought her to town, and that this, which was all the surrender he had ever made, was done under protest.

The jury found for the defendants, and from that judgment this appeal is prosecuted.

The first complaint is that the court erred in giving certain instructions to the jury. We see no error in instructions numbered 1, 2, 3 and 4, respectively. The fifth instruction is as follows:

"If the mare was given up by McCartney to the constable to be sold, the defendant is not liable, whether McCartney was, at the time, a housekeeper or not."

6. "If the mare was jointly owned by McCartney and Mrs. Farmer, and was given up to the constable by McCartney to pay a joint debt of McCartney and Mrs. Farmer, the jury should find for the defendant."

The latter part of this instruction, beginning with the words "or if the mare was jointly owned," is erroneous.

The judgment and execution against appellant, Bersheba Farmer, being void, so far as she was concerned, McCartney had no right to give up her interest in the mare to be sold to pay his debt, and if he did so give her up, Mrs. Farmer is not thereby precluded from setting up her claim.

Section 660 of the Civil Code provides that, if an officer levy an execution upon personal property held by the execution debtor jointly with another person, the officer shall not deprive such person of the possession of the property without his consent in writing, except for the purpose of having it appraised; and that, after it has been so appraised, he shall return the execution with the appraisement to the office from whence it issued, stating in his return the facts connected with the levy and the claim of the joint owner.

Appellee, Reid, the constable, failed to comply with any of the provisions of this enactment. He did deprive Mrs. Farmer, the joint owner of the mare, of the possession of her, without her consent in writing, and instead of having the mare appraised and returning his execution, he sold her.

The jury, therefore, ought not to have been instructed to find for the defendant, if they believed McCartney gave the mare up for sale, if she was jointly owned by McCartney and Mrs. Farmer.

The second complaint is that the court erred in refusing to give the following instruction:

"If the mare was owned by McCartney and Mrs. Farmer jointly, the jury should find for Mrs. Farmer, although they may believe that McCartney gave her up to the constable, under the execution, to be sold."

This instruction ought to have been given, for the reasons already assigned.

We will not notice the complaint that the verdict of the jury was not sustained by the evidence, but for the errors recited the judgment must be reversed.

Judgment reversed and cause remanded, with instructions to grant appellants a new trial, and for further proceedings.

LANDRUM V. COURTNEY.

(*Filed Sept.* 24, 1890.)

1. *Introduction of testimony*—The court having, in its discretion, allowed the defendant to recall one of plaintiff's witnesses for further cross-examination, his testimony, upon the recall, should be regarded in the same light as if it had been drawn out when he was first on the stand, and can not be considered as testimony in chief for the defendant. Therefore, the defendant was not thereby precluded from afterward testifying for himself in chief.

2. *Reversible errors*—There can be no reversal for error in instructions, unless made ground for new trial.

C. H. Harrison and D. S. Clay for appellant.

Geo. C. Drane for appellee.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Presiding Judge Barbour.

After the plaintiff had announced himself as through with his evidence, the defendant's counsel requested the recall of James West, who had testified for the plaintiff, stating that he had omitted to ask him a question. The witness was, without objection, recalled, and was asked and allowed to answer two questions, which related to statements made by him when first testifying. That these questions and answers were proper, as a part of the cross-examination, does not admit of question. The defendant was then placed upon the stand and offered to testify. The plaintiff objected, and the court sustained the objection, upon the ground, as recited in the bill of exceptions, that he had recalled plaintiff's witness before he (the defendant) had testified.

This ruling, counsel for the appellee argues, is sustained by the provisions of subsection 4, section 606 of the Civil Code, which is: "No person shall testify for himself in chief, in an ordinary action, after introducing other testimony for himself in chief." * * *

It seems to us plain that this provision has no application to the facts of this case. They are neither within the letter or spirit of the provision. As we have said, the defendant had introduced no testimony in chief before offering to testify. He had simply asked the privilege—a matter addressed to the discretion of the court—of recalling a witness for further cross-examination, and his testimony upon the recall should be regarded in the same light as if it had been drawn out when he was first upon the stand. The court should, upon this ground, have granted the appellant a new trial.

The giving of instructions was not made a ground for new trial, and we, therefore, could not, for the purpose of reversing the judgment, consider them.

But as the case must go back for a new trial it is proper for us to say that, under the issue as made by the pleadings, the first instruction was faulty in assuming that the plaintiff was, under the contract, required to furnish the tobacco sticks.

For the error in refusing to allow the defendant to testify, the judgment is reversed, and the cause remanded for further proceedings.

FINCH, &C. V. SHACKLEFORD.

(*Filed Feb* 17, 1886.)

1. *Landlord and tenant—Transfer of tenant's obligation*—Where one who purchases property, upon which there is an existing lease, has the obligation of the tenant transferred to him, he has the right, after the termination of the lease, to prosecute a suit in his own name to recover the damages resulting from the negligence of the tenant during the existence of the lease.

2. *Negligence of tenant*—If property has been leased, to be used as a warehouse for storing grain, the tenant has a right to use it for that purpose in a prudent manner. In devoting it to this use he is not liable for any damage resulting, unless occasioned by his negligence. In this case it being claimed that the injury complained of was caused by the tenant placing grain in the second story of the rented warehouse, it is held that if he placed more grain in the second story than a person of ordinary care would have done, he was guilty of negligence; but the landlord's case is not made out until he alleges and proves that such negligence caused the injury.

3. *Commissive waste*—As the tenant was using the building for a purpose contemplated by his contract the landlord can not recover, upon the idea that he was guilty of commissive waste, a necessary element of which is wilfulness.

4. *Burden of proof*—It was error in instructing the jury to place the burden upon the tenant by requiring him to show that he was acting with ordinary care, and also error to instruct that he was to be excused only in the event the jury should find that he used ordinary care in *storing* the grain. The question was as to whether the injury was caused by the tenant placing more grain in the second story than persons of ordinary care would have done.

5. *Contradictory instructions*, without any indication as to which is to be preferred, are worse than none.

Wm. Lindsay, E. C. Phister and Campbell & Worthington for appellants.

Cochran & Son for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Richards.

The Grangers' Association, being the owner of a warehouse in the city of Maysville, proposed, in writing, to lease it to the appellants, who, in turn, by letter, accepted the proposition. After this the association sold the property to the appellee, transferring at the same time the obligation of the tenants. While the lease still existed the great flood of February, 1882, occurred. The testimony conduced to show that the building had been rented, and was used for the purpose of storing grain, as had been done by the same parties for several years previous. As the waters were rapidly encroaching upon the building, the tenants removed a large portion of their grain to other warehouses, and placed the remainder upon the second floor of the building they were occupying. After the lower portion of this warehouse had been submerged for several days, a partition wall between that and the adjacent building, which was also stored with grain, gave way, a large portion of the structure falling in ruins, and curtailing much loss to the property of both landlord and tenants. This action was commenced by the former to recover the damages sustained. Having purchased the property, the appellee had the right, after the termination of the lease, to prosecute the suit in her own name; and by assuming this in the

instructions, the court did not err, since the original owner's contract with the tenants was in writing, as was also the transfer to the purchaser. The theory of her case, as developed in the testimony, was that the building had been prostrated by placing the grain in the second story; but if the property had been leased to the defendants to be used as a warehouse for storing grain, they had the right to use it for that purpose in a prudent manner. In devoting it to this use they were not liable for any damage resulting, unless occasioned by their negligence. Therefore, the plaintiff should have alleged the negligent act, which she did not do. She proceeded, upon the idea that the defendants were guilty of commissive waste, a necessary element of which is wilfulness; that is, that the *act* complained of was designed. It is wilful waste to remove buildings, cut timber, plow up meadows, &c. There the tenant intends the result of his act, and has no warrant for it. But here the tenant does not intend the destruction of the building; he is using it for a lawful purpose, within the terms of his contract (if proven), and is only responsible for the damages occasioned by his negligence. If they placed more grain in the second story than a person of ordinary care would have done, they were guilty of negligence, but the landlord's case is not made out until she alleges and proves that such negligence caused the injury.

There was no objection to the petition, the defendants denying its allegations, and averring that the foundations had been injured by fire and by the high water then pending, so that they fell with the adjoining building, in which grain was also stored, and the joists of which rested upon this partition wall; and denying that the injury was due to their fault or neglect. A substantial issue was thus presented.

In its first instruction the court said: "If the jury believe, from the evidence, that the defendants, by storing grain in the second story of the building occupied by them as tenants of the plaintiff, occasioned the injury thereto described in the petition, and that but for such storing of grain by them said injury would not have occurred, they will find for the plaintiff such damages as she has sustained thereby, not exceeding $1,500, the sum claimed in the petition. Unless the jury further believe, from the evidence, that the defendants, in storing said grain in said building, used ordinary care in so doing."

This instruction erroneously assumes that plaintiff is not required to prove the injury was the result of defendants' negligence, and places the burden upon the tenants of showing they were acting with ordinary care. Moreover, it only excuses them in case the jury find they used ordinary care in storing the grain. The jury may have thought they were negligent in the act of *transferring* the grain, but that they *placed* no more in the second story than prudence dictated. The court did not keep in view the fact that the plaintiff's case depended upon her establishing that the injury was caused by the defendants placing *more* grain in the second story than persons of ordinary care should have done.

Nor was this error cured by the subsequent instructions. This court has heretofore declared, in the language of the Court of Appeals, that "contradictory instructions, without any indication which is to be preferred, are worse than no instructions, being rather calculated to distract and perplex the jury than to enlighten their minds upon the law of the case." Eisfeldt v. Kleine, 5 KY. LAW REP., 139.

For the reasons given the judgment is *reversed*, and the cause remanded for further proceedings.

MOORE AND WIFE v. MOORE.

(*Filed September* 4, 1890—*Not to be reported.*)

Homestead—Mortgage—Res adjudicata—Husband and wife executed a conveyance absolute on its face, and the grantee being about to take possession of the land conveyed, they united in a suit and set up a subsequent instrument executed by the grantee, which converted the former conveyance into a mortgage merely, in which suit the land was sold to satisfy the mortgage lien. No reversal of this judgment has been had, but, subsequently, husband and wife instituted an action claiming a homestead in the land sold. *Held*—That the parties should have set up this claim in the former action, the presumption now being that the court decided against the homestead, and the proper remedy was an appeal.

Boles & Duff and Thos. H. Hines for appellants.

W. H. Botts and W. P. D. Bush for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Pryor.

Moore and wife, who are the appellants in this case, executed a conveyance, absolute on its face, to secure the payment of a certain sum of money owing by the husband to his brother, Simpson Moore. After the deed had been executed, or about that time, a writing was given by the mortgagee, to the effect that all the land sold for above the indebtedness should go to the parties of the first part. Simpson Moore, being invested with the title, obtained a writ of possession under a warrant for forcible detainer, and was about having the writ executed when the husband and wife both united in an action, in which they admit the execution of the deed, but say it was intended as a mortgage, as is evidenced by the writing subsequently executed. The court held the conveyance to be a mortgage of both husband and wife, and subjected the land to the payment of the debt.

The appellee purchased the land, and the sale was confirmed. That judgment stands unreversed. They (the husband and wife) now file this petition seeking a homestead, making various questions as to the mode of acknowledging the writing; the certificate of the clerk, and that no act was done by the wife to divest the husband of his homestead. The mode of relinquishing the homestead is pointed out by the statute, and certainly the conveyance by the husband and wife passed the right, as there was no reservation of dower or homestead.

The husband and wife sought in the first action to make that which appeared on its face to be absolute to be only conditional, and further alleging that the deed passed neither dower or homestead. The relief was granted by holding the deed to be a mortgage, and the land directed to be sold to pay the mortgage debt, but no allotment of homestead was ordered.

A sale made by the chancellor under a mortgage not executed by the wife when she was not before the court in the action, nor any defense was made, was held by this court, in Wing v. Hayden, not to pass the homestead, but in this case the wife admits the execution of the paper as a mortgage, claiming, however, that it did not pass her dower or homestead, and, when asking relief, no judgment was rendered requiring the homestead to be allotted, and it must now be assumed that the chancellor supposed she was not

entitled. The wife and husband being before the court on the first action, if the chancellor failed to give all the relief they asked for or to which they were entitled, the remedy was by an appeal and not by an independent action.

Judgment affirmed.

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KENTUCKY COURT OF APPEALS.

KENTUCKY MUTUAL SECURITY FUND CO. v. LOGAN'S ADM'R.

(*Filed Sept.* 11, 1890.)

Insurance—Venue—A duly authorized agent of the appellant, insurance company, in Allen county, caused to be issued to appellee's intestate, a resident of Allen county, a policy of insurance, and upon the death of the intestate an action was instituted upon the policy in the Allen Circuit Court, the petition alleging that the *transaction* took place in Allen county. Summons issued to Jefferson county only, and was served upon the chief officer of the company there. From a judgment by default appellant prosecutes this appeal, seeking a reversal on the ground that the Allen Circuit Court had no jurisdiction to render the judgment. *Held*—That under section 71 of the Civil Code of Practice the Allen Circuit Court had jurisdiction of the action, as the transaction with the agent of the company was alleged to have occurred in that county, while subsection 3, section 51 of the Civil Code of Practice, authorized the service of the summons upon the defendant's chief officer or agent in any county where he might be found in the State. The question as to whether section 71, Civil Code, localizes the action and confines the bringing of it to the county of the company's principal place of business, or to that in which the transaction occurred upon which the action is based, is not decided.

2. *Pleading—Exhibits—Judicial notice*—An exhibit filed with a pleading, which contradicts the pleading, generally controls, but the policy of insurance filed with the petition in this action, reciting that it is a contract *signed and delivered at Louisville, Kentucky*, can not control the averment of the petition that it was a transaction with an agent in Allen county, as the court judicially knows that insurance companies send out their agents to the country to solicit insurance.

Marc Mundy for appellant.

Thos. H. Hines and F. W. Morancy for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Holt.

The only question to be considered is, whether the Allen Circuit Court had jurisdiction to render the judgment now in question? The action is upon a policy of insurance issued by the appellant, and which is filed as an exhibit with the petition. The judgment was rendered by default. The statements of the petition are, therefore, to be taken as true. It avers that the company's chief office is in Louisville, Jefferson county, Kentucky, and that it "through its duly and regularly authorized agent in Allen county, Kentucky, issued to the said L. D. Logan a certificate of membership in the said Kentucky Mutual Security Fund Company."

Summons issued to Jefferson county only, and was there duly served upon the chief officer of the company.

It is insisted that as no summons was served in Allen county upon any officer or agent of the company, that the Allen Circuit Court, while having jurisdiction of the subject-matter of the action, had no jurisdiction of the person of the company, and no power, therefore, to render a judgment.

Aside from any Code provision the action would be a transitory one, because it is based upon simple contract, and a service upon the defendant in the county where the venue is laid would be necessary to give jurisdiction.

Section 71 of our Civil Code, however, provides: "Excepting the actions mentioned in sections 62 to 66, both inclusive, and in sections 70 and 75 (the excluded sections do not relate to actions like this one), an action against an incorporated bank or *insurance company* may be brought in the county in which its principal office or place of business is situated; or, *if it arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place.*"

It is unnecessary to decide whether or not this section limits the right to bring an action like this one to the county in which the principal office or place of business of the insurance company is located, or if it arise out of a transaction with its agent to the county in which the transaction took place, or to it and the county in which its principal office is located.

This question is not now before us. The section, however, relates expressly to insurance companies, and certainly permits the party, in case his claim arises out of a transaction with an agent, to sue in the county in which the transaction took place. This is the plain language of the provision, and this was, beyond question, the intention of the codifiers.

Without determining whether it localizes the action altogether, and confines the bringing of it either to the county of the company's principal place of business or to that in which the transaction occurred, upon which the action is based, it, beyond question, authorizes the claimant, if his cause of action arose out of a transaction with an agent of the company, to lay the venue of his action in the county of such transaction.

This being so, the law, in the absence of any Code provision, would permit the service of the summons upon the defendant elsewhere in the State; but subsection 3, section 51, of our Civil Code, says:

"In an action against a private corporation the summons may be served *in any county* upon the defendant's chief officer or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent, who may be found therein."

While the section, as a whole, is not as clear in meaning, perhaps, as a different wording might have rendered it, yet the first clause of it was, in our opinion, intended, where the Code localized an action or gave the claimant the right to do so, to authorize the service of the summons in such a case upon the chief officer or agent of the company wherever found in the State.

It is said, however, that the exhibit, filed with the petition, contradicts its averments, and that in such a case the exhibit must control. This is a true statement of the law, but not of the fact.

The policy does show that the company's residence, if it may be said to have one, is in Louisville, Ky., and that the various payments required by it were to be made there.

But, as we have already seen, the claimant is not confined in bringing his action to the county in which the principal office of the company is located; nor does the place of performance govern, but the venue of *the transaction* is to be regarded, and he may sue in the county where the negotiation or conduct of the business was had with the agent out of which the cause of action arose.

It is true the policy recites: "In witness whereof the said Kentucky Mutual Security Fund Company have, by their president and secretary, signed and delivered this contract at Louisville, Ky.;" but the framers of the Code knew, and this court knows, that insurance companies send out their agents to the country to solicit insurance; the "transaction" is had there with the agent, while the policies are signed at the home office. This being so, the fact that the policy shows it was signed in Louisville can not be allowed to control the averment in the petition that the company, "through its duly and regularly authorized agent *in Allen county*, Kentucky, issued to the said L. D. Logan a certificate of membership," otherwise that clause, above italicised of section 71 of the Code, would be rendered nugatory. This would compel the bringing of all actions upon policies of insurance in the county of the home office of the company.

The appellant is an insurance company, within the meaning of section 71 of the Code; the policy sued upon is a contract of insurance; and it was not intended, by providing in its charter: "The said company, being of a purely benevolent character, it shall not be subject to the laws of this State governing life insurance companies, except as herein provided;" that it should be sued otherwise than as the law provides as to other insurance companies.

Judgment affirmed.

FIDELITY TRUST AND SAFETY VAULT CO. V. GLOVER, &C.

(*Filed Sept.* 6, 1890.)

Guardian and ward—Investment of ward's estate—A resident of Tennessee, owning considerable stock in the East Tennessee National Bank at Knoxville, died, and his infant children, having been removed by their guardian to Kentucky, and their guardian having applied to the court for permission to let the funds belonging to his wards remain invested in said stock, as the same was paying regularly large dividends, *Held*—That the judgment permitting said investment to remain undisturbed is affirmed as, independent of any statute, when a guardian makes an investment with a view to securing his ward's money and obtaining an income upon it his diligence and good faith should be measured by the action and conduct of prudent business men investing their own means for like purposes, and when made

in conformity with this view should be approved by the court, but such power is now expressly conferred by act of the Legislature of March 6, 1884. Section 19, article 2, chapter 48, General Statutes, construed.

F. W. Darby for appellant.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Pryor.

Joseph L. Glover, at the time of his death, was a resident and citizen of the State of Tennessee, living in the city of Knoxville. He owned considerable personalty, and but little real estate.

His widow died shortly after her husband, and left surviving, as the offspring of their marriage, three children, who are defendants to this proceeding.

The appellant, the Fidelity Trust and Safety Vault Co. is now, and was when this action was instituted, the statutory guardian of the children, all of whom are infants. The children have been removed to Kentucky by a guardian, previously appointed, who resigned, and are now living and domiciled in this State, in the county of Caldwell.

At the time of Glover's death he owned stock in the East Tennessee National Bank, located at Knoxville, of the par value of $15,000. This bank stock is valuable, and has been paying a dividend of 12 and 14 per cent. The stock was taken by the father of the children, who was cashier of the bank at the time of his death. The institution is in a prosperous condition, and, as the proof shows, is well managed. This bank stock, producing a considerable income to the children, the statutory guardian deemed it advisable to apply to the chancellor for his authority to permit the investment to remain.

Under the General Statutes, chapter 48, page 707, section 19, article 2, a guardian may invest, by applying to the chancellor, the money of the ward in interest-paying bonds of the United States, State of Kentucky, or of some county or city in the State, and by an amendment of March 6, 1884, the power of the chancellor was extended in this regard. The Legislature of 1889 and 1890, by an act, approved April 29, 1890, authorized persons holding funds in a fiducial capacity, "*for loan or investment*, to invest the same in real estate, mortgage notes or bonds, or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as safe investments, and to make loans with such securities as collateral." The fiduciary is prohibited from loaning upon mere personal security, or from investing in bonds or securities of railroads or other corporations, unless such railroad or other corporation has been in operation more than ten years, and during that time has not defaulted in the payment of principal or interest on its bonded debt, &c. This act, although passed subsequent to the filing of this petition, gives to the fiduciary the right to invest *in such securities* as prudent business men would regard as safe and profitable, and under the act now in force the appellant, if he should sell the stock, could at once reinvest the money in the stock of a national bank, or any other safe security, unless that security consisted alone of a mere personal obligation. And there seems to us no reason for restricting a fiduciary from investing his ward's money in that which a prudent man would invest in as a means of security. An investment for purposes of speculation, or in such stocks as pay a dividend one month and none the next, and that are thrown day by day on the market

for purposes of speculation, would and ought to make the fiduciary responsible, but when he makes an investment with a view to securing his ward's money, and obtaining an income upon it, his diligence and good faith should be measured by the action and conduct of prudent business men investing their own means for like purposes.

Here the father had invested his means in what he regarded as a safe banking institution. His money is secure, and the dividends regularly paid, and to require the guardian, even if there was no statute on the subject, to dispose of the stock and reinvest the proceeds, might result in an investment not near as profitable or secure, however prudent and cautious the guardian might be.

This court, in the case of the Citizens' National Bank v. Jefferson, 11 KY. LAW REP., 174, prior to the passage of the act of April 29, 1890, affirmed the judgment of the chancellor permitting a change and transfer of stock by the fiduciary when he deemed it best for the interest of his beneficiaries. This right is now embodied in the act of 1890, and is, in fact, what the chancellor could have empowered the fiduciary to do in the absence of that enactment. The constant changes that are being made in the course of trade and commerce in that character of property in which investments can or have been made, demands that some discretion must be confided to the fiduciary who is required to loan or invest for the benefit of his wards so as to enable him to secure that which would likely be lost before the voice of the chancellor could be heard, and to invest and reinvest when the interest of the beneficiaries required it, without the cost and delay in applying to the chancellor for advice. When acting in good faith and as prudent business men would ordinarily act in investing in securities for the protection of and safety of their own means, he has exercised all the care that should be required of him in making the investment.

The judgment authorizing him to hold the stock for his ward is affirmed.

MCDOWELL v. C., O. & S. W. R. R. CO.

(*Filed Sept.* 4, 1890.)

Pleading—Res adjudicata—A special demurrer to the jurisdiction of an action and a general demurrer to the petition were filed together by the defendant, and the special and general demurrer both overruled, and the action dismissed, from which judgment an appeal was prosecuted, and the case reversed and remanded for trial. Upon the calling of the case for trial appellee filed its answer, alleging a want of jurisdiction, because the defendant had been summoned in a county other than the residence of its chief officer or agent, the tort complained of having been inflicted in the county of McCracken, and the action instituted in Hardin county. These facts having been admitted the action was dismissed. *Held*—That defendant, having come into court and relied upon a defense that went to the merits of the action, can not, after an appeal involving that question has been passed upon, raise the question of jurisdiction, because it has not been summoned in the proper county.

That question is *res adjudicata*. Section 117, Civil Code of Practice, which permits as many demurrers to be filed as there may be grounds for in behalf of the pleader, does not mean or imply that a party may first demur generally to the petition, and if the demurrer is overruled, that an answer may be filed, denying the right of the court to require the party to plead. A party coming into court relying on a defense that he files, which

goes to the merits, or does not question the jurisdiction, will not be allowed to say, if the decision is adverse to him, that he is not bound by the ruling of the court, because he was not properly summoned.

E. D. Walker, R. C. Davis and Matt. O'Doherty for appellant.

J. P. Hobson and P. H. Darby for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor.

This case is here for the second time. The court below sustained a general demurrer to the petition, holding that the facts alleged did not authorize a recovery. On the appeal the judgment below was reversed and remanded for a trial on the merits. When called for trial the defendant filed an answer, alleging a want of jurisdiction over the person of the defendant, and on the hearing the action was dismissed on that ground. The only question we deem necessary to consider on this appeal is: Has the defendant below, by filing its general demurrer and having a decision on the merits, waived its right to raise the question as to the jurisdiction of the court? The record shows that on the first hearing the appellee (defendant) filed a special and general demurrer—the first raising the question as to the jurisdiction, and the second denying the right of recovery upon the facts alleged. The court overruled the demurrer as to the jurisdiction, sustained the general demurrer, and dismissed the action upon which the first appeal was taken. No question was raised in this court as to the jurisdiction of the lower court over the person of the defendant, and none could have been made, as the petition failed to disclose any fact upon which the jurisdictional question could have been raised.

The court below, therefore, properly overruled the special demurrer, and this court, holding that the facts, stated in the petition, constituted a cause of action, a reversal was had on that ground. On the return of the case the answer of the defendant was filed, alleging a want of jurisdiction, because the defendant had been summoned in a county other than the residence of its chief officer or agent, the tort complained of having been inflicted in the county of McCracken, and the action instituted in Hardin county. These facts having been admitted, the action was dismissed.

The defendant is a common carrier, and it is insisted by the appellant (plaintiff) that under section 73, Civil Code, the circuit court of any county through which the carrier passes has jurisdiction over it for the recovery on account of a personal injury, although its chief office or place of business may be in some other county.

It is not necessary to place any construction on the various sections of the Code on this subject, as it was too late to plead to the jurisdiction after a hearing on the merits.

It is true that a party may file a special and general demurrer at the same time and in the same pleading, but he will not be allowed to invoke the judgment of the court as to the sufficiency of the petition, and if the decision is adverse to him, then file an answer denying the jurisdiction over his person. The filing of the special demurrer did not secure to the defendant this right. There was nothing on the face of the petition to show any want of jurisdiction, and if there had been, or the facts developed at the first hearing on the motion to quash, which, on the summons showing a want of jurisdiction over the person, it is too late, after the case has been to

this court and no question raised by either party as to the jurisdiction, to again make the question. It is *res adjudicata*. The case stands in this court and the court below as an action for a personal injury against the common carrier. The defendant appears and demurs generally to the petition, and after a decision by the court, then offers an answer denying, not that the court has no jurisdiction of the subject-matter, but denying the right of the court to try the case, because it was not served with a summons in the proper county. We understand the doctrine to be well understood and settled, that a party sued waives all right to question the jurisdiction of the court over him when he pleads to the merits by invoking a decision, either by a decision or plea, without objection to the jurisdiction.

At common law matters in abatement and in bar could not be united in the same pleading, but the Civil Code, section 117, subsection 2, has permitted as many demurrers to be filed as there may be grounds for in behalf of the pleader, but this does not mean or imply that you may first demur generally to the petition, and if the demurrer is overruled, that you may file an answer, denying the right of the court to require you to plead. A party coming into court relying on a defense that he files, which goes to the merits or does not question the jurisdiction, will not be allowed to say, if the decision is adverse to him, that he is not bound by the ruling of the court, because he was not properly summoned. In such a case he submits himself to the jurisdiction, and the court, having jurisdiction of the matter in controversy, the judgment, if otherwise proper, will be sustained. An appearance, for the purpose of questioning the jurisdiction over the defendant is not a voluntary appearance, but where the right to the subject-matter is involved, and the jurisdiction is invoked by one asking that this right be determined, he becomes bound by the judgment. Any other rule would defeat the practical administration of justice, and permit the litigant to speculate upon the court's ruling, holding himself bound by the judgment, if favorable, and denying the right of the court to pass on the question if the decision should be adverse to him.

The judgment below dismissing the petition is reversed, and remanded for a new trial in conformity to this opinion.

HARPER, &C. v. N. N. & M. V. R. R. Co., &C.

(*Filed Sept.* 9, 1890.)

1. *Railroads—Venue*—A person injured by being run over by an engine on a railroad in Graves county brought suit in McCracken county to recover damages for such injury. To the action the company pleaded to the jurisdiction of the court for the following reasons, viz:

First. That the plaintiff resides, and the alleged injury was, in Graves county.

Second. That the chief office, residence and place of business of defendant is in Jefferson county.

Third. That John Echols, being its vice-president and chief officer and agent in Kentucky, is in that county.

The demurrer to that plea having been overruled and the action dismissed, *Held*—That the court properly sustained said plea. In case of a railroad corporation it is obvious that the residence of its president, if there be one in the State; or if not, its vice-president, if there be one in the State, was intended, and must be treated as the residence of the corporation in determining jurisdiction of the defendant in actions like this;

and as this action, being for a personal injury, was not brought in the county in which the vice-president, who is the chief officer of the company, resides, nor in the county in which either he, or his next friend suing for him, resides, it necessarily follows that the lower court has no jurisdiction of the defendant.

Sections 72, 78 and subsection 33, section 732, Civil Code of Practice, construed.

2. *Parties to actions*—A railroad company owning the road and having leased the same to another company, who are running and operating it, is not a necessary party to an action for personal injuries committed by the latter company.

Gilbert & Reed for appellants.

Quigley & Quigley for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellant instituted this action in the McCracken Common Pleas Court against appellees to recover damages for personal injury done in Graves county by a locomotive engine running over him, through negligence of those in charge of it.

It is stated in the petition that the railroad, on the track of which appellant was at time of the injury, was owned by the Chesapeake and Ohio and Southwestern Railroad Company, but was then controlled and operated exclusively by the Newport News and Mississippi Valley Railroad Company, a carrier of freight and passengers, and those in charge of said locomotive were employes of that company. The summons was issued against both defendants, and returned by the sheriff of McCracken county, executed on the Newport News and Mississippi Valley Company by delivering to I. W. Briggs a true copy of the summons; he, as stated, being the chief officer of the company in that county, and executed on the Chesapeake and Ohio and Southwestern Company by delivering to John Echols a true copy; he, as stated, being chief officer of that company.

The Chesapeake, Ohio and Southwestern Railroad Company filed a general demurrer to the petition, which was sustained, and, we think, properly done, because, though it is alleged to be the owner, the Newport News and Mississippi Valley Company having the exclusive control and management of the road, and the locomotive by which the injury was done being, at the time, operated by its employes, is alone answerable in damages to the plaintiff.

The latter company filed a plea to the jurisdiction of the court for the following causes:

1. That the plaintiff resides, and the alleged injury was done, in Graves county.

2. That the chief office, residence and place of business of defendant is in Jefferson county.

3. That John Echols, being its vice-president and chief officer and agent in Kentucky, is in that county.

The general demurrer to that plea having been overruled, and the plaintiff declining to further plead, judgment was rendered dismissing the action for want of jurisdiction, and therefrom this appeal is prosecuted.

The precise question of jurisdiction, now before us, was made and decided in the case of Sherill v. C., O. & S. W. Railway Co., Nov. 14, 1889, 11 KY. LAW REP., 502. It was there held that the jurisdiction, in cases like this, is regulated and determined by section 73,

Civil Code, as follows: "Excepting the actions mentioned in 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants resides, or in which the contract is made, or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendants, or either of several defendants, resides; or in which the plaintiff or his property is injured; or in which he resides, if he resides in a county into which the carrier passes."

In that case the residence of a corporation, which is a common carrier, was held to be, according to a fair construction of the Code, the county in which its chief officer or agent, if in the State, resides when the action is commenced. Who the chief officer or agent is, in meaning of the Code, is determined by subsection 33, section 782, as follows: "The chief officer or agent of a corporation, which has any of the officers or agents herein mentioned, is: first, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; sixth, its managing agent.

In case of a railroad corporation it is obvious that the residence of its president, if there be one in the State, or if not, its vice-president, if there be one in the State, was intended and must be treated as the residence of the corporation in determining jurisdiction of the defendant in actions like this; and as this action, being for a personal injury, was not brought in the county in which the vice-president, who is chief officer of the defendant, Newport News and Mississippi Valley Railroad Company, resides, nor in the county in which the plaintiff was injured, nor in the county in which either he or his next friend suing for him resides, it necessarily follows the lower court has no jurisdiction of the defendant.

But it is contended that the jurisdiction in a case like this is regulated by section 72, which applies to actions against corporations generally, and does not relate, as is the case of section 73, to corporations that are like the defendant here, common carriers. To adopt that view would result in leaving section 73 without any meaning or application whatever, and moreover violate a well settled and entirely reasonable rule of construction.

That section 72 was not intended to apply to actions against common carriers is made plain by the express exception therein contained of actions mentioned in section 73.

It seems to us that every reasonable facility is given to the plaintiff in an action like this by the provision authorizing him to bring his action in either the county where the injury is done, or in the county where he may then reside, if it be one into which the carrier passes, or in the county of the defendant's residence, and clearly it can not be brought elsewhere.

The case of Ches., O. and S. W. Railway v. Heath's adm'r, 10 KY. LAW REP., 646, has no application here, because the action was there brought in the county where the plaintiff received the personal injury complained of, and the question presented and decided was in regard to the proper person upon whom to serve the summons, and none arose as to the proper county in which such actions must be brought. Hence, nothing said in the opinion in that case can be considered in conflict with Sherrill v. C., O. and S. W. Railway Co., 11 KY. LAW REP., 502, nor with our views in this case.

Judgment affirmed.

PAYNE'S ADM'R V. HARDESTY, &C.

(*Filed Sept.* 11, 1890—*Not to be reported.*)

1. *Non-residents—Constructive service—Void judgment*—A judgment rendered against a non-resident proceeded against by warning order citing defendant to appear in court on the first day of a term, commencing *within sixty days* from the making of said warning order, was absolutely void, and setting aside that judgment at a subsequent term and rendering another judgment on the defective warning order does not validate the judgment.

Subsectien 7, section 57, Civil Code, construed.

2. *Pleading—Allegation and proof*—A party having, in his petition, alleged that certain persons, who are non-residents, have an interest in the subject-matter of the action can not, by his proof, show that such allegation is untrue.

It is a well settled rule of pleading that the proof, to be available to a party relying upon it, must not contradict what he alleges, in his pleadings, to be the truth.

Hugh P. Cooper for appellant.

Thompson & McChord and J. R. Thomas for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

Thomas B. Spalding, as administrator of May F. Payne, deceased, brought this action to settle her estate as an insolvent estate. She owned a tract of land, which she, in her life-time, had mortgaged to the appellee's, Geo. Hardesty, intestate. Subsequent to said mortgage she sold one-half of said land to John McCarty. Afterwards the latter mortgaged this land to B. F. Mattingly. The representatives of those parties were all made parties to this action, and set up their respective claims.

H. T. Payne and Sedonia McCarty were made defendants and proceeded against by warning order. On the 24th day of May, 1887, these persons were warned to appear at the next term of court, which commenced in June following, and within sixty days after the warning order was made. Subsection 7 of section 57, Civil Code of Practice, provides, in substance, that when a non-resident is proceeded against by warning order, he must be warned to appear on the first day of the next term of court, "which does not commence within sixty days after the making of the order." This court, in the case of Brownfield v. Dyer, &c., 7 Bush, 505, decided that an order warning the defendant to appear and answer on the first day of a term of court, that commenced within sixty days from the date of the warning order, was absolutely void. The order of warning being void, of course the non-resident defendants in this case were not before the court for any purpose whatever, and any judgment thereafter entered against them was "absolutely void." The judgment that was taken in August following was set aside, and in December following another judgment was entered; but this latter judgment was entered upon the supposed authority of the warning order of date the 24th of May preceding, which, as said, being void, conferred no authority to render the judgment. Consequently, it was void.

But it is said that the non-residents had no interest in the event of the litigation. Consequently, the judgment was not void. It is said that this fact appears from the evidence. The petition, how-

ever, discloses the fact that they are interested, in the event of the litigation. It is thus shown by the appellant in his petition, and any proof to the contrary contradicts what he says upon that subject. It is a well established rule of pleading that the proof, to be available to a party relying upon it, must not contradict what he alleges, in his pleadings, to be the truth. He will not be permitted to recover upon a state of case which he says is not true. If he wishes to avail himself of such state of case he must conform his pleading to the fact proven by an amendment. This the appellant failed to do. Consequently, the non-residents must be treated as having an interest, in the event of the litigation, and they, not having been brought before the court, as the law requires, before judgment was rendered, the judgment setting aside said judgment must be affirmed.

As the question of taxation of costs is not before the court for review, we can not pass upon it.

The judgment is affirmed.

SMITH V. CITY OF LOUISVILLE.

(*Filed Sept.* 11, 1890—*Not to be reported.*)

Municipal taxation—Poll-tax—The city council of Louisville, during the year 1886, failed to pass an ordinance imposing taxes, and the city assessor and collector resorted to the act of May 12, 1884, that was intended to remedy the omissions on the part of the council. The taxation was imposed as directed by section 4 of said act, and in addition a capitation tax of $2 on all resident males over 21 years of age. After payment of the capitation tax, this action was instituted by several tax-payers to recover the poll-tax paid, on the alleged grounds that the imposition of same was unauthorized. *Held*—That the poll-tax was properly collected, because the same had been imposed by section 2 of the act of the Legislature, and there was no reason for its being embodied in the 4th section of the act. The statutory rate fixed by law in section 4 on property was in fact the levy ordinance for that year, as the Legislature had said should be, when the council failed to act, and the same applied to the capitation tax in section 2, as the Legislature had fixed the amount.

Lane & Burnett, T. L. Burnett and O'Neal, Jackson & Phelps for appellant.

H. S. Barker for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The city council of the city of Louisville, during the year 1886, failed to pass an ordinance imposing taxes, and the city assessor and collector resorted to the act of May 12, 1884, that was intended to remedy the omission on the part of the council. That act is entitled "An act to revise and amend the tax laws of the city of Louisville," and provides:

SEC. 4. "That if, in any year, the general council shall fail to pass a levy ordinance; or if the levy ordinance in any year shall be invalid or inoperative, the rate of taxation for the succeeding year shall be as follows, and any tax bill made by color of an invalid ordinance shall be valid to that extent: For city purposes proper,

seventy-five cents on each $100 worth of property subject thereto; for school purposes, thirty cents; for subscription to the Elizabethtown, Paducah and Louisville and New Albany railroads, as long as these taxes are needed, thirty cents; for the sinking fund, forty cents; for house of refuge, two cents; for cleaning and repairing public ways, eight cents; for cleaning and repairing sewers, one cent; for reconstruction of carriage ways, six cents; for bonds under ordinance and vote of 1883, twelve cents in each case on the $100 worth of property subject to tax."

The taxation under this enactment was imposed, as directed, and in addition a capitation tax of $2 on all resident males over twenty-one years of age, that amounted to near $26,000. This action was instituted by several of the tax-payers of the city for themselves, and all others who had paid the capitation tax, to recover back the money thus paid the city. A demurrer was sustained to the petition, and the tax-payers have appealed. Several objections are made in this court by counsel for the city against the right of recovery. It is first insisted that the few tax-payers uniting in the action can not sue for all; and if not, that this court has no jurisdiction, by reason of the amount involved. Assuming that such an action may be maintained, it then becomes necessary to pass upon the main question, the right of recovery. The second and third sections of the act of May 12, 1884, already referred to, provides the manner in which taxes shall be levied; or rather the amount with which the person and property is to be charged.

SEC. 2. "Thereafter the following taxes shall be levied: An *ad valorem* tax on lands and improvements, and on certain kinds of personal property; a license tax on certain trades and occupations, and the use of certain articles; a head tax of $2 a head on all resident males more than twenty-one years of age."

SEC. 3. "The general council shall, in each calender year, as early in the month of December as practicable, by ordinance, levy an *ad valorem* tax not exceeding the following rates: For city purposes proper, not more than eighty-five cents on each $100; for the support of the high schools and common schools, not more than thirty cents; for meeting the principal and interest of the bonds of the Louisville, Paducah, St. Louis and New Albany railroads, not more than thirty and a half cents; for the use of the sinking fund, not more than forty cents; for the house of refuge, not more than five cents; for cleaning and repairing sewers, not more than two cents; for cleaning and repairing public ways, including footways and crossings, not more than thirty cents; for reconstructing carriage way of streets and alleys, in conformity with section 6 of amending act, approved February 20, 1873, not more than six cents; for bonds under the vote of 1883, not more than twelve cents," &c.

The council, having failed to comply with the provisions of the city charter for the year mentioned, section 4, already given, fixes the rate and amount of tax to be collected. Under section 3 the council has a discretion in fixing the rate of taxation for city purposes, not to exceed the limit prescribed, and failing to exercise this discretion, or to act at all, the Legislature has, by section 4, fixed the amount of tax to be imposed. Then it is argued, as section 4 does not authorize the collection of the *head tax*, and there being no ordinance on the subject by the city for the year mentioned, the collection was illegal; and, therefore, a recovery can be had. Waiving the question as to whether the tax was or not voluntarily paid, it is plain that the omission to insert any provision in regard to the capitation tax in section 4 was intentional, because section 2 of the

same act had already imposed a *head tax* of $2 on each male inhabitant over twenty-one years of age. This section says that this head tax shall be levied. There is no condition or limitation annexed to it, but when, by the third section, the Legislature authorizes the *ad valorem* tax, it gives a discretion to the council in its imposition, not to exceed, however, certain amounts; therefore, the necessity, when anticipating the failure of the council to make a levy, for the Legislature to fix the precise sum for which the property of the citizen could be taxed.

The capitation tax had been imposed by the Legislature, and there was no reason for its being embodied in the 4th section of the act. It was the duty of the citizen to pay it, and whether fixed or not by ordinance, he has done that which, by law, he ought to have done. The statutory rate fixed by law in section 4 was, in fact, the levy ordinance for that year, as the Legislature had said it should be, when the council failed to act, and the same applied to the capitation tax in section 2, as the Legislature had fixed the amount. While the city council, if the city treasury contained a surplus, and no necessity existed for imposing a tax, might refuse to make the levy, although the act was imperative, because no taxation in such a case would be required, still when the necessity exists, and the law imposes the tax, there is no reason, with the curative statute before him, for the chancellor's interference. There is a manifest difference between the act of March 3, 1870, and the 2d section of the act of May 12, 1884. The first named act confers on the council *the power* to impose a head tax of $2, and without an exercise of this power it could not be enforced; but under the act of May 12, 1884, the Legislature has said the citizen shall pay the $2 capitation tax. This operates as an imposition of the tax, and particularly when considered with the curative enactment found in section 4 of the same. There was no reason for exempting one who had no property from the payment of the head tax, and imposing the whole burden on the property owner, and the failure to allude to *head tax* in the 4th clause was for the reason that it had already been fixed and agreed to be paid by a higher power than the council. It is not a material inquiry how this money is to be appropriated, or whether there was a levy ordinance or not, the council had no power, under the act before us, to relieve one of a burden at the expense of another, and the tax-payer, having paid that which he ought to have paid, is not entitled in law equity or good conscience to recover his money back.

Judgment affirmed.

WINN V. BOARD OF PARK COMMISSIONERS.

(*Filed Oct.* 2, 1890—*Not to be reported.*)

Construction of statutes—Special elections—The city council of Louisville in the resolution providing for a submission to the voters of the city the proposition of issuing $600,000 worth of bonds to provide for and maintain public parks in and near Louisville, complied substantially with the act of the Legislature by reciting only so much of the title as provided for "*the establishment of public parks in and adjacent to the city of Louisville*," the omission from the resolution of the remaining words of the title, viz: "*and improvement and management of the same*" was unimportant and immaterial.

The 30th section of the act providing that the question of assuming this indebtedness should be submitted to the voters at a special election was com-

plied with by the submission of the proposition at the regular election held on August 4, 1890, and its ratification by 9,962 voters. The special election called was an election for a definite purpose, that is, to ascertain the wishes of the tax-payers in reference to the act in question, besides the vote for and against the tax was taken by secret ballot under the provisions of a law applicable to the city of Louisville, and conducted by officers appointed by the council for that purpose, while the vote at the general election was *viva voce* and taken by separate and distinct officers. There is nothing in the entire body of the act that forbids the ascertainment of the popular will at the same time and on the same day a general election is held. The omission from the 30th section of the act of the words "*on days when no other elections are held in Louisville*" are significant, and the variance from the rule prescribed in a former section for the election of park commissioners, may be explained by a different legislative intent governing such election, while the additional safeguard attending the ratification of the act is found in the provision requiring that the aggregate vote for and against the act should exceed one-fourth of the aggregate vote at the last preceding general election.

Barnett, Miller & Barnett for appellant.

H. S. Barker for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The appellant, Winn, a tax-payer of the city of Louisville, is assailing the validity of an election, held in the month of August, in the year 1890, in that city, for the purpose of ascertaining the popular will as to the assumption by the tax-payers of an indebtedness of $600,000, for the establishment of public parks. It is insisted that the election is invalid for two reasons:

1. The act was not properly recorded in the resolution of the council submitting it to the popular vote.

2. The election held on August 4, 1890, was not a special election, as required by the 30th section of the park act under which the vote was taken.

Section 30 of the act, from which the two questions arise, provided that "there shall be held a special election in the city of Louisville, at a date not less than thirty days after the election of said commissioners, to be fixed by the general council of said city, at which election the question shall be submitted to the qualified voters of Louisville as to whether or not this act shall take effect; notice of which election shall be published in at least two daily newspapers for at least ten days before the election."

The title of the act of which section 30 is a part, is: "*An act to provide for the establishment of public parks in and adjacent to the city of Louisville, and the improvement and management of the same.*"

The general council in fixing the day for the election, and in calling the attention of the voters to the question embodied in its resolution, only so much of the title as provided for "the establishment of public parks in and adjacent to the city of Louisville," and omitted to add the words "and improvement and management of the same." The voter was called on to adopt or reject the act in question, as its practical operation depended upon the public sentiment of the city to be expressed at the polls.

He was called upon to say whether or not he was for the act providing *for these public parks in or adjacent to the city.* This, it

seems to us, was a compliance with the spirit and meaning of the provision under which the submission was made, and afforded every voter, whether intelligent or ignorant, of the proposition upon which his vote was desired, and the omission of the words "and the improvement and management of the same," was neither deceptive or misleading to the voter, for if he favored the establishment of parks by the city, the *improvement and management* of the grounds would be the necessary result of the voters' own act. Besides the notice of the time, manner and purposes of the election was given in the daily newspapers of the city, in which was set forth the entire title of the act, and if the resolution had been defective, the notice given would have remedied the irregularity in the proceeding.

As to the second ground for a reversal, it is maintained that as this vote was had on a day when State and county officers were elected, it was not a special election within the meaning of the act.

Section 2 of the act establishes a board of six park commissioners, to be chosen by the qualified voters of the city at a *special election*, to be called by the general council, and after prescribing the qualifications of the members, further provides, "*election for park commissioners shall always be special elections, on days when no other elections are held in Louisville.*" These commissioners were elected in strict accordance with the act in question, and have qualified as such. Its provisions are many, with reference to the duties of the commissioners and management of the park, and after these duties have been imposed, the thirtieth section of the act provides: "*That there shall be a special election in the city of Louisville at a date not less than thirty days after the election of said commissioners, to be fixed by the general council of said city,*"&c. A majority of the votes cast determined the result, provided the aggregate vote for and against the proposition was not less than one-fourth of the aggregate vote at the last preceding general election for city or State purposes.

The election having been held, those in favor of the public parks numbered 9,962; those against, 2,997, so it is evident that the voters of the city favored the measure.

It is argued, however, and very properly, that this expression of public sentiment by which a majority impose heavy burdens on the minority, is unlike popular elections for public position, and can not be controlled by the same general rule, and that, although the voice of the majority has been fairly expressed, as the result is the imposition of a burden upon those who are unwilling to assume it, the provisions of the act must be strictly followed, at least in its spirit, and the manner of holding the election must be as prescribed. This is the recognized doctrine applicable to this character of legislation, and unless the vote was taken at the time and in the manner provided, it would be held invalid. The demand of the public by reason of the majority vote will not be listened to by the chancellor unless the statute has been complied with. The question then arises, what meaning is to be given the words *special election*, as found in the thirtieth section, or in other words, what was the legislative intent? It is a well settled rule in the construction of a statute that "every part must be construed together, and the intention of the law-making power must be ascertained from the entire act." It is argued that as the Legislature in providing a *special election* for park commissioners, further provided that such election should be held "*on days when no other elections are held in Louisville;*" that when the Legislature used the words *special election* in the section in reference to the approval or rejection of the act, the intention was to have the will of the voter expressed at a time

when no other election was being held, whether State, county or municipal.

In the election of park commissioners the Legislature doubtless considered the fact that such an election would be held at the expiration of each official's term of office, and to prevent the influences that might be exerted over the voter by reason of other municipal or State elections by candidates, in whom the voter might be interested, expressly provided that such elections should be held at a time when no other elections were held. In investing such a large sum of money to be devoted to the welfare and prosperity of the city, it was manifestly the purpose of the Legislature to place the control of the parks, if possible, in the hands of those who were devoted to the interests of the city, than to the preferment of those who might be seeking favor from the voter in the State or municipal government, and for that reason required these annual elections to be held when no such influence would control.

After making this express provision in regard to the election of the commissioners in the second section of the act, and then proceeding to prescribe their duties when elected, in the thirtieth section a *special election* was directed to be held *for or against the act*, omitting entirely the provision that it should not be held when any other election was being held, and providing as a means of obtaining a full expression of public sentiment and of protecting the tax-payer against a small minority vote, that although a majority of those voting favored the law, it should not take effect if the aggregate vote for and against it was less than one-fourth of the aggregate vote at the last preceding general election. The special election called was an election for a definite purpose, that is, to ascertain the wishes of the tax-payer in reference to the act in question. Thus far it is to be distinguished from a general election, but there is nothing in the entire body of the act that forbids the ascertainment of the popular will at the same time and on the same day a general election is being held.

In the general election the voting was *viva voce* in accordance with the Constitution of the State, and held by officers appointed under the general law of the State, while the vote for and against the tax was taken by secret ballot under the provisions of a law applicable to the city of Louisville, and conducted by officers appointed by the council for that purpose. It was in every sense a vote for a definite purpose, and that vote was in the meaning of the act, a special election, although the polls were opened at the same time and at the same place the State election was being held. It is obvious the Legislature did not intend that the vote on the act itself should be taken on a day when no other election was being held, and one of the most cogent reasons for so adjudging is that after inserting such a provision so as to remove the election of commissioners that occurred annually from the influences that sometimes affect general election, when requiring a vote on the act itself, no such provision is to be found.

The judgment below is, therefore, affirmed.

BARGHMAN V. PORTMAN.

(*Filed Sept.* 6, 1890—*Not to be reported.*)

Partnership—Rescission of contract—Consideration—Sale of liquor—B. and P., being joint owners of a hotel, with the furniture therein, entered into a written contract by which B. agreed to surrender all control of the hotel to

P., who also agreed to take the interest of B. in all the furniture, at an agreed valuation, and to pay to the joint owners, styled a firm, the sum of $725 annually for the use of the house, and to continue said contract for a period of years, say ten years. In an action to recover rent by B., the chancellor rescinded the contract between the parties, apparently upon the ground that the transaction was a partnership, and shortly after the making of the contract B. advocated and voted for the "local option" law, which prohibited the sale of liquors in said town, and greatly reduced the proceeds derived by P. from the bar-room attached to the hotel. *Held*—That the contract was not a partnership transaction, but a renting by P. of B's one-half interest in the hotel property, and it was no violation of the terms or the spirit of the contract for B. to vote either for or against the sale of liquor.

Hill & McRoberts and R. C. Warren for appellant.

W. H. Miller and W. O. Bradley for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

Barghman and Portman were the joint owners of certain hotel property in the town of Stanford, as well as other houses, and on the 23d of November, 1883, entered into this contract:

"Know all men by these presents that we, Henry Barghman and M. C. Portman, own the St. Asaph Hotel in partnership or equally. Now it is agreed that the said M. C. Portman, of said firm, shall take charge of the hotel, and all the lot and stables belonging, and run it as a hotel in the town of Stanford for a term of years, say ten years, unless either the said Barghman or Portman should die, then the administrator or executor shall have the right to close the contract or run it, as he may choose, should he think best; and the said Portman is to do whatever little improvement on said property in the house at his own expense; if any accident from wind or fire make it necessary for any improvement, then the said firm shall bear the expense equally; otherwise, the said Barghman is to be at no expense whatever. The firm agrees to paint the whole house, including the store-house outside, at equal expense. The said Portman is to pay to the firm of Barghman & Portman, annually, $725 at the end of each year, and the said Portman is to take possession on the 1st of January, 1884; also the said firm own two store-houses attached to the premises, which we agree to rent for the best price possible, and divide the proceeds equally between the firm. It is agreed also that the said M. C. Portman takes all the furniture in said hotel at a valuation by two disinterested men, and pay Henry Barghman his half of the same when he takes possession." The purpose of this action was to recover rent by Barghman under this contract, and the chancellor, by reason of certain defenses set up, rescinded the contract between the parties.

It seems from the character of the pleadings and the argument of counsel that the court below regarded the contract as recognizing the existence of a partnership, with the right of either party to end the contract whenever it was to the interest of the firm. A bar-room was attached to the hotel, and no doubt was one of the principal sources of revenue to the proprietor. The local option law passed by the Legislature, after the making of this contract, deprived the appellee of this source of profit, and reduced the proceeds from the hotel greatly. Barghman, who owned the hotel in conjunction with Portman, was an ardent advocate of the law, and it

is urged that this act of his so far affected the contract as to authorize its rescision. Without discussing this question, we need only say that if a renting, the lessee took it subject to legislative regulation, and it was no violation of the terms or the spirit of the contract for Barghman to vote either for or against the sale of liquor. That Barghman and Portman were the joint owners of this property is plain from the facts alleged, and while the contract designates the two as constituting a firm, it is apparent that it was a renting by Portman of Barghman of the latter's interest in the hotel for the period of ten years.

Barghman was entitled to none of the profits resulting from the running of the hotel, nor could he be compelled to share the loss or any part of it, but yet it is insisted by Portman that he could run the hotel as long as it was profitable, and when the period arrived that no money could be made, he then had the right to abandon the contract. It is conceded that Portman made a handsome profit until the passage of the local option law, and still Barghman got no part of these profits, but was only entitled to one-half of the rental. This, therefore, is not, and should not have been an action to settle the partnership, as the contract amounts to a renting by one joint tenant from another of a one-half interest.

The tenant or joint owner renting, enjoying the whole profits, and paying to his co-tenant the one-half of the rental as fixed by the agreement. Portman was to take, and did take all the furniture in the house at a value, to be ascertained by two disinterested parties, and pay to Barghman his half of the valuation, the entire contract showing a surrender and control by Barghman over the hotel, and placing it with Portman to run it for the period mentioned, Portman to receive all the profits. We can not well construe this contract in any other light, and, therefore, the judgment below rescinding the contract is reversed, with directions to dismiss the cross-petition of the appellee.

MUDD'S EX'ORS V. MUDD, &C.

(*Filed Sept.* 9, 1890—*Not to be reported.*)

Parties to actions—Pleading—A vendee of land owing a note for unpaid purchase money, which was not secured by a lien on the land, was sued jointly with the executrix of one who had taken up the note, the action was dismissed without prejudice as to the executrix, and after the expiration of one or two terms, after the dismissal, an amended petition was filed to cure the defects of the proceeding. *Held*—That said amendment was too late, and ineffectual, besides if there was any consideration to uphold the promise made by the decedent it was such as would have authorized a separate action against the executrix.

J. W. Lewis for appellants.

W. E. Selecman and J. W. S. Clements for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

S. A. Mudd purchased of his father, Donatius Mudd, a one-half interest in a tract of land for $3,000, the last payment to be made in four years, and the lien for this last note expressly released by the

conveyance. R. E. Mudd paid off the lien note and the land was conveyed to him by S. A. Mudd. This action was brought against S. A. Mudd, the vendee of his father, and against Teresa Mudd, as executrix of R. E. Mudd, to recover the amount of this last note, the petition and amended petition alleging that R. E. Mudd in his life-time assumed and promised to pay to Donatius Mudd this last note. Before the amended petition was filed the executrix of R. E. Mudd by motion and rule against the plaintiff had the action as against her dismissed without prejudice. She was then out of court. The amended petition was filed in the clerk's office for the purpose of curing the defects in the proceedings after one or two terms had expired without any offer to amend, and when no leave to amend had been given by the original judgment. This was an independent promise by R. E. Mudd, if made, to pay a debt to which he was a stranger at the time the debt was created.

As between him and S. A. Mudd the exhibits and pleadings show that S. A. Mudd has no cause of action against him, and if R. E. Mudd is indebted to Donatius Mudd or his assignees, it is by reason of a promise based upon a consideration that would make it R. E. Mudd's debt and not that of S. A. Mudd. The action as to R. E. Mudd's executrix having been dismissed, no amendment should have been allowed, but the appellant left to bring his independent action. This is his remedy, if the promise alleged is binding, a question not necessary to be decided.

Judgment affirmed.

HOUSTON V. WANDELOHR.

(*Filed Sept.* 9, 1890—*Not to be reported.*)

Pleading—Liability of clerks—Measure of damages—Appellant's petition alleged that he brought suit in the Pendleton Circuit Court against D. and others to recover the possession of about 175 acres of land. The trial of the case resulted in a judgment against the appellant, and he prayed an appeal. His bill of exceptions was agreed on and filed, and he also, within the time allowed by law in which to appeal, requested the appellee, who was clerk of said court, to furnish him a copy of the bill of exceptions to forward to this court as his appeal; but the clerk failed to furnish him with said copy, and he thereby lost his right of appeal. He brings his action against the clerk to recover $3,000 in damages for his failure to make said copy. The lower court sustained a demurrer to the petition, and this appeal is prosecuted. *Held*—That the petition is defective, for, conceding that the negligence of the clerk subjects him to pay such damages as appellant has sustained, the petition does not state facts to show that any reversible error existed in the judgment appealed from. The allegation in the petition that plaintiff *believes* he would have obtained a reversal of the case, being a mere conclusion of the pleader, and not a statement of facts.

The question as to whether errors in the judgment could be considered in a collateral proceeding, conceding that the petition showed such errors to exist, is not decided.

Quere. Was not the appellant's only remedy against the clerk by rule or mandamus from the Court of Appeals?

W. J. Perrin for appellant.

L. T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, as appears from his petition in this case, sued in the Pendleton Circuit Court, Wm. C. Ducker, &c., to recover the possession of about one hundred and seventy-five acres of land. The trial of the case resulted in a "judgment against" the appellant. His bill of exceptions was agreed on and filed, and he prayed an appeal to this court. He also, within the time allowed by law in which to appeal, requested the appellee, who was clerk of said court, to furnish him a copy of the bill of exceptions to forward to this court as his appeal; but the clerk failed to furnish him with such copy, and he thereby lost his right of appeal. He brings this action against the clerk to recover $3,000 in damages for his failure to make said copy, &c. The lower court sustained a demurrer to this petition, and the appellant has appealed to this court.

It was the duty of the appellee to make a copy of the bill of exceptions for the appellant upon the latter's request. He should have made such copy with all reasonable dispatch, provided the request was made within the time allowed the appellant to appeal. His failure to do so would subject him to any damages that the appellant has sustained by reason thereof. But what damages was the appellant sustained by reason of such failure? The facts alleged in the petition fail to show that the appellant sustained any damages by reason of such failure.

If the land belonged to the appellant, and he was in said action entitled to recover the possession of it, and by reason of an erroneous judgment he was deprived of that right, then he was damaged to the extent of his loss. On the other hand, if the judgment was not erroneous the appellant was not damaged by it. So the appellant's right to damages depends upon the fact whether he was deprived of his right to said land by an erroneous judgment of the court. We can not say that said judgment was erroneous in any particular. If said case were here for review, its correctness, in all its parts, would be presumed, unless an error appeared therein. Not a fact is alleged that tends, even, to show that said judgment deprived the appellant of any right to which he was entitled. It is true that the appellant alleges that he "believes" that he would have reversed the case, but he does not allege any fact, whatever, that indicates a reversible error. In the absence of such fact the allegation as to his belief that he would have reversed the case must be regarded as merely the conclusions of the pleader; and in the absence of such fact we must presume that the judgment was right in all its parts.

But if the appellant's petition had shown that said judgment was erroneous, then the question would be presented as to whether the errors could be considered in a collateral proceeding. As the judgment showed that the appellant was not entitled to recover, is not that judgment conclusive against the appellant in a case of this sort? It now stands in full force and effect, and it says that the appellant is entitled to nothing. So, can he show in a collateral proceeding that said judgment was erroneous in order to entitle him to recover damages against the clerk for a failure to do his duty? Such a decision would not reverse the judgment, it would stand in full force and be conclusive upon the appellant; yet, to allow the appellant to recover, we would have to, in effect, reverse the case as far as the appellant and appellee are concerned, notwithstanding the fact that it stands in full force and effect as far as the appellant's right to the land is concerned, and is conclusively presumed to be correct. Was not the appellant's only remedy against the clerk by rule or mandamus from this court? But owing to the defective pe-

tition in not pointing out the errors of judgment, it is not necessary to decide the foregoing question.

The judgment is affirmed.

YOUNG V. COX.

(*Filed Sept.* 11, 1890—*Not to be reported.*)

Burden of proof—Pleading—Possession—Limitation—Appellant's petition alleged that she was the owner and entitled to the possession of a tract of about 652 acres of land, describing the same by metes and bounds, and alleged that appellee has unlawfully entered upon it and taken possession of two parcels thereof, containing twenty and seven acres. The answer set up claim to said land as parts of a tract of 130 acres owned by him, which he had possessed adversely to a marked boundary for more than fifteen years. Appellant prosecutes this appeal from a verdict and judgment against her. *Held*—That the answer alleged sufficient defenses. The burden of proof was on appellant to show a superior title and right to possession, and the issues, having been fairly submitted to the jury, and the verdict being sustained by evidence, the judgment is affirmed. It does not appear in this case, nor is it material whether appellee had any other than a possessory right, nor whether the tract of 130 acres was or not vacant.

H. C. Martin and W. J. Macey for appellant.

Lewis & McQuown for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Lewis.

The statement of appellant's petition is that she is the owner and entitled to possession of a tract of about 652 acres of land, the boundary of which is set out, and that appellee has unlawfully entered upon it, and taken possession of two parcels thereof, containing 20 and 7 acres, the boundaries of which are also set out, and cut and carried away valuable timber and kept her out of the possession.

The answer contains a denial she is the owner and entitled to possession of the tract of land, and a statement in substance that the two parcels of 20 and 7 acres are parts of and embraced by the boundary, set out, of a tract of 130 acres, of which appellee is the owner, and that he and those under whom he claims have had the actual, continuous and adverse possession of for fifteen years next before commencement of the action, claiming and using it to a well marked boundary.

It seems to us the right of appellant to recover the two parcels of land and damages prayed for, was fully and fairly put in issue by the answer, all the conditions necessary to bar recovery were stated, and the statute of limitation properly pleaded. For, although, appellant has a paper title to the tract of 652 acres, deduced from the Commonwealth, still, as it was not stated in the petition she was or ever had been in possession of any part of it, the alleged adverse possession by appellant of the tract of 130 acres, *prima facie*, was not restricted by the lap or interference, but extended to the limits of the 130 acres, including the two parcels in dispute. The general demurrer to the answer was, consequently, properly overruled. And, although, the affirmative allegations of the answer were denied by

the reply, the onus was on appellant to show a superior title and right to possession in order to recover.

But upon the trial the only evidence offered by her was a patent for the tract of 652 acres, issued to her in 1859, which was shown to cover and include the two tracts of 20 and 7 acres. It is, therefore, clear that it was available and sufficient for appellee, even without paper title, to show that he and those from whom he derived title, had for the period of fifteen years the actual continuous and adverse possession of the 130 acres, which was identified and claimed to a marked boundary. For it seems to be here well settled that possession without paper title may exist, which, if continued fifteen years, will bar recovery in ejectment of any part of the land within a marked boundary thereof, though the plaintiff may have title derived from the Commonwealth. Farmer v. Lyons, 10 KY. LAW REP., 374; Campbell v. Thomas, 9 B. M., 82. It does not appear in this case, nor is it material whether appellee had any other than a possessory right, nor whether the tract of 130 acres was or not vacant.

The instructions were more numerous than necessary, and some of them were more favorable to appellant than the law authorized, and she certainly was not prejudiced thereby. But the true and only issue was substantially submitted to, and doubtless understood by the jury. And as the verdict is supported by evidence, the judgment must be affirmed.

MUDD V. GREEN.

(*Filed Sept.* 11, 1890—*Not to be reported.*)

Title—Adverse possession—Appellant having agreed to perfect the title to land sold to appellee before the purchase money was required to be paid, the chancellor will compel the purchaser to accept the title tendered by appellant, although the paper title may be somewhat defective, provided the long continued possession of appellant, and of those from whom he purchased, is sufficient to make a possessory title, and especially will this remedy be afforded where the purchaser retains possession, and does not ask for a rescission of the contract.

W. E. Selecman for appellant.

W. C. McChord for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Pryor.

While the title upon record to the land in controversy is somewhat defective, the long continued possession by the appellee, and of those from whom he purchased, connected with the possession of the appellant, who purchased of the appellee, is sufficient to perfect title. A period of forty years and more has elapsed since the entry by the vendors of the appellee, claiming the absolute title with a continued possession. It is argued, however, that the obligation of the appellee to perfect the title before the money is paid is binding, and the parties must abide by their contract. The effect of such a ruling would give the appellant the land, who now has possession under a general warranty deed from the appellee, without his paying for

it, and as the possession has been of such a long and continued holding the appellant should be compelled to pay the money or surrender the land, when the facts before us show that all has been done that can be to make the paper title perfect. The interest on the purchase money note is improperly adjudged. The agreement was that it should bear interest for three years, and if the title was not perfected when the three years elapsed, interest should cease to run. The interest of McElroy and wife was obtained by the appellee, and from that time $1,000 of the $2,000 runs with interest. As to the balance, interest should be calculated from the rendition of the judgment.

Under this agreement between the parties the appellant or her testator was not required to accept a possessory title, but when the chancellor finds the title complete in that way, and the appellant makes no offer to rescind the contract, it seems to us the equity of this case is to allow interest from the rendition of the judgment.

For that reason the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

PASSMOORE, &C. V. EASTIN'S ADM'X.

(*Filed Sept.* 13, 1890.)

Mechanic's lien—Married women—The general estate of a married woman can not be subjected to the payment of a claim for building a stone foundation for a house on her land under section 1, chapter 70, General Statutes, where the contract was made with the husband, although the wife enjoyed the benefit thereof, because she could bind her estate only by *writing signed by her for necessaries*, conceding that a dwelling-house was included in the term *necessaries*.

Section 2, article 2, chapter 52, General Statutes, construed.

Poston & Jacobs for appellants.

Phil. B. Thompson, sr., for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Lewis.

Wm. Eastin, administrator of whose estate is appellee, brought this action under article 1, chapter 70, General Statutes, to enforce a lien upon land owned by appellant, M. B. Passmore, wife of appellant, George Passmoore, for satisfaction of an amount alleged due for labor done and materials furnished in construction of a stone foundation of a dwelling-house erected on the land.

It seems to be admitted the husband contracted with and agreed to pay Eastin for his services, but though it is manifest the wife expressly or tacitly accepted them, so far as she could in legal contemplation, and got and has since enjoyed benefit thereof, she denies she made or ratified the contract.

Section 1 of the statute provides in substance: "A person who performs labor or furnishes materials in the erection * of a house, * * * * * or for the improvement in any manner of real estate by *contract with* or by the *written consent of the owner*, shall have a lien thereon and upon the land which such improvements may have been made, or on any interest such owner has in the same, to secure the amount thereof with costs."

It is not alleged nor proved that M. B. Passmore gave her *written* consent for performance of labor and furnishing materials by Eastin in constructing the stone foundation. And if she made with him any contract therefor, it was verbal and not in writing signed by her; consequently not binding nor enforceable. For section 2, article 2, chapter 52, provides that real estate of a married woman shall not be liable for any debt or responsibility of her husband, contracted or incurred before or after marriage, nor for her debts or responsibilities contracted after marriage, except on account of necessaries for herself, or a member of her family, her husband included, *as shall be evidenced by writing signed by her.*

So even if it be conceded dwelling-houses are, in meaning of the statute, "necessaries" for building which a married women may make her real estate liable, still the indispensable condition of the validity of the contract appellee seeks to enforce against M. B. Passmore, is lacking—it is not "evidenced by writing signed by her."

But it is contended in argument that as section 1, article 1, chapter 70, does not in terms make a condition of existence and enforcement of a mechanic's lien, that the contract therein mentioned shall in any case be in writing and signed by the owner of real estate, upon which the house may be built, the lien exists and may be enforced in this case, as though M. B. Passmoore was unmarried.

It is true no express exception to operation of that statute is made in favor of married women. Neverthless, it must be considered and construed as part of a general system of laws, and, if possible, made to harmonize with the other statute which prescribes the conditions upon which a married woman may by contract incumber her real estate with liens. Otherwise there would have to be given by implication, and contrary to the well settled policy of this State, validity and efficacy for special purposes provided for in article 1, chapter 70, to verbal contracts of married women that are elsewhere in the General Statutes expressly and clearly made invalid and unenforceable.

There need be no case of hardship under the statute as construed and understood, for every one dealing with a married woman, can, by reducing the contract with her to writing, as Eastin might have done, make it binding upon her. On the other hand irreparable and unavoidable wrong and injury would result from a repeal or relaxation of the statute. But with the expediency and policy of the statute we have nothing to do. In this case it is so plainly written that no other alternative is left but to decide that no lien exists upon the real estate sought to be subjected by appellee. And, consequently, the judgment of the lower court is reversed, and cause remanded for the action to be dismissed.

STURM V. MEYER, &C.

(*Filed Sept.* 13, 1890—*Not to be reported.*)

Employer and employe—Contributory negligence—In an action by an employe to recover damages of his employer for personal injury caused by defective machinery where a recovery of $50 damages is had. On appeal by plaintiff, *Held*—That the recovery will not be disturbed, as the plaintiff was the foreman and authorized to repair the machinery when necessary, and the jury may have believed that the injury may have resulted from his lack of care.

The rule is that if the employer knew or ought to have known the defect complained of, he is liable, or where the employe has the right to depend upon the judgment of his employer as to the safety of the machinery, and there is neglect in this regard, a recovery may be had, but the damages in this case may have been lessened by contributory negligence of the plaintiff.

Hallam & Myers for appellant.

Wm. Goebel for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

This is an action by an employe against his employer to recover for a personal injury caused by defective machinery. The case went to the jury and a verdict returned for $50, from which the party (plaintiff) recovering has appealed. The rule is that if the employer knew or ought to have known the defect complained of, he is liable, or where the employe has the right to depend upon the judgment of his employer as to the safety of the machinery, and there is neglect in this regard a recovery may be had. There was testimony in the case conducing to show neglect on the part of the employer, but other testimony on the part of the defendant (appellee) conducing to show that the party injured (the plaintiff) was the foreman in the shop, and employed to make such repairs as he saw proper. He was foreman and knew the danger, and the jury doubtless thought under the circumstances the amount of recovery should be small; in other words, that the appellant by his own neglect caused the injury, resulting from defective machinery, that he could have repaired at any time. While if there had been no contributory neglect on the part of the plaintiff, or nothing in the defense to lessen the recovery, the amount of compensation allowed would have been no equivalent for the injury sustained; under the facts before us the verdict ought not to have been disturbed.

The instructions embodied the law of the case and the judgment must be affirmed.

MILLER V. SOUTH, &C.

(*Filed Sept.* 16, 1890—*Not to be reported.*)

Ejectment—Landlord and tenant—In an action instituted by appellees, as heirs of S., for the possession of land, in which the judgment was rendered in favor of said heirs, it is contended that the verdict is against the evidence. *Held*—That appellant, having continued in the possession of said land, which was entered by his father as tenant under S., can not deny the landlord's title; and the finding below, not being flagrantly against the evidence, will not be disturbed.

J. E. Cooper and W. W. McGuire for appellant.

A. Duvall for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Pryor.

The heirs of J. W. South in 1881, shortly after his death, instituted this action to recover of the appellant, Miller and others, the possession of a tract of land in the county of Breathitt. There was a demurrer to the petition on the ground that the boundary was not defined with sufficient accuracy. The averments make a minute description of the land in controversy, and the demurrer was properly overruled. The principal question involved in this case is one of fact, for if Martin Miller did not enter as the tenant of South and Buck, the appellees would have some difficulty in establishing their claim of title or in overcoming the adverse claim relied on by the appellant. The preponderance of the testimony favors the conclusion reached by the court below that Martin Miller entered under a lease from South and Buck, and his son holding in the same way, can not now set up an adverse claim so as to defeat the recovery. There is no evidence showing a renunciation by Martin Miller or his son, the appellant, of their allegiance to the title of South until after the death of the latter in the year 1880. There is proof conducing to show that Miller entered under another claim, but the weight of the testimony shows, and there can be little doubt on the subject, that Martin Miller went upon the land under a lease from South for the purpose of protecting the land from wrongful entries by trespassers, and that he was to hold during his life. The lease was recorded, and the clerk's office afterward destroyed by fire, but the clerk or his deputy testified to recording it, and the admissions of Miller, together with other proof as to the existence of the lease, settle that question beyond dispute. That South and Buck entered under a tax title that may be irregular, is immaterial—neither the patentee or the original owner are asserting any claim to this land—and the tenant entering under South can not make the question.

The manner of entry and the mode of holding by Martin Miller and his son, Jeremiah, being clearly established, the question as to how South and Buck derived title is not necessary to be looked to. There is nothing in the record showing a conveyance by South of this land to another, and the deed exhibited for the purpose of showing that South had divested himself of title, does not authorize such conclusion, in fact, it is apparent that it is not the same land. There was ample time for all parties to prepare this case for hearing, and there was no reason on the part of the chancellor for indulging the parties in their effort to delay the submission.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

GREENWOOD V. STROTHER.

(*Filed Oct.* 8, 1890—*Not to be reported.*)

Landlord and tenant—Statute of frauds—Contract not to be performed within a year—In January, 1889, the appellant and apellee entered into a parol contract of lease of a farm to appellant for a consideration agreed on between appellant and appellee for a term of one year, to commence March 1, 1889,

and to end March 1, 1890. The appellee refused to deliver the possession of the farm as agreed upon, and the appellant instituted this action against him to recover $110 in damages.

A demurrer to the petition was sustained, and the petition dismissed, from which this appeal is prosecuted. *Held*—That subsections 6 and 7 of section 1, chapter 22, General Statutes, apply alike to contracts relating to realty and personalty, and as this lease was *not to be performed within one year from the making thereof*, it is embraced in subsection 7 and will not be enforced.

Morris & Peak for appellant.

McCain & Carroll for appellee.

Appeal from Trimble Circuit Court.

Opinion of the court by Judge Yost.

In January, 1889, the appellant and appellee entered into a parol contract, by the terms of which appellee leased to the appellant for a consideration, agreed upon between them, a farm in Trimble county, for a term of one year, to commence March 1, 1889, and to end March 1, 1890.

The appellee refused to deliver the possession of the farm as agreed upon, and the appellant instituted this action against him, seeking to recover $110 in damages for the breach of the contract.

To this petition the appellee filed a general demurrer, which was sustained by the court, and the appellant electing to plead no further, his petition was dismissed, and from that judgment this appeal was taken.

This case involves the construction of subsections 6 and 7 of section 1, chapter 22, of the General Statutes, which, so far as they bear upon the question at issue here, are as follows:

SEC. 6. "No action shall be brought to charge any person upon any contract for the sale of real estate or any lease thereof, for a longer term than one year."

SEC. 7. "Nor upon any agreement which is not to be performed within one year from the making thereof, unless the contract or agreement * * * shall be in writing."

The question to be considered in this opinion is: Is a parol lease of land for one year, made in January, to begin in March, valid or invalid? In other words, does the 7th subsection apply to contracts for the lease of land, when the terms begin in the future and is to last a year, or does it apply only to contracts not relating to sales or leases of land?

Brief and simple as this clause of the statute seems to be, it has been subjected to more critical discussion and a greater variety of opinions have been expressed and delivered about the question here involved than possibly about any other section of our laws.

The courts in many of the States having a similar statute have construed it, and we will now consider a few of those cases. The case of Young v. Dake, 5 New York, 463, is a leading case, is cited as authority by the courts of Indiana, Iowa and Michigan, and followed by them.

In that case the Court of Appeals held that a parol agreement to lease real estate for a term of one year, to begin in the future, was valid, basing the opinion upon the theory that the second section of their statute (our 7) had reference only to conveyances and contracts relative to goods, chattels and things in action, and that none of its provisions had any application to or effect upon contracts or

agreements concerning lands or interest in land, while the 1st section (our 6) performed that office.

An examination, however, of the New York Statute of Frauds shows that there was at that time omitted from the 2d section (our 7) the words "from the making thereof," and the court seems to have decided that case on that omission, using the following language: "The question is whether the lease or contract, in order to be valid, must be confined to one year from the time of granting or entering into it. The statute does not say so. There is no word or expression which would seem to attach any such qualification or condition to a parol lease or contract of letting for a year, as that it shall commence immediately, and can not be made to commence at some future day. The appellant * * * insists * * * that the words 'from the making thereof' are to be supplied, so that these sections of the Revised Statutes must be understood as having the same qualification * * which existed in the old statute," but had been omitted from the new. The court refused to supply the words, holding that this omission was intended by the Legislature as an amendment to the former statutes. "Now who can say," said the court, "or can have the right to say that when the alterations and amendments were made in the law, the Legislature did not intend to dispense entirely with the qualification which *the latter words would seem to import.* Omitting to re-enact those words shows conclusively a design to take off the restriction they were calculated to impose as not being necessary when the letting should be but for a single year."

It is easy to reconcile this opinion with the New York statute.

With the first section providing that no action should be brought upon a parol contract for the lease of land for a longer term than one year, it would seem a surplusage to apply the second section, which only provides that no action should be brought on a parol contract not to be performed within a year, to contracts touching realty, as they must then both mean one and the same thing.

In our statute, however, the seventh section, broadening in its scope, takes in all contracts which can not be performed within a year "from the making thereof," making their invalidity depend not only upon their duration, but to the time when they were to begin and applying alike to contracts relating to realty or personalty. The expression "from the making thereof" is the very core of the section, and shows plainly the breadth of its purpose and intention.

In our opinion the whole tendency of the language of the opinion in this case is to show that if the words had not been omitted the court would have followed the decision of the Supreme Court of New York in Cromwell v. Crain, 7 Barbour, 192, which it overruled.

The Supreme Court of Michigan, in Whiting v. Ahlert, 52 Mich., 462, held that an oral agreement for a lease of one year, to commence in the future, is valid, but in the statute of frauds of that State we find the provision corresponding with our sixth section in a chapter under the title of "Fraudulent conveyances and contracts relating to land." While that corresponding with our seventh section is in a chapter under the title of "Fraudulent conveyances and contracts relating to goods, chattels and things in action." This clearly evinced the intention of the Legislature that one section should apply solely to contracts touching land, and the other to contracts touching personalty, and the court properly construed the law in the case cited.

The Supreme Court of Iowa, in Sobey v. Bisbee, 20 Iowa, 105, and

Jones v. Marcy, 49 Iowa, 188; and the Appellate Court of Indiana, in Fall v. Hazlerigg, 45 Indiana, 576; Baynes v. Chastain, 68 Indiana, 380, and Railsback v. Walker, 81 Indiana, 412, in construing statutes similar to ours held that that section of their statutes of frauds which declares that no action shall be brought upon any parol agreement not to be performed within one year from the making thereof is not applicable to agreements in relation to real property.

Upon the other hand Taylor, in his work on landlord and tenants, in discussing this question, says, that by the English statutes of frauds also, every agreement not in writing and signed by the party to be charged therewith is void, if not to be performed within a year from the making thereof; and that a verbal agreement to lease land must, by the English authorities, commence from the making of the agreement and can not be made to commence at a future day.

Brown, in his work on statute on frauds, says that this section includes all contracts which are of such a duration, whether they concern personalty or realty.

The Supreme Court of Georgia, in Attwood v. Norton, 31 Ga., 509; the Supreme Court of Illinois, in Comstock v. Ward, 22 Ill., 248; the Supreme Court of Massachusetts, in Delano v. Cushing, 4 Cushing, 44; the Supreme Court of Alabama, in Cromelin v. Whip, 31 Alabama, 412; and the Court of Appeals of Missouri, in Briar v. Robertson, 19 Mo., 66, and Sharpe v. Rhiel, 55 Mo., 97; in construing statutes, having the same provisions as our own, held that a parol contract for the lease of land for a year, to begin in the future, was obnoxious to the statutes of frauds in that it was an agreement not to be performed within a year from the making thereof.

If our own courts had not passed upon this question we would still conclude that not only the weight of authorities but the better reasoning induces us to hold that such contracts come within the statute of frauds and can not be enforced. It seems to us a strained construction to contend that the 6th section fills all of the offices touching contracts concerning real property, and the 7th, although using the language, "upon *any* agreement," must be held to refer only to those contracts not relating to realty. It is certainly reasonable to presume that the Legislature intended to make the several provisions uniform, and the 7th subsection to apply to all contracts, whether the agreement was for the use of real estate or about any other matter concerning which an agreement could be made.

But this section has been construed, both by this court and the Court of Appeals. This court, in Waters v. Holmes, 8 KY. LAW REP., 780, held that a contract made in October, 1880, for the renting a tract of land, the term to begin March 1, 1881, and to end March 1, 1882, was not a contract to be performed within a year, and not being in writing could not be enforced.

The Court of Appeals, in Roberts v. Tennells, 3 Mar., 247, took the same view of this section, and as this decision seems to have been overlooked, we will give the principal points at issue in the case, which was an action of replevin brought by Tennells v. Roberts for the taking of a horse under a distress warrant.

Tennells entered upon a tract of land belonging to Roberts under the following parol contract: On the 19th of January, 1820, Roberts delivered to a third party a bond to Tennells for the land, and Tennells gave to Roberts his note for $100, due Sept. 4, 1821. It was agreed upon between them that if Tennells paid off the note when due, the party holding the bond was to deliver it to him, and the

land was to be his, but if he failed to pay it the bond was to be given to Roberts and Tennells was to pay him $25 a year rent for the land. Tennells failed to pay the note, and after he had occupied the land for two years Roberts sued out a distress warrant for the rent due.

Chief Justice Boyle, in delivering the opinion of the court, said: "It may perhaps be doubted whether the transaction * * * ought to be considered as an immediate lease of the land for two years subject to be converted into an absolute purchase on the payment by Tennells of the note, or an immediate sale of the land liable to become a lease for two years in case of his failure to pay the note. It is, however, not material in which light it is considered, for in either case it will obviously come within the statute against frauds and perjuries, as there was no memorandum in writing of the lease or the payment of the rent. Nor is it material whether we consider the transaction as coming within the provision of the statutes in relation to a lease for more than a year, or within that provision which relates to agreements not to be performed within a year. In either case the effect upon the contract must be the same.

This decision of the highest court of our State is conclusive.

We, therefore, hold that the 7th section of our statute of frauds applies to every contract, regardless of its subject-matter, which is not to be finally and fully performed within one year from the making thereof. A parol contract for the rental of land for one year, the term to begin in the future, is, within the statute of frauds, and can not be enforced. The demurrer to appellant's petition ought to have been sustained.

Judgment affirmed.

Judge Young not sitting.

SUPERIOR COURT ABSTRACTS.

SOWDERS, &c. v. CITIZENS' NATIONAL BANK OF LANCASTER.

Filed September 24, 1890. Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge YOST, reversing.

1. *Where a party signs his name to a blank bill or note*, either as drawer, maker or indorser, and delivers it to another, he thereby makes the holder his agent, the blank signature operating as a general letter of credit, which authorizes the party to whom it is delivered to fill it up in any manner not inconsistent with the character of the paper, and an agreement between the signer and the person to whom the paper is delivered that it is to be filled up for a certain amount, or in a particular way, will not affect one who takes the paper without notice of the agreement.

2. *Conditional signing of note*—A surety can not escape liability upon a note, upon the ground that he signed it upon condition that another was to sign it, unless the holder had notice of the agreement.

3. *National banks—Usury*—If a national bank stipulates for more than the legal rate of interest it forfeits all interest, and can recover only the principal. National banks are amenable to the penalties denounced by the act of Congress establishing them, and not to penalties denounced by State laws.

Crawford & Mason for appellants; James D. Black for appellee.

BRADY'S ASS'EE v. MATTINGLY.

Filed September 24, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge YOST, affirming.

1. *Pleading legal conclusion*—In an action by a surety to enforce a mortgage executed by the principal to indemnify him, the defendant having admitted, by his failure to deny, that plaintiff signed the note as his surety, and had paid the same, his averment that the mortgage was without consideration was but a legal conclusion, and of no value. While a plea which avers that a note, bond or other like instrument was given without any consideration, is good, the answer in this case does not come within the rule.

2. *Consideration for mortgage*—The defendant's denial that he agreed to sell the mortgaged property and pay the proceeds, or any part thereof, to the plaintiff, did not constitute a defense, for the reason that the plaintiff, if he had a mortgage lien, was entitled to the proceeds of sale, whether defendant had promised to pay the same to him or not.

H. P. Cooper for appellant; Thompson & McChord for appellee.

BRINEY v. HAYDEN'S ADM'R.

Filed September 24, 1890. Appeal from Nelson Circuit Court. Opinion of the court by Judge YOUNG, affirming.

1. *Assignment "without recourse"—Fraud*—A note executed for the purchase price of land was assigned by the vendor "without recourse," the vendor representing that the note was a lien upon the land, and that he would not execute a deed until all the purchase money, including the assigned note, was paid. The vendor, however, at the request of the vendee, fraudulently conveyed the land to a third party without retaining a lien. *Held*—That the assignor is liable, notwithstanding the fact he assigned the note "without recourse."

2. *Limitation* began to run in favor of the assignor against the assignee only from the time when the assignee discovered the fraud, there being nothing to show that he might, by the exercise of reasonable diligence, have discovered it sooner. The fraudulent conveyance was not constructive notice.

John S. Kelly for appellant; John D. Wickliffe for appellee.

RAGLAND, &C. v. BLAKEMAN.

Filed October 1, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge YOST, affirming.

1. *Collateral attack on judgment*—A final judgment in an action for the settlement of a decedent's estate is a bar to an action by one of the distributees against the administrator to recover a sum with which she alleges she was falsely and fraudulently charged by him, the charge complained of having been reported by the commissioner, and his report confirmed, and judgment rendered thereon.

2. *Jurisdiction to vacate judgment*—The Marion Circuit Court had no jurisdiction to question a judgment of the Green Circuit Court, nor to surcharge a settlement of an administrator, made before the proper tribunal in Green county.

Thompson & McChord for appellants; Samuel Avritt for appellee.

COMMONWEALTH, FOR USE, &C. v. HAMPTON, &C.

Filed October 1, 1890. Appeal from Boyd Circuit Court. Opinion of the court by Judge YOST, reversing as to trustee, and affirming as to his sureties.

The trustee of the jury fund has no authority to collect that portion of fines and forfeitures given by law to Commonwealth attorneys or county attorneys, and if he does so, the sureties on his bond are not liable therefor.

T. R. Brown and John J. Montague for appellant; John F. Hager and L. T. Moore for appellees.

VAUGH v. DEYE.

Filed September 24, 1890. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge BARBOUR, affirming.

In a suit for the settlement of a decedent's estate the assets in the hands of the administrator being insufficient to pay the debts, the chancellor, instead of ordering a sale of the land, directed the commissioner to rent it out until the rents received should pay the debts, no objection being made. While the action was still pending and awaiting the receipts of the rents, the administrator was required by the court to pay, and did pay, several demands presented against the estate, and which were not included in the order fixing the amount to be realized from the rents. *Held*—That upon a partial transcript this court must presume that these claims were valid claims against the estate, and that the court properly required the administrator to pay them, and that it was proper to substitute the administrator to the rights of the claimants.

W. B. Harrison for appellant; Russell & Russell for appellee.

GABLE, &c. v. GABLE'S ADM'R.

Filed September 24, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Judge YOUNG, affirming.

1. *Verbal gifts between husband and wife* ought not to be admitted except upon clear and satisfactory proof that the property of the donor was vested in the donee.

2. *It is essential to the validity of a gift* that it should go into effect at once and completely; therefore, delivery is essential.

3. *Gift by husband to wife*—A husband who was a locomotive engineer brought home a sum of money and laid it on the table, saying to his wife: "This money is yours, in case anything happens to me on the road." After this declaration, he deposited the money in bank to his own credit, and afterward drew it out and lent it, taking the note payable to his wife. *Held*—That there was a gift of the money by the husband to the wife, and that he acted merely as her agent in lending it. The declaration of the husband was not intended as a condition, but as a reason for the gift.

E. S. Watts for appellants; George Weissinger Smith for appellee.

KIMBALL, &c. v. THURMAN, &c.

Filed September 24, 1890. Appeal from Larue Circuit Court. Opinion of the court by Judge YOUNG, reversing.

1. *Bond of county judge—Time of execution*—A county judge is required to execute bond within thirty days after his election and before he enters upon the discharge of his duties. Therefore, the fact that the bond of a county judge was executed several days before the day on which his term of office commenced does not render it void.

2. *Same—Approval by clerk*—Under a statute requiring the county judge to execute before the clerk of the circuit court a covenant with sufficient surety "to be approved by said clerk," the clerk's attestation of the bond is sufficient evidence of his approval. A formal certificate of approval is not necessary. But even if the statute required such a certificate its omission would not render the bond void.

J. P. Hobson for appellants; Twyman & Twyman and J. W. Gore for appellee.

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KENTUCKY COURT OF APPEALS.

HERR, &C. v. MARTIN.

(*Filed Sept.* 13, 1890.)

Jurisdiction—Restoring title to land.—Appellants allege, in their petition, that they are the owners of a tract of land in Butler county, but are non-residents of said county, and have not the possession of said land, and that the appellee has not posesssion of it; that in 1882 they sold said land to appellee, for which he was to pay the price agreed; that he refused to accept the deed tendered, because he had fraudulently procured the deputy sheriff of said county to sell said land for a supposed tax of $3.70 for 1881, at which sale appellee became the purchaser, and fraudulently procured a deed to be made to him by the deputy sheriff; that said sale was void, because no assessment of said land had been made. They ask that said deed be set aside. *Held*—That said petition states a cause of action, a court of equity having jurisdiction to restore to appellants the title wrested from them by the fraudulent acts of appellee, although appellants have not possession of the land. This action differs from an action to remove a cloud from a title in this: that in the latter action the plaintiff, in order to maintain the action, must have both the legal title and the possession.

B. L. D. Guffy and W. S. Taylor for appellants.

H. A. James and H. T. Clark for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Bennett.

The appellants allege in their petition and amended petition that they are the owners of a certain tract of land in Butler county; that they are non-residents of the county, and have not the possession of said land, and the appellee has not the possession of it; that in 1882 they "sold" said land to the appellee, for which he was to

pay the sum of $600; that they sent a deed of conveyance, acknowledged, &c., to the Morgantown Deposit Bank, to be delivered to the appellee; but he refused to accept the same, because he had, in the meantime, fraudulently procured the deputy sheriff of said county to sell said land for a supposed tax of $3.70 for 1881; that said land had not been listed for taxation; that by reason thereof the sheriff had no right to sell the same; that the appellee fraudulently "procured and induced" the said deputy to sell said land for said tax, &c., and, the appellee having purchased the same, to make him a deed therefor. He asks that said deed be set aside, &c. A demurrer was sustained to the petition and the amended petition upon the ground, it is supposed, that the appellant, not being in the possession of the land, could not maintain an action to have this fraudulent sale of his property set aside.

The Legislature of this State in 1854 empowered any person, having the legal title and possession of land, to proceed, by action in equity, &c., against any person setting up claim thereto, to establish his title to said land; and, if established, to quiet the same. There was a similar statute of this State before the adoption of the Revised Statutes. These statutes have been construed to confer a right in the nature of an action, "*Quia temel.*" Such action has been held by some courts to be in favor of persons not in the possession of the land to quiet title to it, where the adversary was not in the possession of it, upon the ground that it was the only remedy to redress the injury to the title; but the Legislature of this State has limited the right to institute such actions to persons in the possession of the land, and having a legal title to it.

It is supposed that the Legislature limited the right to sue to persons having the legal title and the possession of the land, for the reason that none but those possessing the perfect right to the land, to-wit: the possession and right to the possession and legal title, should have the right to institute such action against any person who clouded, or attempted to cloud, his perfect right with an adverse claim of title which might, in a business point of view, if not in a legal point, seriously affect the market value of his estate, and be a constant menace to his enjoyment of his perfect right.

But said statute does not relate to an effort to deprive one of his title by converting it to the party's use. Such effort is not clouding the other person's title by asserting a superior legal title, but is a deprivation of the title by converting the same to the use of the person seizing it. It is the wrongful seizing his title that is the foundation of the action. Asserting a paramount adverse title to the land is a cloud upon the title of the other party, but to seize his title is to deprive him of his right to his estate.

In the first named case the person must have the legal title and the possession in order to maintain his action to remove the cloud from his title. In the latter case he can maintain his action, although not in the possession as readily as if the injury was done to the corpus of his estate. Here it is said the appellee wrongfully caused the appellant's title to be seized and sold, and he purchased it. He asks that this sale be set aside, and his title be restored to him. By this wrongful act he is deprived of his title. He asks a court of equity to set this sale aside and restore to him his title. How can he get his title back unless the chancellor does this? It is his only remedy for the wrongful act, and to deny him this remedy is to deny him even-handed justice.

The judgment is reversed and remanded, with directions to overrule the demurrer to petition and amended petition.

ROBB V. HANNAH'S EX'OR, &C.

(*Filed Sept.* 16, 1890—*Not to be reported.*)

1. *Commissioner's report—Exceptions*—The exceptions filed by the appellant to the commissioner's report of sale were properly overruled where the testimony of all the witnesses shows that the land sold for more than two-thirds of the price fixed by the appraisers, besides, admitting that the land sold for an inadequate price, mere inadequacy of price is no ground for setting aside a judicial sale, the sale having been made in accordance with the judgment and appraisement is approved.

2. *Easement*—The owner of an easement having become owner of the land over which it was a servitude, the easement is extinguished, and the failure to set up the easement by pleading was a waiver of its existence, of which appellant can not complain.

3. *Pleading—Parties to actions*—The filing of an amended petition bringing before the court a remote vendor, whose lien for purchase money had not been released of record, was advantageous to appellant.

4. *Rents*—The court having, after the confirmation of the sale, limited the entry of the purchaser to the land not in cultivation, and assessed the rents against appellant for the land covered by crops, the same is approved.

D. G. Falconer and A. Duvall for appellant.

J. D. Hunt for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal by the debtor and owner of land from judgment overruling his exceptions to and confirming a decretal sale thereof, and from a judgment rendered between time of the first judgment and the sale in the same case determining the relative rights of himself and the purchaser.

No question can be considered as to the length of time since the persons selected and sworn to appraise the land had actually been on or seen it, for as it was sold for more than two-thirds of the value fixed upon it by any of the witnesses who testified on trial of exceptions to the sale, we do not perceive how appellant was prejuliced by the want of necessary knowledge on part of the appraisers, even if they be decided not qualified, which certainly could not be done in face of the commissioner's certificate, and their own oath to discharge the duties required of them.

It appears that originally 173 acres of the land sold and another tract of about forty-four acres were owned by different persons, but at the time of the judgment appellant was owner of both, and, as a legal result, the right of way, which was once an easement attached to the forty-four acres, as also the servitude with which the 173 acres was incumbered ceased to exist; and it was not an error to adjudge the 173 acres sold as unincumbered land, especially as appellant failed to set up by pleading or otherwise before judgment his right of way as an easement, belonging to the forty-four acres, which was not sold.

Appellant is not entitled, as matter of either fact or law, to the third exception. For the evidence does not show the price at which the land sold was grossly inadequate; and it is well settled that where a judgment sale of land is, in every other respect, legal and fair, mere inadequacy of price is not sufficient to authorize a chancellor to set it aside.

The commissioner made no mistake or error to the prejudice of

appellant in the form of advertisement of the sale, for it was sold in accordance with both the advertisement and judgment.

We do not perceive how it was possible for appellant to be prejudiced; on the contrary it was to his advantage, for the plaintiff, by amended petition, to bring before the court a remote vendor for the purpose of having his lien for purchase money, which had not been released of record, adjudged according to the fact already satisfied and discharged.

Appellant being in possession when the sale was confirmed, and having crops not matured and harvested, it became necessary for the chancellor to determine and fix the relative rights and interests of him and the purchaser. And as the latter was thereafter entitled to possession and enjoyment of the land, the only equitable adjustment that could have been made was to limit the right of his entry to such parts of the land as were not in actual cultivation, and to require appellant to pay a reasonable rent for use thereafter of so much as he had in his growing crops.

The evidence seems to sustain the court as to amount and value of each fixed; and, therefore, both judgments appealed from are affirmed.

SCHOOLER V. TURNER, &C.

(*Filed Sept.* 16, 1890—*Not to be reported*)

1. *Gaming—Action by stranger to recover winnings—Pleadings—Answer*—In an action by a stranger, under section 4, article 1, chapter 47, General Statutes, to recover of the winnner money lost at gaming, the answer alleging that before the action was brought the winner had in good faith settled with the loser, constitues a valid defense.

2. *Instructions*—The court properly instructed the jury "if the money lost had been returned in good faith and was not intended as a mere device to enable the defendant to evade the statute or to retain part of their winnings, they must find for the defendant."

W. A. Sudduth and Young, Mitchell & Young for appellant.

Peters & Tyler for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Pryor.

This court, in Barnes v. Turner, 4 Met., 114, and Caldwell v. Caldwell, 2 Bush, 446, held, in effect, that where the loser settled with the winner in good faith, before suit brought by a stranger, it constituted a valid defense.

In this case Turner, Gatewood and others won of McGowan near $2,000, and before the claim of the stranger appellant was asserted under the statute they settled with McGowan by refunding what had been lost by him. Section 4 of article 1, chapter 47, provides, "that where the loser, or his creditor, fail within six months to sue for what has been lost, any other person may sue the winner, and recover treble the amount or value of the thing lost," &c.

It was, therefore, only a question of good faith between these parties, and if they did, in fact, refund to McGowan what they had won from him, with the understanding or agreement that he was to account in some other way, the defense is a valid one.

The testimony on the subject is positive and uncontradicted, and

we perceive no objection to any of the instructions given. The instruction refused had been, in substance, given by the court.

The court told the jury: If the money lost had been returned in good faith, and was not intended as a mere device to enable the defendants to evade the statute, or to retain part of their winnings, they must find for the defendant.

The instruction refused was, that if the settlement was not made in good faith, but was a device to evade the gaming laws, then the law is for the plaintiffs. We perceive no material difference in the instruction given for the plaintiff and that refused.

The judgment below is affirmed.

ALEXANDER'S EX'ORS V. ALFORD, SURVIVING PARTNER, &C.

(*Filed Feb.* 22, 1883.)

Guardian and ward—Witness—Partnership—Set-off—D., who was guardian of T., became insolvent and resigned his trust, and an action having been instituted against D. and A., his surety, to recover the amount due T., and the executors of A., the surety, having paid off the amount due the ward, are seeking to subject certain moneys owing D. by Alford & Co. to indemnify them, on the ground that it is money belonging to the ward, and which was loaned them as a part of the trust fund. They seek to be substituted to the right of the ward, having paid off the debt. Alford & Co. say they have a claim against D. for a much larger sum than the amount they are owing him and have pleaded it as a set-off. The note executed to D. by Alford & Co. was made payable to him in his own right, and not as guardian, and the dealings between Alford & Co. and D. conducted as if the money belonged to D. and not to his ward. The member of the firm to whom D. loaned the money is dead, and the real party to the transaction, D., to whom the note is made payable, was introduced as a witness to show that the firm, through the deceased member, borrowing the money, knew that it was the money of the ward, and borrowed as such. *Held*—That D. was incompetent to testify as to the transaction had with a deceased partner, where such testimony would tend to charge a living member of the firm with a liability. The testimony offered would deprive Alford & Co. of their right of set-off against the note with which they are charged. The assignment by D. of his interest in the debt against Alford & Co. did not render him competent as a witness. Sections 2 and 9, section 605, Civil Code of Practice, construed.

D. W. Lindsey for appellants.

Buckner & Allen, Porter & Wallace and Alford & Smith for appellees.

Appeal from Woodford Court of Common Pleas.

Opinion of the court by Judge Pryor.

Davenport, who was the guardian of young Troutman, became insolvent, resigned his trust, and Witherspoon, having been appointed guardian in his stead, brought his action against Davenport and his surety (or the executors of his surety) on the guardian's bond to recover the amount for which Davenport was liable. The executors of Alexander (the surety) paid off the amount due the ward of Davenport, and are now seeking to subject certain moneys owing Davenport by O. P. Alford & Co., to indemnify them, on the ground that it is money belonging to the ward, and which was

loaned them as a part of the trust fund. They seek to be substituted to the rights of the ward, having paid off the debt. Alford & Co. say they have a claim against Davenport for a much larger sum than the amount they are owing him, and have pleaded it as a set-off. The note executed to Davenport by Alford & Co. was made payable to him in his own right, and not as guardian, and the dealings between Alford & Co. and Davenport conducted as if the money belonged to Davenport, and not to his ward. The member of the firm to whom Davenport loaned the money is dead, and the real party to the transaction, Davenport, to whom the note is made payable, is introduced as a witness to show that the firm, through the deceased member borrowing the money, knew that it was the money of the ward, and borrowed it as such.

Subsection 2 of section 606, Civil Code, contains the following provision: "No person shall testify for himself concerning any verbal statement of, or any transaction with, one who is dead when the testimony is given," &c.

Subsection 9 provides: "The assignment of a claim by a person who is incompetent to testify for himself, shall not make him competent to testify for another."

The entire transaction was had in this case with the deceased partner, and the testimony of Davenport alone conduces to establish knowledge on the part of the deceased partner that the money borrowed belonged to the ward. The subsequent transactions between the firm of Alford & Co. and Davenport show an individual liability on the part of the latter for a much larger sum than the firm is owing him, by reason of the note in controversy. The testimony of Davenport defeats the right of the appellee, as surviving partner, to plead the claim as a set-off to the note, and changed the legal effect of the obligation. It is argued, however, that there is no controversy between the surviving partner and Davenport, but an issue as to whether the money due, evidenced by the note, is the money of the ward or that of Davenport, to whom the note was executed. There is more in the issue than the mere question as to whom this money actually belonged at the time it was loaned. The effect of the testimony of Davenport is to show knowledge on the part of the firm, and to change the character of the obligation by making the firm pay to one with whom they never contracted, and at the same time deprive them of the right to set-off the amount owing them by Davenport against this note. The interest of the witness may be in equipoise, or he may be testifying against his interest, still his testimony affects the rights of those who are not present to speak with reference to the transaction, and in rendering all competent to testify, this was made an exception, and for the purpose of denying to one the right to testify for himself, when the person with whom he had the transaction can not be heard to speak. Interest does not now exclude one from testifying, but when testifying for himself, or when he has assigned the claim, and would have been incompetent, if he had not assigned it, he can not testify against one who is dead, with reference to the transaction, although he may have divested himself of all interest. It is to protect the estates and interests of those who can not speak that this exception is made, and the exception can not be disregarded, because the party who made the contract, and had the right to make it, has no longer any interest in the subject-matter of controversy. Davenport still holds the note of the firm, and his right to maintain an action upon it in his own name is unquestioned. Suppose he had instituted his action against the surviving partner, with the allega-

tion that the note was made payable to him as an individual by mistake; that it should have been executed to him as guardian, and the deceased partner was so informed when the money was loaned. The surviving partner denies any such knowledge, and pleads, as a set-off, his note or account against Davenport, will it be insisted that Davenport would be competent, as a witness, to defeat the claim to a set-off, and change the character of the paper, when the partner with whom he contracted, was dead? The interest of Davenport in such a case might be to testify that it was his own money, because then it would go to discharge his indebtedness to the firm; but, as before stated, the interest of the witness in such a case is not the subject of inquiry, but the question is: Does the statement made affect the rights of the party who is dead? If so, he is incompetent, the whole object of the statute being to place the dead and the living upon terms of perfect equality in this particular; the one not being able to testify, the other shall not. An administrator or executor, or the assignor of a note, without recourse, were competent witnesses prior to the testimony act, and they are still competent, but can not testify as to transactions had, although in a fiducial capacity with one who is dead, and for no other reason than that the party against whom they are testifying can not be heard. A party, who makes a contract with another, either in his own right, or as a fiduciary, will not be allowed to testify against one who is dead, in reference to the transaction with him, unless called on by the adverse party, or unless the decedent, or his representative, or some one interested in his estate, shall have testified, with reference thereto, or the agent has testified, or is living when such person offers to testify with reference thereto. In each and every such case the party, where none of the exceptions exist, is testifying for himself, and his assignment of his claim or right can not affect the question of competency. Here the contract was with Davenport. He had the right to make it, either as guardian, or in his own right, but he can not be called on to detail what took place between him and the deceased partner, so as to bring knowledge to the firm of the fact that the money borrowed was a trust fund. The relations of Davenport to his ward being changed can not affect the question. When these parties borrowed the money and executed these notes they had the right to deal with him, upon the faith of their obligation to him individually, and that when he contracted the debt to the firm it can not be met and discharged by their indebtedness to him. In the case of Lawhorn v. Carter, 10 Bush, —, it was held "that an opposing party is not a competent witness to prove what took place between himself and a deceased partner in the absence of the surviving partner." There is no proof that the surviving partner was present, or knew the nature of the borrowing, otherwise than as shown by the note, and as Davenport was not a competent witness, if he had sued in his own name, and could not make himself competent by alleging it, the chancellor, under no rule of law or equity, must undertake to substitute the appellants to his right, or that of his ward, in order that he might speak of the transaction between himself and the dead. Nor will the chancellor take hold of slight circumstances in this case, evidencing knowledge on the part of the firm, for the purpose of making them lose the debt, instead of the sureties in the guardian's bond. The loss must fall on either the surety or the appellees, and as the note does not evidence any liability to the ward, and the proof showing transactions between Davenport and the appellees, by which a mutual indebtedness exists, there would be no equity in

taking the money from the appellees under such circumstances, and applying it to what Davenport owes the executor, or to substitute them to the rights of the ward. The money borrowed was without ear marks, and nothing enabling the appellees to know it was trust property, or to place them on inquiry; and the ward, in the absence of stronger proof than appears in this case (excluding the testimony of Davenport) could not have defeated the right of the firm to the set-off pleaded.

The relief sought was properly denied, and the judgment is affirmed.

See Hobb's ex'or v. Russell's ex'or, 79 Ky., 61, deciding the same question.

DEPP V. L. & N. R. R. CO.

(*Filed Sept.* 18, 1890—*Not to be reported.*)

Pleading—Petition—A petition for damages for personal injuries alleging that appellant was induced by the conductor of appellee's train, upon which he was a passenger, to alight from it in the night time before it reached the platform at the station of his destination, the petition further alleging that the accident occurred on the —— day of ————, 1888. Upon the failure of appellant to make the allegations of his petition more specific the action was dismissed. *Held*—That the petition states a cause of action. The court may dismiss an action where the averments of the petition are so uncertain in character that it can not well be determined whether sufficient facts are or not stated, although objection be not taken by demurrer. In such a case no ground for relief is presented.

The objection urged to the petition that appellant was not in fault is not tenable for contributory neglect in a case like this, is a matter of defense. It is further urged that the petition should have stated the date of the accident, which being shown, might prove that the action was barred by limitation. This objection could only be made available by plea.

Boles & Duff and Wm. P. D. Bush for appellant.

Wm. Lindsay and Lewis McQuown for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice Holt.

Damages for personal injuries are sought in this action by the appellant, Peter Depp, upon the ground that he was induced by the conductor of the appellee's train, upon which he was a passenger, to alight from it in the night time before it reached the platform at the station of his destination.

He was required to make the averments of his petition more certain and definite as to the manner in which the accident occurred. He responded that he could not do so, and, thereupon, the action was dismissed.

If a petition fails to state the facts essential to the maintenance of the action, or the averments are so uncertain in character that it can not well be determined whether they are or are not stated, the action may be dismissed, although objection be not taken by demurrer. In such a case no ground for relief is presented.

It is contended that the action of the lower court must be sustained, because the petition does not aver that the appellant was not in fault; and also because it avers that the accident occurred on

the —— day of ——, 1888, and the action was not brought until March, 1889. It is said that if the date of the accident had not been left blank, it might appear from the petition that the action, when brought, was barred by limitation, the time for suing in such a case being limited to one year.

Contributory neglect in a case like this is a matter of defense; and even if the petition had shown that more than a year had elapsed from the time of the accident until the bringing of the suit, yet the defense of limitation could only have been made available by plea. Moreover, the appellant was only required to make his petition more definite as to *the manner* of the injury.

It avers, in substance, that he was a passenger upon the train; that by the negligence of the conductor he was induced and directed to step off the train before it reached the platform, the conductor saying to him, "you are now at the right place," and that in doing so his injuries were received.

These averments are sufficiently certain and definite to support the action. The petition does not show that the train was in motion when appellant attempted to alight. It may fairly be taken, from its statements, that the train had stopped before it reached the platform, and that the appellant was then told by the conductor, "you are now at the right place."

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

WILSON'S ASS'EE V. BEAM.

(*Filed Sept.* 18, 1890—*Not to be reported.*)

Statute of frauds—Verbal sale of land—Appellant, as assignee of W., sold his land at public auction to appellee, who finding that he could not give the personal security required by the terms of sale; wrote to appellant, renouncing his purchase; subsequently the appellant made another contract of sale of the land to appellee for the price fixed at the former sale, but the first payment to be secured by mortgage on some personal property. In an action for a breach of the new contract, *Held*—The new contract for sale of land, being verbal, will not be enforced.

C. T. Atkinson for appellant.

Jno. S. Kelley for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, as the assignee of B. A. Wilson, sold the latter's land at auction, and the appellee purchased it at the price of $4,000, but was unable to give personal surety for the price, which the terms of the sale required him to do. He, upon finding that he was unable to give the surety, wrote to the appellant the following letter:

"Sorry to inform you that I can not give bond on that land that was sold at Bicomfield; therefore, will have to let it go." This letter, in plain terms, renounces the purchase of the land, and the appellant did not reject the renouncement, but entered into a new agreement, relative to the purchase of the same, which was, in effect, that the appellee was to take the land at the same price that he bid

for it at the auction sale, and secure the first payment by mortgage on some personal property. This agreement, taking said letter renouncing the purchase as a basis, amounted to a new contract of purchase, and it is this breach of the new contract that is the alleged cause of action, and said agreement being verbal, no action for its breach can be maintained.

The judgment is affirmed.

GOOCH V. BENGE.

(*Filed Sept.* 18, 1890.)

Auditor's deed—Insufficient description of land—In an action to recover land purchased under sale by an auditor's agent under an act, entitled "an act to amend the revenue laws," approved May 6, 1880, for which the purchaser holds a deed from the auditor, describing the land sold as "thirty acres of land, located in Yates' precinct, Madison county, Kentucky, adjoining the land of William Witt, and listed for the year 1881 in the name of Rice Benge, being the same property sold for taxes under said act of the General Assembly." *Held*—That no recovery can be had under said deed and sale because of insufficient *description* of the land sold.

The description of the land, to authorize a recovery, must be such as to "clearly show the tract intended," and that it is necessary that the location or boundary be accurately described in the deed or certificate of sale without reference to any other paper or pleading in the case.

Stephen D. Parrish for appellant.

C. F. & A. R. Burnam for appellee.

Appeal from Madison Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellant, claiming title under a conveyance to him from the auditor of public accounts, brought this action to recover of appellee a tract of land, described in the deed, as follows: "Thirty acres of land, located in Yates precinct, Madison county, Kentucky, adjoining the lands of William Witt, and listed for the year 1881, in the name of Rice Benge, being the same property sold for taxes under an act of the General Assembly, entitled 'An act to amend the revenue laws,' approved May 6, 1880, and purchased by the party of the second part, as certified to said Fayette Hewitt, auditor aforesaid, by Rankin Mason, auditor's agent, duly appointed and qualified for the county of Madison, State of Kentucky."

Section 1, of the statute referred to, being now part of chapter 92, General Statutes, requires the auditor to "make out for each county a list of all lands which may have been returned to him as having been sold in that county, and bought in by the State for taxes, or other indebtedness to the State, upon which the equity of redemption shall have expired, *describing* such lands, and charging them with the amount of delinquent tax," &c.

By section 2 he is required to cause a copy of such list to be published for four weeks, together with notice that so much of said lands as may be necessary to discharge the taxes, &c., which may be due thereon, will be sold at public auction.

Section 6 provides, that after payment of the purchase price shall be made, the agent of the auditor shall give to the purchaser a cer-

tificate in writing, *describing* the land so purchased and the sum paid, which certificate shall entitle the holder to possession of the premises therein *described;* and on presentation of such certificate to the auditor he shall receive a deed thereto, which shall vest in the grantee an absolute estate in fee simple.

Being, in substance, so provided as to such cases in section 19, it must be presumed here, in absence of allegation and proof by appellee to the contrary, that the land, attempted to be described in the deed, was subject to taxation at date of the assessment of the tax for which it was sold; that the taxes, for non-payment of which the land was sold, were not paid to the proper officer within the time limited therefor; that it had been assessed for taxes, for non-payment of which it was sold; that it had not been redeemed pursuant to law; and that no certificate in proper form had been given by the proper officer, within the time limited by law for paying the tax, or redeeming from sale made for non-payment thereof, stating that no taxes were due, or that the land was subject to redemption.

But manifestly there may be, and in section 20 express provision is made in contemplation of possible existence of causes, other than those enumerated in section 19, which will render conveyances by the auditor invalid and ineffectual to pass tax titles to purchasers. One of such indispensable conditions is, that land shall, as provided in section 1, be described by the auditor in advertising sale of it; and also, as provided by section 6, in the certificate given by the agent of the auditor to the purchaser. For without description of each tract a fair sale could not be made; the holder of the certificate could not legally claim, nor be put in possession; nor could the auditor's deed made, as it must, in accordance with the certificate presented to him, be rendered at all certain as to the land conveyed, nor, consequently, effectual for any purpose.

The main inquiry then is, whether the description contained in the deed in question is definite and certain enough to pass title of the land in dispute to appellant, or, in language of the statute, "vest in the grantee an absolute estate in fee simple."

Section 14 provides, that "the sale of lands shall not be invalid on account of such having been listed or charged in *any other name* than the rightful owner." But the statute contains no other rule by which the degree of certainty, in the description required, is to be ascertained and determined; nor has the precise question, now presented, been heretofore passed on by this court.

In Allen v. Robinson, 3 Bibb., 326, there was a variance as to the *quantity* of land between the list sent out by the auditor and the certificate of purchase, and the deed to the purchaser, which was held not to invalidate the title; this language being used: "The law regulating the conduct of the auditor does not require any particular description to be observed, and every purpose of justice is abundantly answered by a description which *clearly* shows the tract intended."

In Graves v. Hayden, 2 Little, 62, the court said: "We can perceive, in fact, no possible principle upon which a mistake in quantity of the tract sold for taxes, if there be otherwise a sufficient description to *identify* it, can be held to vitiate the sale."

Though, under the statute in question, a mistake as to the person's name in which the land may be listed or charged will not invalidate the sale; nor, as seems to be settled by this court, a mistake in the quantity of land will vitiate the sale; nevertheless, the description must be sufficient, in the language of one of the cases cited,

"to clearly show the tract intended," and of the other to "identify it," neither of which can be done, it seems to us, unless the actual location or boundary be accurately described; and it was, therefore, said in Currie v. Fowler, 5 J. J. M., 145, that while a variance in quantity might be cured by other evidence establishing the identity of the land sold, there was no case which formed a precedent for getting over a variance in the water-course upon which the land was situated. It is true there existed, when the land was sold in that case, a statute requiring the water-course on which the land was situated to be mentioned. But the design of that statute, as said in the case cited, was "to identify the tract, and enable the officer, in his advertisement, to describe it accurately, if it became necessary to sell it, and to enable those who might be disposed to purchase to find it by description, to ascertain its value, and to regulate their bids accordingly." And although there is now no statute containing that special requirement, the reason still exists for such an accurate description of land listed and sold for taxes, as will enable the officer selling and those disposed to purchase, to find it, and ascertain the character of it by the description given.

In Lawless v. Barger, 8 Bush, 665, which was an action to enforce a vendor's lien, it was held that the judgment in such case should be so certain and specific in its directions to the commission in the description of the property to be sold by him, as well as other duties to be performed in its execution, as would enable that officer to discharge those duties, without reference to any other paper or pleading in the case, and the commissioner should be equally as definite in making his report."

And in Ross v. Adams, 13 Bush, 370, it was said that interest of parties to judicial sales, as well as of purchasers, invoked a strict adherence to previous adjudication on that subject.

We perceive no reason why the same rule should not be applied to sales and conveyances of lands for taxes. For direction of the auditor to his agent to sell land for non-payment of taxes is, in the nature of a judgment, and as effectual as the direction of the chancellor to sell land for non-payment of a debt, with the difference that the owner in the latter case has notice, by actual summons, before judgment is rendered, while the other has not.

In our opinion, according to a reasonable construction of the statute, there should be in the certificate given to the purchaser, and, consequently, in the deed executed by the auditor, such an inteligible and accurate description of land sold for non-payment of taxes as to secure identification of it, without reference to or inspection of other papers.

The description given in the deed to appellant, which is, of course, the same as that in the certificate of purchase, is too meagre and uncertain to enable any person to thereby identify the land. For though the quantity of land, the precinct in which it is situated, and the fact it adjoins the lands of William Witt, are stated, it does not appear which one, of several tracts he may own, it adjoins, on which side or end of any one of them it lies; nor is the course of any line or situation or character of any landmark or other object mentioned.

In our opinion the land which appellant seeks to recover is not described in the deed under which he claims, as required by the statute, and, consequently, he did not acquire a valid title thereto.

Although appellant was entitled to judgment for the amount, $5, bid by him at the sale, together with twenty per cent. interest thereon, and a sale of the land to satisfy his claim, the lower court inad-

iled to render such judgment. But we do not consider
on sufficient ground for reversal, inasmuch as appellant
cept the money when tendered by appellee, and may
it.
t affirmed.

GERMAN INS. CO. V. READ'S EX'TX, &C.

(*Filed June* 19, 1890—*Not to be reported.*)

to property insured—Death of insured—A. policy of fire insurance,
by appellant, an insurance company, to indemnify R. against
e and lightning on his house, furniture, wearing apparel, sewing
nd provisions for the period of five years.
e death of R. the property was burned, and this action was insti-
he policy by his widow, as his sole devisee, to recover the amount
s sustained, to which the defense is urged that the title of the
a the property was divested by his death, and no recovery can,
, be had. *Held*—Such defense is insufficient.
ructions—Fraudulent valuations—The court having instructed the
merating the different items of property insured, and the value of
d given the further instructions, at the instance of defendant, in
to both fraudulent representation of value in the original applica-
d also as to fraudulent proof of value after the fire occurred; and
y, failing to find any fraudulent valuation by the insured or his
, it will not be presumed that they found in their verdict the valua-
any item of property not destroyed by fire.

n S. Kelley for appellant.

. D. Wickliffe for appellees.

peal from Nelson Circuit Court.

inion of the court by Chief Justice Lewis.

ppellant, the German Insurance Company, of Freeport, Illinois,
policy of insurance, dated May 24, 1886, and issued to F. S. and
. Read, agreed to make good unto the insured, their executors,
inistrators and assigns, all such immediate loss or damage, not
eeding in amount the sum insured; nor the interest of the
ured in a dwelling-house, furniture, wearing apparel, provisions
l sewing machine, as might happen by fire and lightning to the
perty during a period of five years, beginning May 24, 1886.
This action was brought against appellant by Sallie T. Read,
ecutrix, and also styled sole devisee of F. S. Read, who died in
87, to recover value of property insured, which, it is alleged in
e petition, was totally destroyed by fire, occurring, without fault
f the plaintiff, or any other person, on January 15, 1888. And
pon final trial a verdict and judgment was rendered in favor of
he plaintiff for $1,948.44. As the property insured was destroyed
after death of F. S. Read, in whom title of the property was, but
within the period of five years from date of policy, the main ques-
tion is, whether the policy was in force at date of the fire, or ceased,
at death of the insured, to be of force.

It is not necessary to consider that question at length, because the identical question was presented, considered and determined in the case of Joseph Richardson's adm'r v. the German Insurance Co., of Freeport, Illinois, decided at the present term of this court.

It was in that case decided the policy, which contained the same provisions, and recited causes of forfeiture as are in the one under consideration, did not become void or inoperative upon and by reason alone of death of the insured.

It is alleged in the petition by appellee, T. S. Read, who was wife of F. S. Read, that her name was put in the policy for some reason unknown to her, and she disclaims any insurable interest in the policy, except in virtue of the will of her husband, stating the contract was really with F. S. Read alone; and, consequently, the simple question, just mentioned, was presented and passed on in the lower court.

One other defense made was alleged over-valuation of the property in the application for insurance, which applies to the dwelling-house alone, as no complaint was made on that account in reference to the other property.

The whole amount of property insured was $2,000, the dwelling-house being valued at $1,500.

As held by this court in Germania Ins. Co. v. Rudwig, &c., 80 Ky., 223: "Before such defense can prevail it must appear that the party falsely, and with purpose of deceiving the company, or its agent, placed an over-valuation on the property insured." And we think the issue on that subject was fairly, and in accordance with the rule thus laid down, presented by instruction of the court to the jury, and the verdict being against appellant on the facts, can not be disturbed by this court.

Judgment affirmed.

Chief Justice Lewis delivered the following response:

Instruction No. 1, given at the instance of the plaintiff, of which counsel in the petition for rehearing complains, it is true, enumerates the different items of property insured, and the value of each, as fixed in the policy. But instructions were given at instance of the defendant, in respect to both fraudulent representation of value in the original application, and also as to fraudulent proof of value after the fire occurred. And, of course, in the absence of such fraud, not only were the parties to the policy bound by the value fixed by them, but the jury was also bound to find for the plaintiff verdict for the value of each item of property destroyed, and necessarily the aggregate value of all that was destroyed.

But they were not authorized to find the value of any one or more of the items, not actually destroyed; and we do not think the instruction complained of, fairly construed, does authorize the jury to include in their verdict value of any single item of property, unless they believed, from the evidence, it was destroyed. For being limited in their finding to the value of each item, as stated in the instruction, they could not, being men of ordinary intelligence, construe that instruction as authorizing them to find any greater value, nor any more than the aggregate of each item, proved to have been destroyed.

Petition overruled.

ARNOLD, &C. v. ARNOLD.

(*Filed Sept.* 20, 1890—*Not to be reported.*)

d maintenance—Fraudulent conveyance—From a judgment allow-
, as wife of appellant who had abandoned her, $125 per
:ven years, to be paid in installments of $30 each at
every three months, as alimony and maintenance of their
l; also adjudging a conveyance, made by appellant to his
raudulent, and giving to appellee a lien on said land for the pay-
.id allowance, subject to a lien of $500, paid by appellant's
)urchase money, appellants have appealed. *Held*—That said al-
reasonable, and the judgment setting aside the conveyance, sub-
claim of $500 purchase money, is as favorable as appellants
in view of the facts that appellant seduced and had carnal
of appellee when she was under sixteen years of age, under
marriage, which promise he failed to keep, but upon arriving at
l a settlement with his guardian, and made the conveyance of his
s mother, and fled to the State of Missouri, from which he was
n a charge of felony, and was only discharged from custody by
with appellee, with whom he lived but a short time.

S. Clements for appellants.

W. Lewis and W. C. McChord for appellee.

al from Washington Circuit Court.

.on of the court by Judge Lewis.

:llee, Johanna C. Arnold, brought this action to recover of
sband, John M. Arnold, who had abandoned her, a proper
t for alimony and maintenance of their infant child, Julia
l, to whom he had, as alleged, fraudulently conveyed his
)eing also made defendant. The judgment of the court was,
ie appellee recover of John M. Arnold the sum of $120 per
for the period of seven years, to be paid in installments of $30
at end of every three months; that the attachment, issued at
ıencement of the action, be sustained, and the sale and con-
ıce by him to his mother, Julia Arnold, be set aside. It was
er adjudged that appellee has a lien on the tract of land, which
be enforced at any time to satisfy the amount mentioned,
:, however, subordinate to a lien in favor of Julia Arnold for
, paid by her as part of purchase price of the land.

ppellee alleged in her petition that in 1886 she, being under
een years of age, was seduced and gotten with child by John
Arnold upon a promise of marriage, with which he afterward
ısed to comply. And, as appears from the evidence, December
886, when he became twenty-one years of age, he had a settle-
nt with Julia Arnold, his mother and guardian; was paid by
r what was coming to him, and thereupon, for expressed conside-
ion of $1,000, conveyed to her his tract of ninety-eight acres of
ıd, and soon after left the State. But he was, upon a requisition,
rested and brought back to this State to answer a prosecution for
ie offense of seducing and having carnal knowledge of a female
nder sixteen years of age, under promise of marriage, punished by
ıtute as a felony. And in order to procure a discontinuance of that
rosecution, which the statute provides may be done in that way,
ie, in February, 1887, married appellee. But after cohabiting with
ıer a few weeks, he abandoned her; and after birth of her child in
April, 1887, of whom he is the father, she brought this action.

It seems to us the amount allowed by the court is not, as argued by counsel, unreasonable; nor can the manner and time in which it is required to be paid by him be considered illegal or irregular. But for his perfidious contract of marriage, in February, 1887, by which he undertook to faithfully perform all the duties of a husband, including support and maintenance of her and children thereafter born to them, he would have been subject, not only to a civil action for damages to a much greater sum, but also to conviction and punishment for the felony committed by him.

It was, in discretion of the chancellor, to require the amount adjudged to be paid in installments, and such discretion was not abused by him.

We think the evidence shows that the sale and conveyance by him to his mother of the tract of land was made to hinder and defraud his creditors. For the circumstances under which the transaction took place, and conduct of the parties, show he was in haste to leave the State, and made the conveyance to prevent the land being made subject to the claim of appellee.

The chancellor did not err, therefore, in setting the sale aside, and might have given appellee prior lien on the land to secure satisfaction of the judgment. But he seems to have concluded Julia Arnold had paid $500 of the purchase price, and gave her prior lien for that sum, which was more favorable to her than he need to have made the judgment.

Judgment affirmed.

STAFFORD V. BRUCE & CO.

(*Filed Sept.* 20, 1890—*Not to be reported.*)

1. *Bills and notes—Release of indorsers by laches of holder.* In this action, it is sought to hold the appellant liable as indorser on five notes, executed by the Louisville Express and District Telegraph Company, and indorsed by appellant to appellee. Said makers were, at the date of the maturity of the first two notes, residents of Louisville, and the holders failed to institute action on said notes until nine or ten days after their maturity. *Held*—The indorsers are released by such laches of the holders, it appearing that the Common Pleas Court of Jefferson county is always open for litigants, and all cases may stand for hearing in said court at any time after twenty days' service of process on defendants in Jefferson county.

2. *Request for indulgence by indorser.* A request not to sue the makers of a note, made by an indorser after his release, does not authorize a recovery against him, but such request, if made before his release, is a waiver of diligence required against the makers.

Wm. Lindsay, A. E. Wilson and E. S. Watts for appellant.

C. H. Gibson for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

Appeal from the Superior Court.

The Louisville Express & District Telegraph Company became indebted to the appellee, Bruce & Co., evidenced by five promissory notes, payable at stipulated periods, and all of them indorsed or assigned by the appellant, Stafford.

of *nulla bona* having been made by the sheriff upon issued or judgments obtained by the appellees against ıy, the present action was instituted to recover of the afford, who pleads in defense the laches of the holder ing the obligor to insolvency.

pany and its chief officers resided in the city of Louis- by an act establishing the common pleas court, or an ıt to it, that court is always open for litigants, "*and* all sum- uted in any action in said court twenty days, if executed n county, or thirty days, if executed in any other county :e, shall be sufficient to authorize the plaintiff or defend- ɔe the action on the trial docket for hearing," &c. Some n days elapsed after the two notes first maturing fell due t was instituted, and by analogy to cases heretofore de- :his court, such a delay must be regarded as laches on the ıe assignee, and as releasing the indorser from liability, r to continue the liability of the assignment, must sue at the of the court, obtain his judgment, and have his execution d returned no property found.

ıre to bring the action at the first term of the court releases nor. In Green v. Page, 80 Ky., 368, a delay of three days to be unreasonable, but a delay of nine or ten days, without ıse for not suing, should be held to discharge the indorser; ɪrefore, as to the two notes, no recovery against the assignor ɔe had.

laimed by the appellee as to all these notes that the assignor ɔ, because it was at his request that suits were not instituted, s promise to pay without suit. The trouble as to the two ıentioned is, that the assignor was released before the 9th of y, 1885, when it is said this agreement was made, and, there- ıe mere agreement or provision to pay, without suit, can not ıis liability on paper that had already ceased to exist.

as at best only a waiver on the part of the assignor of his legal , and the provision to pay can only affect the notes upon which bility existed, then due and to become due.

jury, by a special verdict, said: That Stafford agreed, with laintiff that he would pay the notes, without suit against the ɪr, and requested the appellees not to bring suit; that the ap- ɛs were induced to delay by reason of these provisions is mani- we think, from the testimony.

e appellant was a large stockholder in the company, and its dent, or at least had been its chief officer; had taken a mort- to indemnify him against these liabilities, as well as other obli- ons upon which he was bound. The company was insolvent, the prosecution of an action against it would have only lessened distributable share of each creditor; but whether so or not the jury, upon the testimony, has said that the delay in suing was ɪibutable to the action of the appellant, and there was certainly of in the cause authorizing such a conclusion. There was noth- ɪin the subsequent conduct of the appellant, or his attorney, that prived the appellee of the benefit of the waiver on the part of the pellant. The letter of the attorney is an invitation to the appel- ɛs to aid in an equitable action to foreclose the mortgage to Stafford, which the claims of other creditors might be made subordinate those of the appellees. The object then seems to have been on ıe part of the appellant to hold on to the indemnity to save the ap- ellees, and, doubtless, because of his previous promise to pay them ɪithout suit, although the contents of the letter would induce the

belief that appellant was making an effort to avoid any personal liability.

In addition to what has already been said in this case it seems to to the court that the promise, if made by the appellant, and we must assume that it was made, from the special findings before us, it was not intended to waive any legal right of the appellant, or to hold him bound upon notes upon which, as an assignor, he had already been released. Besides, the assignment was that of a mere accommodation indorser, and no consideration actually passed from the appellee to the appellant when he became bound as assignor. The forbearance to sue is a sufficient consideration for the promise to pay, but under the facts of this case the promise, as proven, should not be held to apply to notes upon which no liability existed. The appellee is entitled to a judgment for the amount of the three notes, last maturing, and the interest.

The judgment is reversed that such a judgment may be entered.

MCFARLAND V. WASHINGTON.

(*Filed Sept.* 20, 1890—*Not to be reported.*)

Homestead—Abandonment—From the judgment of the lower court, upon the law and facts being submitted to it, finding that there had been no abandonment of his homestead right by a defendant in an execution, this appeal is prosecuted. *Held*—The judgment is affirmed, as it appears that the owner of a homestead in the city of Owensboro removed to leased premises in the country in the spring of 1884, for the purpose of raising tobacco, and that by two other distinct contracts for the years 1885 and 1886 he remained away from his home, but returned to it in January, 1887. In the mean time the sheriff had made sale and deed to his property. The homestead right was not forfeited, because the removal was only temporary, with an intention to return and make it a home.

Owen & Ellis for appellant.

R. H. & E. P. Taylor for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is, whether appellee had homestead exemption right to the land in contest when it was sold under execution. If he did, then appellant acquired no title by his purchase and sheriff's deed, and, consequently, no right to recover the land. It appears from finding of facts by the court, trial by jury having been waived, that appellee was at date of sale, and continued to be, a *bona fide* housekeeper, with a family, consisting of a wife and children; that as such he occupied the land in dispute, situated in the city of Owensboro, for several years, up to the spring of 1884, when he removed temporarily to the country for the purpose of raising a crop of tobacco upon the land of Taylor, with whom he made a contract therefor; that he made two other similar, but distinct contracts, for the years 1885 and 1886, and returned to and reoccupied his place in Owensboro, January, 1887, which was subsequent to purchase by, and date of the sheriff's deed to, appellant. The further fact was found that appellee did not have a pur-

doning his homestead, but left it temporarily, and with
return.
state of case we think appellee did not lose the statu-
or, as has been frequently held by this court, the home-
s never forfeited when there has been an occupancy and
orary removal, with an intention to return and make
s a home.
ore, the homestead of appellee was of less value than
lant acquired no right to it by his purchase, and the judg-
med.

STEINRIEDE V. TEGGE.

WINDISCH, JR. & CO. V. SAME.

SCHNITKER V. SAME.

(*Filed Sept.* 13, 1890—*Not to be reported.*)

nt conveyance—The chancellor, having decided that the convey-
ht to be set aside as fraudulent, were based upon the considera-
uring to the infant ward of grantors her estate, that decision
d disturbed.

& Fenley and A. P. Schmidt for appellant.

oebel for appellee.

l from Kenton Chancery Court.

n of the court by Judge Pryor.

pparent from the testimony that the conveyances made by
nd wife to Mary Schurestman, in December, 1880, were based
uable consideration, and that the object was to secure and
he amount due the latter as their ward.
ettlements showing the indebtedness are all filed, and there
ng in the sale, whether looking to the value of the property
ed or the object to be accomplished, to authorize the chan-
o vacate the deeds.
e was a man of no means, and this was the only mode of se-
the ward. Whether the chancellor should have permitted
ransactions to be assailed on the ground of fraud or for other
s by an amended petition, offered to be filed after the cause
en submitted, was a question addressed to the discretion of
ancellor. Depositions had been taken in this case, that had
pending for some time, the case, fully prepared upon the
made in the original pleadings, and it was too late to permit
issues to be made after submission, even if the facts authorized
elief sought by the amendment, a question not necessary or
er to be now determined.
dgment affirmed.

LOUISVILLE SOUTHERN R. R. CO. V. MINOGUE.

(*Filed Sept.* 13, 1890.)

Negligence—Damages—Punitive and compensatory—Excessive verdict—The appellee, a lady passenger upon a train of appellant company, was thrown from her seat and injured by a shock caused by a construction train running into the rear of the passenger coach, and was awarded a verdict for $10,000 damages in an action for such injury against said company. On appeal, it is urged that said verdict is excessive, being the result of prejudice or improper sympathy. *Held*—That the verdict is excessive. The petition charged the company with gross neglect, and the verdict is presumed to include both compensatory and punitive damages. Where compensatory damages alone are given the court may, without difficulty, pass upon the adequacy thereof, because they, in part, admit of exact measurement. The court may, with increased caution, pass upon the question of punitive damages. In the present case, there is no evidence of an intentional injury to any one, but there is evidence of an effort upon the part of the employes on the passenger train to flag the approaching construction train, and the evidence of the physicians as to the extent of injury suffered by the appellee, not indicating whether the partial paralysis she now suffers will be permanent or merely temporary, the verdict, as returned, should be set aside.

Railroad companies, as to their passengers, should be held to the exercise of the utmost care and skill which prudent persons should be likely to exercise as to themselves, under the like circumstances, and in the conduct of a business so hazardous as railroading; but in the absence of bad motive or purpose of injury, or a neglect so wanton as to demand the severest punishment, and where it is utterly uncertain what the result of an injury will be, a verdict for such a sum as has been awarded to the appellee strikes one at first blush as the result of either prejudice toward the offending party, or an undue sympathy for the one injured.

L. C. Willis, E. Frazier and Thos. W. Bullitt for appellant.

Gilbert & Foree, Matt O'Doherty and R. C. Davis for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Holt.

A train of the appellant was delayed by the air-brakes failing to work. It was overtaken by a construction train of the company, which was known to those in charge of the passenger train to be but a few minutes behind it, and a collision occurred, the only damage to the passenger train being the destruction of the rear platform of its rear car. The appellee, Mary J. Minouge, who was a passenger upon it, was by the jar of the collision thrown from her seat to the floor of the car, in which she was riding, and for the injuries she thereby sustained she brought this action for damages, averring that they resulted from the gross neglect of the appellant's agents, who were operating the trains. It is claimed this neglect consisted in failing to exercise care in flagging the coming train.

The evidence is somewhat conflicting as to whether this was done in time to have enabled it to stop before overtaking the passenger train; but whether the fault lay in neglect in this respect, or in the rear train, if it had sufficient notice to enable it to do so, failing to check up, need not be considered, because whether the one or the other, the testimony is of such a character as authorized the question of the existence or non-existence of gross neglect upon the part of the company's agents to be submitted to the jury.

rned a verdict for $10,000. It is urged that this verdict
of the evidence, so excessive, that conceding it embraces
nsatory and punitive damages, yet this court should re-
dgment.
ence of ordinary neglect in such a case authorizes com-
amages, while gross neglect permits the jury to award
are both compensatory and punitive. In this instance
they thought proper, were authorized by the instruc-
d both.
they have gone beyond reasonable limit must be deter-
he conduct of the company's agents, connected with the
nd the character of the appellee's injuries.
ie rule for the measurement of compensatory damages
matter largely to the discretion of the jury, yet the find-
be within the confines of reason.
nust exemplary damages be reasonably adequate to the
fault.
ellee sustained internal bruises, and her nervous system
ly shocked.
s evidence tending to show, however, that it had been
t impaired by previous events.
liately after the accident she walked to a friend's house
and soon after rode home in a vehicle, a distance of several
She was confined to her bed for seven or eight weeks, and
from nervousness and sleeplessness. Since she left her bed,
walked about her room, and been to town once or twice, but
unable to do any work. The accident occurred in October;
was tried in March following, and this, briefly stated, was
lition during that period. None of her bones were broken,
ne time since the accident, if not ever since, she has been
d with partial paralysis, or an insensibility in one leg from
e down.
probable duration of her injuries is not shown by the testi-
Whether they are of a permanent character does not ap-
The medical testimony, which was introduced, is utterly
sfactory in this respect. The burden rested upon the appellee
w the extent of her injuries. If of a permanent character, she
l have shown it. A perusal of the evidence creates no satis-
y opinion upon this point, and leaves the matter in entire
. The physicians, who testified, say she may recover entirely
he may not.
s impossible to measure, with any thing like absolutely certainty,
mount of punitive damages proper in a case, or the extent of
of the elements of those which are compensatory. The opin-
f a jury has been, and properly, no doubt, regarded as the best
ns of even a fair approximation, and every verdict should be
ed, *prima facie*, as the result of honest judgment upon their
. They are the constitutional triers of the facts of a case, and
ts should exercise great caution in interfering with their ver-
s. Litigants must not be left, however, to their arbitrary will,
be without remedy in cases where verdicts can be accounted for
y upon the theory that they are the result of an improper sym-
hy, or unreasonable prejudice.
n such cases it is one of the highest duties of a court to interfere,
erwise great wrongs will often result, and the party be remediless.
Whether it should do so is more easily determinable in a case
here compensatory damages only are allowable, because they in part
limit of exact measurement. In such cases this court has often re-

versed the jury's finding. We see no reason why it should not do so in a case like this one, but with increased caution, perhaps.

In the case now presented there was no intentional injury. An effort was made to flag the coming train, and those in charge of it attempted, upon notice of the danger, to stop it. Whether these efforts were of such a character as left the company open to the charge of gross neglect, was a question for the jury; but no purpose to injure is shown; and while it was properly a question for the determination of the jury, whether the company's agents had not been guilty of such neglect as merited punishment by way of punitive damages, yet, in our opinion, a case was not presented by the evidence for a verdict of $10,000, either upon the score of punishment or compensation, or both. It is true that railroad companies, as to their passengers, should be held to the exercise of the utmost care and skill, which prudent persons would be likely to exercise as to themselves, under the like circumstances, and in the conduct of a business so hazardous as railroading; but in the absence of bad motive or purpose of injury, or a neglect so wanton as to demand the severest punishment, and where it is utterly uncertain what the result of an injury will be, a verdict for such a sum as has been awarded to the appellee strikes one at first blush as the result of either prejudice toward the offending party or an undue sympathy for the one injured.

While absolute certainty as to the result of an injury should not be required, yet a mere conjecture, or even a probability do not warrant the giving of damages for future disability, which may never be realized.

The future effect of the injury should be shown with reasonable certainty, to authorize damages upon the score of permanent injury.

This was not done in this case. The evidence shows that the appellee is as likely to entirely recover, and perhaps, in a short period of time, as she is to be permanently affected by the injury.

To sustain a verdict like this one, under such circumstances, would often result in the grossest injustice, and its existence can be accounted for only upon the ground that the jury were swayed by prejudice or an improper controlling sympathy.

The judgment is, therefore, reversed, and the cause remanded for a new trial consistent with this opinion.

SMITHWICK V. WINTERSMITH.

(*Filed Sept.* 18, 1890—*Not to be reported.*)

Trusts Defeasible fee -D., by a deed executed to G., in trust for his two daughters, Jane and Hannah D., by the terms of the conveyance G. was to hold the land conveyed for the uses and purposes mentioned. "*that is to say*, that the said two hundred acres of land and every part and parcel thereof, with all and singular the appurtenances, in trust for the use of Jane D., and until the said Jane shall arrive to the age of twenty-one years, or for the use of the heirs of her body lawfully begotten, and in case the said Jane should die without heir as aforesaid, or before she arrives at the age stipulated, then the said trust is to continue in G., his heirs, &c., for the use and benefit of Hannah and the heirs of her body lawfully begotten."

Jane married and arrived at the age of twenty-one years, and afterwards with her husband conveyed the land in fee simple to appellee's vendor. The children of Jane in this suit are claiming the land as beneficiaries under said conveyance. *Held*—That the arrival of Jane at the age of twenty-one years ended the trust, and she then held the fee simple title to

The conveyance to her was a fee simple, subject to be divested event of her dying before she arrived at twenty-one years of

ish and J. P. Hobson for appellant.

E. Gaither, Montgomery & Poston and Fairleigh & Straus ee.

from Hardin Circuit Court.

ı of the court by Judge Pryor.

avidson had two children, Jane and Hannah Davidson. rried Lewis and had by him children. The children of the appellants in this case, claiming a tract of land that st was conveyed to a trustee for the benefit of their mother fe, and at her death to her children. The mother and her conveyed this land by an absolute deed to Huffman, and llee holds under Huffman, claiming that Jane, the mother ppellants, was vested with the fee and had full power in tion with her husband to pass the title to her vendee.

itle was acquired in this way: The father of Jane Lewis one John Vanmeter to execute a conveyance to one Amohagen, his heirs, &c., in trust for his two daughters, Jane nnah. Geohagen, by the terms of the conveyance, was to e land for the uses and purposes mentioned, "*that is, to say*, e said two hundred acres of land, and every part and parcel , with all and singular the appurtenances in trust for the use of avidson, of Hardin county, and until the said Jane shall arthe age of twenty-one years, or for the use of the heirs of her lawfully begotten; and in case the said Jane should die withir, as aforesaid, or before she arrives at the age stipulated, then d trust is to continue in Ambrose Geohagen, his heirs, &c., e use and benefit of Hannah, and the heirs of her body, lebegotten, forever."

daughter, Jane, arrived at the age of twenty-one years, and ustee having died, and the parties believing the trust had terted, the heirs of the trustee conveyed the property in fee to

It seems to us the purpose of the grantor was to vest in Jane bsolute fee upon her arriving at the age of twenty-one, and the to vest in her children, should she die before reaching that age. conveyance was in trust *until she arrived at twenty-one years*, hen the trust ended, unless she died before that time, leaving heirs er body, and then the trust was to continue for them; and if she without heirs, the estate passed to her sister, Hannah, all the isions having reference to Jane's dying before she was of age. ie will is not aptly drawn, but is sufficiently plain to show that fee passed from her in the event of her dying before the period ıtioned, "and in case the said Jane should die without heirs, as esaid," has reference clearly to her dying before the period when estate passed without children, "*or before she arrives at the age ulated*" without children, then the estate was to pass to Hannah, sister. There is nothing on the face of the instrument showing intention to create a life estate in Jane, but the grantor intending at the title should become absolute in Jane, when she arrived at e, was inserting provisions in the instrument by which it should ss to others if his daughter should die before the event, the hapning of which vested her with an indefeasible fee. If dying be-

fore twenty-one her children were to take, and if no children, her sister, Hannah, was made the benificiary. The trust, by an express clause in the deed, terminated as to Jane when she reached the age mentioned, and its continuance is only provided for in the event she died before that period.

This is conclusive as to the intent of the grantor when considered in connection with the grant to those who were to take upon the contingencies mentioned. This trust is to end when Jane arrives at age, because she is then vested with the absolute estate, but if the contingency happens upon which her children are to take the trust is to continue, &c. The grantor certainly did not propose to give the estate to Jane for twenty-one years only. There is no conveyance of a life estate, and it was manifestly the intention of the grantor to pass the fee to Jane, to be divested if she should die within the period mentioned. She held the estate without limitation or condition after arriving at age.

The judgment below is affirmed.

SKAGGS, &C. V. HILL, &C.

(Filed Sept. 18, 1890—*Not to be reported*)

Lien—Attorney's fees—Clerk's and examiner's fees—A person, having qualified as guardian of two infants and received estate belonging to them, conveyed voluntarily to his son a tract of land containing about seventy-five acres. After the death of the guardian his successor, as guardian, brought this action against the son of the former guardian, alleging that the land conveyed to him was purchased with money belonging to the wards, and asking that the land be subjected to the payment of the indebtedness of the former guardian. Subsequent to the institution of the suit the wards became of age, and compromised the suit, by the terms of which the suit was to be dismissed. All parties, except the guardian, pleaded the compromise, and asked that the suit be dismissed.

At this stage of the proceedings the attorney, who had prosecuted the action, and the clerk and an examiner, united as parties to the action, alleging further, that had not the parties compromised the action plaintiff would have recovered judgment, and asked that they be adjudged a lien on the land for their fees for services rendered the plaintiff in said action. *Held*—That the attorney is entitled to a lien on the land in litigation for a reasonable attorney's fee, as it is alleged that the wards received a valuable consideration by the compromise, but as to the fees of the clerk and examiner, their claim of lien is denied.

H. P. Cooper for appellants.

Rives & Spalding, Sam'l Avritt and C. S. Hill for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Holt.

John Skaggs, as the statutory guardian of John and Elizabeth Skaggs, received estate belonging to them. He thereafter purchased a tract of land, containing about seventy-five acres, and had the title made to his son, the appellant, John D. Skaggs.

After the death of the father, and in 1886, E. H. Kirtley, who had succeeded him as guardian, brought this action against John D. Skaggs, claiming that the former guardian was indebted to the

he land had, in fact, been purchased with their money; eyance to the appellant was a voluntary one, merely, to subject it to the payment of the indebtedness of the lian.

t to the institution of the suit the wards became of age, ıde a compromise with the appellant, by the terms of ction was to be dismissed, the claimants paying their They pleaded the compromise, as did also the appellant, ave Kirtley, asking that the action be dismissed.

age of the proceedings the appellee, Samuel Avritt, who he attorney for Kirtley as guardian, and as such, had d prosecuted the action by petition, made himself a party and asserted a lien upon the land in contest for his fee. ees, R. G. Hill and G. C. Averitt, also united with him tion, claiming a like lien for the sums due them from the or services rendered to him in the action as clerk of the examiner in taking depositions in it, respectively.

er court allowed their respective claims as a lien against ordered a sale of it, and it has been sold for the amount of the cost, in all $82.38, after being appraised at $200, the Hill, becoming the purchaser.

s nothing in the pleadings or testimony showing that the not susceptible of division. The record shows that it was in the country; that it was a considerable tract; and upon e of case we must presume it could have been divided with- erially impairing its value.

ıdgment appealed from, and which was rendered on Decem- 888, was, therefore, erroneous, inasmuch as it directs the sale ntire tract, and the report of the sale shows that it brought ount of the judgment. There is another objection to it, how- hich arises in advance of this one.

urged by the appellant that where a plaintiff dismisses his *bona fide*, receiving nothing from the defendant, the attor- the plaintiff has no lien upon whatever may have been in t, and can look alone to the plaintiff for his fee.

is true. It was so held by this court in Rowe, ex'r, v. Fogle, Ky. Law Rep., 689, and the appellant says, as is true, that etition of the appellees does not aver that the plaintiffs in btained anything of value from him by reason of the com- ise. He also says they were not entitled to recover anything. his amended answer, setting up the compromise, he, however, "By said agreement this defendant paid off and settled all is of every description of said John Skaggs and Elizabeth Car- (formerly Skaggs)."

oreover, the record tends strongly to show that the plaintiffs in ction were entitled to recover, and would have done so but for compromise.

nder this state of case the attorney was, in our opinion, entitled ne lien, which was adjudged to him, and which is derived alto- ıer from the statute. We know of no statutory provision or n equitable rule, however, which gives to the clerk or an exam- r a lien for what the plaintiff in an action may owe them upon atever may be in contest, or which enables them by way of lien look to the defendant or his property for pay for services rendered them to the plaintiff. In case of a recovery by the latter, they ay, for what he may owe them for services rendered in the action, ve an endorsement for their benefit of the judgment *pro tanto*, d then look to the defendant for it; but that is not this case.

Upon the contrary, in a case like this, these officers must look to the plaintiff for their compensation, and the court erred in adjudging to Hill and G. C. Averitt any lien upon the land. The petition as to them should have been dismissed, and a judgment entered allowing the lien of the appellee, Samuel Avritt, alone, and providing for its enforcement by a sale of so much of the land as might be necessary for its satisfaction.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

BATEMAN V. CITY OF COVINGTON.

(*Filed Sept.* 18, 1890.)

Municipal government—Power to lease wharf—The city council of Covington having leased to appellant the exclusive privileges of a wharf bordering on the Ohio river for a term of years, at the time of the lease one Shinkle had possession of it, and in an action by appellant to recover damages for failure to place him in possession of said wharf, *Held*—That the city council, having no legislative authority conferred upon it to lease the privileges of the wharf to an individual in antagonism to the rights of the public, exceeded its powers in making said lease, and the court properly dismissed the action.

Cleary & Hamilton for appellant.

Wm. A Byrne for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The city of Covington, the appellee in this case, leased to the appellants, Bateman & Woods, for the period of five years a part of its wharf bordering on the Ohio river, being a small strip of land between the river and the parallel street. The appellants were invested with all the rights of the city, and were given by the terms of the lease complete control of the wharf, binding themselves to use the ground for wharf privileges only. At the time of the lease Shinkle was in possession of the wharf, using it for his own purposes, and the city failing or refusing to place the lessees in possession, they brought this action to recover damages for a violation of the contract on the part of the city. There was a demurrer to the petition, and the demurrer sustained on the ground that the city council had no power to make such a contract, and divest the city of the right to control its wharf for the use and benefit of the public.

We perceive no authority in the city charter or any legislative enactment empowering the city to make such a contract or to deprive the public of its use. The city has the power to impose certain duties upon those availing themselves of wharf privileges, and to make such regulations as may be necessary to keep the wharf in repair for public use, but it has no power to confer such absolute control to an individual who leases it for his own private use. The city must control the use, and for this purpose may place the ground in charge of a wharf master or some agent, who acts for the city, that the public may enjoy the use. A city has the exclusive control of its streets, and a like control over its wharfs, and in appro-

e use of either for the benefit of a private person, to the of the public, it is going beyond its power, and such a void.

is a mere trustee for the public, and all have the right to and wharfs, one citizen having the same right as another. Municipal Corporation, 659, 661.

city undertakes to confer on a private individual such a reets or wharfs, without legislative authority, as will pro- nflict between the public and the private use, the act is s, and as said in the case of the City of Louisville v. The ited States, 3 B. M., 138, "it would be almost as reasonable to appropriate as private property the river itself as the ining its margin, the object of the town or the city owning nd is to benefit its facilities as a highway." In this case t to the use or control is in effect abandoned by the city, and t to the possession claimed by the appellants on the one side nkle on the other.

e case of Railway Company v. The City of Louisville, 8 15, it was said: The municipal government had no power to ne use of its streets for a railway without legislative au- . The use and control of public highways, such as streets, , &c., belonging to the city can not be surrendered by contract vate individual, to the exclusion of the public. Such high- re public property, intended for public use, and placed under ntrol of the city government for the benefit of the public, and her disposition of such property, without special authority red by the law-making power, must be disregarded.

gment affirmed.

HURST, &C. V. COMBS, &C.

(*Filed Sept.* 20, 1890—*Not to be reported.*)

s *adjudicata—Boundary of land*—After an action of ejectment brought 876 had been to the Court of Appeals and that court had affirmed the ment of the lower court, which decided that the land in controversy be- ed to one party, a party to that action can not in an action for parti- of the same land, upon an allegation that the court in the original on made a mistake as to the land involved, have that question retried. *res adjudicata* as to him.

. B. White for appellants.

I. E. Cooper and H. C. Lilly & Son for appellants.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Pryor.

In order to prevent a recovery in this case, it is argued by ounsel for the appellant, that the judgment of 1876, in the consoli- ated cases of Landson's heirs v. Phillips, to which Combs and Hurst vere both parties, should be disregarded. It is said that the error was committed by the court below, and followed by this, Combs and Hurst brought the action of 1876 to this court, in which the boundary of the land was in dispute, was involved, and it was af- firmed. He then filed a petition for a new trial in the court below,

that was decided adversely to him, and that was affirmed. Combs was a party to that litigation, and it seems had paid off the mortgage upon it, or purchased it of Chambers, who was the sole beneficiary.

Now it is argued that the court in the original action made a mistake as to the land involved, and that mistake is attempted to be corrected by a petition for a new trial, to which these appellees, or those from whom they derived the land, were parties.

Now in this action for a partition of the very land involved in the former litigation, and which was adjudged to belong originally to Landson's heirs, and not to Hurst, the latter is insisting that his defense in the action of 1876 should have prevailed, and if not, that a new trial should have been granted him on his petition filed after the case had been affirmed in this court.

There must be an end to litigation, and this court will not stop to inquire whether the judgment of 1876 was or not erroneous. That decision is final and binding on all the parties. The identical question involved here, will be seen, had been litigated in the former actions, and, therefore, as Hurst had no claim against the title of Combs or his heirs, or adverse to that title, the judgment below must be affirmed.

Judge Holt not sitting.

HOUSTON V. KIDWELL.

(*Filed Sept.* 20, 1890—*Not to be reported.*)

Pleading—Petition and amended petition—A petition by appellant to have a verdict and judgment set aside, having been dismissed, and at a subsequent term an amended petition was filed and dismissed, on appeal from the judgment dismissing the amended petition, *Held*—That the correctness of the judgment dismissing the original petition can not be inquired into, as that judgment is not appealed from, and the allegations of the amended petition being the same as the petition it is *res adjudicata*, and the fact that the pleading is styled an "amended petition" does not relieve it from the same objection.

The proof to support the allegations of the amended petition is merely cumulative to that offered in support of the petition, and it is well settled that evidence merely cumulative is not sufficient to authorize a new trial.

J. W. Menzies and C. H. Lee for appellant.

L. T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bennett.

In March, 1887, the appellant brought his action to set aside a verdict and judgment that had been rendered at the October term, 1886, and grant him a new trial. At the April term, 1887, this petition was dismissed absolutely. Thereafter, at the November term, 1887, the appellant filed an amended petition, alleging that, since the filing of his petition, he had discovered additional evidence. Thereafter at the ——— term, 1888, this amended petition was dismissed; from this judgment the appellant has appealed.

The ground alleged in the petition and amended petition for a new trial are substantially the same, and the proof offered in each

s to that ground, the latter being merely cumulative.
ing no appeal from the judgment dismissing the
we can not review that judgment, we must regard
rect. The evidence offered to the amended petition
cumulative to the matter set up in the petition, upon
ere had been a judgment of the court. Now it is
ed that evidence, merely cumulative, is not sufficient to au-
new trial, because that fact has already been investigated
ment pronounced thereon, and to allow either party to
same issue upon evidence appertaining to it, which he says
as discovered since the trial, would be to keep up intermi-
igation.
es the petition to which the amendedment was filed was not
he court; it had lost its day in court by reason of the judg-
Unlike a pleading that is demurred out of court, and which
holds in court, during the term, for the purpose of amend-
he judgment was final as to all matters contained in the
, or that should have been contained therein, and the peti-
as no longer in court for any purpose whatever, except for
an appeal. Therefore, as an amendment to a pleading pre-
es that there is a pleading in court that may be amended,
there was no pleading in court the amendment could not be
d as an amendment.
although styled an amended petition, should it be treated as
ion, and allowed to proceed as such? We think not, for the
that the relief it seeks was *res adjudicated* by the final judg-
on the first petition. The fact that in this second petition there
dditional evidence tendered, which, as said, being merely cu-
tive to the matter adjudicated, furnishes no new cause of action,
eaves the matters therein set up *res adjudicata*.
e judgment is affirmed.

KENTUCKY SUPERIOR COURT.

BAKER, &C. v. PHELPS & CO.

(*Filed Oct.* 8, 1889—*Not to be reported.*)

1. Although a note be made payable and negotiable at a bank, it is not necessary to the maintenance of an action against the obligors only, that the petition should allege that the note was presented for payment at the place of payment. Such an allegation would, however, be necessary in an action seeking to hold the indorsers liable.

2. If the obligors in such a note rely upon the failure of the plaintiff to present the note for payment at the place fixed for payment, they must allege the fact in their answer, and follow it up with a tender of the money in court.

Lindsay & Botts for appellants.

Gaunt & Downs and E. E. Settle for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Presiding Judge Barbour.

Counsel for appellants has misapprehended the record. There was no demurrer, either to the petition, the answer or any of the subsequent pleadings. In fact, there was not a single objection or exception taken, from the inception of the action to the rendition of the judgment. But the petition was unquestionably good. The action was brought in the name of J. S. Phelps & Co., upon a note made payable to J. S. Phelps & Co., consequently there was not that variance between the petition and the obligation sued on, which is so earnestly insisted upon by counsel in his brief.

Though the note was made payable and negotiable at a bank, as the action was against the obligors only, it was not necessary to its maintenance that the petition should allege that the note was presented for payment at the place of payment. Such an allegation would, however, be necessary in an action seeking to hold the indorsers liable. But as to the obligors, if they relied upon the failure of the plaintiff to present the note for payment at the place fixed for payment, they must allege the fact in their answer and follow it up with a tender of the money in court. Newman on Pleading, 364, 437; Bank v. Hickey, 4 Litt., 225; Butterfield v. Kinzie, 1 Scammon, 445; 30 Am. Dec., 657.

The only question submitted to the court was a question of fact. The plaintiff's evidence, if true, it must be conceded, sustains its contention. The court below believed it to be true, and we think rightly. The defendants in their rejoinder and in their evidence admit that the item of $175, December 15, 1885, was advanced to and received by them. Their only contention on this point being that that sum and the items of $25 and $560 were embraced in a note for $760, and were transactions independent of the mortgage and not intended to be embraced in it. There was no error as to interest in the judgment. If interest had been given on each sum from the date it was advanced (which plaintiff was entitled to), it would have amounted to more than the judgment does, which gives interest on the whole sum from the 12th of February, 1886.

The judgment is affirmed.

SUPERIOR COURT ABSTRACTS.

JACKSON v. JACKSON.

Filed September 24, 1890. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge BARBOUR, reversing.

1. *Parol agreement to vary writing*—Husband and wife having executed a joint promissory note and a mortgage on the wife's land to secure it, the

not escape personal liability on the note by setting up a con-
s parol agreement to the effect that he was not to incur any
ility, but was to sign the note simply as an evidence of his con-
tecution of the note and mortgage by the wife.
or relief—In an action to enfore a mortgage lien on land a prayer
on for the enforcement of the lien "and for all proper relief"
:o authorize a personal judgment, the defendant having made

n for appellant; B. F. Bennett for appellee.

TRIMBLE BRO'S v. LAIDLEY & CO.

er 1, 1890. Appeal from Kenton Circuit Court. Opinion of the
Judge YOUNG, affirming.
ersonal property—Passing of title—Where there is an absolute sale
l property delivery of possession is not necessary in order to
Therefore, when goods were set apart by the seller and marked
irchaser's name, and were held by the seller subject to the pur-
der, the title passed.
& Myers for appellants; William Goebel and Simrall & Mack for

KELLY, &C. v. MOODY'S ADM'R.
RIDGWAY &C. v. MOODY'S ADM'R.

ober 1, 1890. Appeal from Henry Circuit Court. Opinion of the
y Judge YOST, reversing.
ility of sureties in sheriffs bond—Where a term of office is for more
year and the officer is required to renew his bond each year, the
ls given from time to time are merely cumulative, the first bond
ntinuing to be a security for the discharge of the officer's duties,
new bonds become an additional security for the discharge of such
are to be performed after their execution. Therefore, the failure
ounty court to require a sheriff to renew his official bond the second
his term does not relieve the sureties in the first bond from liability for
ult during that year, the statutory provision requiring a renewal of
d being intended as an additional security to the people and not as
nty to the sureties in the first bond.
ilure of sheriff to return execution—In an action against a sheriff and
ties for the failure of the sheriff to return an execution, the petition
allege that such failure was "without reasonable excuse."
me—It is no defense to such an action that the plaintiff consented
delay unless such consent was in writing,
D. Carroll for appellants; W. B. Moody for appellee.

DEADMAN v. ROYAL INS. CO. OF LIVERPOOL.

October 1, 1890. Appeal from Marion Circuit Court. Opinion o
court by Presiding Judge BARBOUR, affirming.
A parol contract of insurance is valid, but the evidence to establish such
tract should be clear. The details of the contract should be fixed
he agreement or understanding of the parties in reference thereto
ld be mutual; and especially after a jury passing upon the facts
found that there was no contract, the courts should be slow to dis-
their verdict, unless the evidence of the contract is of the clearest
most convincing character.
Agreement to re-insure—When an insurance agent agreed with the in-
d that at the expiration of the policy he then had he would re-insure
, this was not a completed contract of insurance, but was a personal
lertaking of the agent, for a violation of which the insurance company
ot liable.
Avritt & Russell for appellant; Rountree & Lisle for appellee.

LOUISVILLE SOUTHERN R. R. CO. v. BOHON.

Filed October 1, 1890. Appeal from Mercer Circuit Court. Opinion of the court by Judge YOUNG, reversing.

1. *Railroads—Negligence at public crossing—Evidence of similar acts on other occasions*—In an action against a railroad company to recover for an injury to plaintiff's carriage, caused by a collision with one of defendant's trains at a public crossing, the court refused to allow defendant to prove by plaintiff's driver that on a former occasion he had attempted to cross the track with a horse and carriage, when a train was approaching, and that the train was stopped and he was warned by the conductor not to attempt to cross the track in front of him in that way any more, but the court ruled that defendant might ask the witness whether he had been warned by the conductor before this time not to attempt to cross the track when the train was approaching. *Held*—That this ruling was correct. The question was not what the driver had done or omitted to do on a former occasion, but as to what was his conduct at the time of the collision.

2. *Instructions as to contributory negligence*—The court erred in instructing the jury, in effect, that plaintiff was not chargeable with contributory negligence "unless the plaintiff's driver saw the approaching cars in time to have avoided the collision and injury, or recklessly or knowingly approached the place of collision and danger." It was the duty of the carriage driver to have used such care as an ordinarily prudent person would have used in approaching a railroad crossing, and as the instruction ignores this idea, and also the fact that the driver may have heard the usual and customary signals used by moving trains, although he did not see the train, it was erroneous.

E. H. Gaither and C. A. Hardin for appellant; Poston & Jacobs and Thomas H. Hardin for appellee.

Kentucky Law Reporter.

EDITOR:

M CROMWELL, ... Frankfort, Ky.

DECEMBER 1, 1890. No. 11

KENTUCKY COURT OF APPEALS.

GRIDLEY, &c. v. BROOK-WATERFIELD CO.

(Filed September 23, 1890—Not to be reported.)

-Purchase money—Subordinate liens—P. sold 140 acres of land to reserved a lien in the deed to secure the unpaid purchase money. ter H. sold 75 acres of the land to S., and reserved a lien on the land e the payment of the purchase-money notes. These last notes were d to appellee, the Brook-Waterfield Co. H. and her husband mort- he remainder of the land, except 10 acres previously sold to another to indemnify appellant and others, as sureties of said husband on a s executor. Afterwards P. brought suit to enforce the satisfaction of rchase-money notes by enforcing the lien on the whole land. The rdered a sale of the whole land, without reference to the equities of ant Gridley, and the appellees, as subsequent separate lienholders on arate parcel of said land. After the sale, and while the case was still g, appellant filed an amended pleading, setting up the fact that since cree he had liquidated and paid his indebtedness on the executorial and asking that the appellee be compelled to pay his proportion of said The land on which the appellant held the mortgage having paid the amount of the debt, and that on which appellee held a lien having free, the court dismissed this pleading, and also those to which it was nendment. From this judgment appellant has appealed. Held—That ourt properly disregarded the equity of appellant when the sale was or- l, as then the appellant could not force a sale of said land, because his lity had not been liquidated and paid, yet he had a valid lien subsisting aid land to secure him against loss by reason of said liability, which ned into an enforcible lien as soon as such liability was ascertained paid by the appellant, and which would entitle him to contribution from co-sublienholders to pay in proportion to the value of each portion. refore, appellant's pleading and amended pleading should not have been nissed; but the value of each portion should have been ascertained, and

that portion on which the appellee held a lien should have been held liable to contribute to the payment of the debt, to satisfy which the land on which the appellant held a lien was sold, in proportion to the value of each parcel.

J. J. Landram for appellants.

R. W. Masterson and Jno. S. Gaunt for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Bennett.

Rod. Perry, in 1884, sold to Mrs. Hamilton about one hundred and forty acres of land, and reserved a lien in the deed to secure the unpaid purchase money. Thereafter Mrs. Hamilton sold about seventy-three acres of this land to Mrs. Turley, and took notes from her for the unpaid purchase money, and reserved a lien on the land to secure the payment of the same. Thereafter Mrs. Hamilton assigned these notes to the appellee, the Brooks-Waterfield Co. After the sale of said land to Mrs. Turley, Mrs. Hamilton and her husband mortgaged the remaining portion of said tract, except ten acres which had been sold to Holton, to the appellant and others, to indemnify them as the sureties of said husband on his executorial bond. Thereafter Rod. Perry asserted his lien by an equitable action on said one hundred and forty acres of land, and his lien was allowed on the entire tract, without reference to the equities of the appellant, Gridley, and the appellees as subsequent separate lien holders on the separate parcels of said land.

The rule in several of the States where subsequent purchasers or holders of liens on different parcels of a tract of land, which is encumbered with a prior lien, is to enforce the prior lien so as to protect the first subsequent purchaser and then the second, next the third, and so on, letting the burden fall upon the last purchaser. The reason of this rule, where it obtains, is that as the first subpurchaser has a right, upon payment of the lien, to be subrogated to the rights of the lien holder, and enforce his right thus acquired upon the remainder of the land in the hands of the first owner, and thereby protect his purchase, and this right attaches upon his purchase, which holds good, and is enforcible as against a subsequent purchaser of another parcel of the same land; and the second subsequent purchaser stands in the same relation to a third subsequent purchaser as the first did to him. He can push the lien off himself on the third purchaser; and the latter on next purchaser, and so on, until the burden is made to fall on the last purchaser.

But this court, by uniform decision, has adopted the more equitable rule of compelling each subsequent purchaser's portion of land to contribute to the payment of the prior encumbrance in proportion to the value of each portion. This rule, and the reasons for it, are clearly set forth in Dudley v. Thompson, 8 B. M., 313, and the authorities there cited. The whole tract is subject to this lien and sale for the satisfaction of the lien, and it should be so adjudged in the decree of sale; but, ordinarily, the value of each portion should be ascertained before the rendition of the decree, and it should contribute to the payment of the prior encumbrance in proportion of the value of each portion, and each portion should be directed to be sold to satisfy such contribution. But this practice can not obtain in a case like this, because at the time of the decree the court had no power to sell the land on which the appellant held a lien; his lien was to secure him against loss on account of an unliquidated lia-

ich was not enforcible by a sale of the land, and uld only be enforced by a liquidation of the amount, yment by the appellant, hence it would not be equit- mpel the lien holder to wait an indefinite time on the to put his lien in a shape that it might be enforced, h he might never do. Therefore, the chancellor did decree the sale of all the land and postpone the question ribution until another time. After said sale, but while was still pending on the question of contribution, the t filed an amended pleading, setting up, since the de- liquidation of said liability and its payment by him, ng that the appellee be compelled to pay his proportion debt. the land on which the appellant held the mortgage paid the entire amount of the debt, and that on which llee held a lien having gone free. The court dismissed ading, and also those to which it was an amendment. his judgment the appellant has appealed. While, when ce of sale was rendered, the appellant could not force a said land because his liability had not been liquidated d, yet he had a valid subsisting lien on said land to se- m against loss by reason of said liability, which ripened enforcible lien as soon as such liability was ascertained id by the appellant, and which would entitle him to con- on from his co-sublien holders to pay in proportion to the f each portion. Therefore, the appellant's pleading and ed pleading should not have been dismissed; but the of each portion should have been ascertained, and that on which the appellee held a lien, should have been held to contribute to the payment of the debt to satisfy which nd on which the appellant held a lien was sold in propor- o the value of each parcel.

judgment is reversed, with directions for further proceed- onsistent with this opinion.

STRONG, RECEIVER, &c. v. NATIONAL BANK OF BOYERTOWN.

(Filed September 27, 1890.)

Banking—Collection of drafts—Agency—Appellee brought this action over of Louisville Banking Co. amount of draft collected; but the lat- disclaiming ownership, paid the money into court, and appellant, as ver of Fidelity National Bank of Cincinnati, on his petition, was made ty to the action. The draft was made payable at the Bank of Louis- to Hellegass; but appellee, by discounting, became owner; and May 887, sent it to the Fidelity Bank for collection; thence it was sent for ame purpose to, and June 17, day of maturity, collected by Louisville king Co., of which fact the Fidelity Bank was notified, by letter re- ed June 18; and on that day it mailed to appellee the same notification, ch was received June 20. But the only account kept by the Fidelity nk of either the draft or money was on its collection register, where an ry was made June 20 of credit to appellee for the amount so collected by Louisville Banking Co. On June 20 the Fidelity Bank suspended pay- nt, and was placed in the hands of the receiver. Held—That the proceeds the draft belonged to appellee, as the relationship of principal and agent isted between appellee and the Fidelity Bank. The indorsement "for col- ction and credit" by appellee conveyed the idea that the party giving was

then the owner, and the one receiving was agent, and it is well settled that a holder of paper, who delivers it to a bank for collection and credit, is at liberty to treat the bank as an agent, until the proceeds are collected by the bank in money, and that authority of the bank to credit the customer does not arise until he has actually received the money. Therefore, the collection made by the Louisville Banking Co. and entry of the amount on its books to the credit of the Fidelity Bank was not, in meaning of the contract, such collection by the latter as gave it the right, by mere entry on its collection register before receiving the money, to change itself from agent to owner, and appellee from owner to creditor.

2. Parties to actions—A party, having sent a draft through a bank for collection, may maintain an action against the bank having possession of the paper or money, where the transmitting bank has become bankrupt.

A. Barnett for appellants.

D. M. Rodman for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

Appellee, National Bank of Boyertown, Pennsylvania, brought this action to recover of Louisville Banking Company amount of a draft collected. But the latter disclaiming ownership, paid the money into court; and since then litigation about it has been between appellee and appellant, Armstrong, receiver of Fidelity National Bank at Cincinnati, Ohio, who was, upon his petition, made a party to the action.

The draft was made payable at bank of Louisville to Hellegass; but appellee, by discounting, became owner; and May 25, 1887, sent it to the Fidelity Bank for collection. Thence it was sent for the same purpose to, and June 17, day of maturity, collected by Louisville Banking Company, of which fact the Fidelity Bank was notified by letter received June 18, and on that day it mailed to appellee the same notification, which was received June 20. But the only account kept by the Fidelity Bank of either the draft or money was on its collection register, where an entry was made June 20 of credit to appellee for the amount so collected by the Louisville Banking Company.

It further appears that June 20, after close of its business, the Fidelity Bank was, by authority of the comptroller of currency of the United States, closed and placed in possession of Armstrong as receiver. And subsequently, upon information filed in the United States Circuit Court, judgment was rendered forfeiting its franchise.

The first inquiry that naturally arises in determining which of the parties has right to the money in dispute is as to the attitude toward each other of appellee and the Fidelity Bank when the draft sent by the former was received by the latter.

The indorsements on the draft, when it went into possession of the Fidelity Bank, were in blank, which fact, as held by this court, implied a transfer to that bank as holder of dominion over and some right to it, with authority to fill up the blanks as proof of the specific character of that right. (Cepe v. Daniel, 9 Da., 415.)

But such implication may be rebutted by evidence showing the true character of the transaction and actual rights of parties. If it could not, then the result in this case would be to exclude altogether the claim of appellant, who has title as receiver to only what the defunct bank owned, for the blanks had not been filled up when the draft was received by the Louisville Banking

, and, of course, it became entitled to benefit of the
plication.

idence is conclusive, independent of appellant's admis-
ellee did not intend to transfer, and the Fidelity Bank
lect by filling up the blanks to receive, the draft as bona
er, even if it could have done so; that the actual rela-
veen the parties was that of principal and agent is not
wn by a letter of instruction accompanying the draft
entry mentioned, but the theory of appellant's right to
ey is based upon the fact, conceded in his pleading, that
t was sent by one and received by the other for "collec-
credit."

is, however, as contended by counsel, a distinction be-
n instruction by the owner to a collecting bank to "col-
remit," and the one, given in this case, to "collect and
But whatever other difference in meaning of the two
there may be, both convey the idea that the party giving
owner, and the one receiving the instruction is agent,
then being the relation when the draft was received, the
quiry is whether any thing thereafter occurred which
legal effect to change the attitude of the Fidelity Bank
at of agent to owner.

pears appellee was induced to send the draft by a circular
the Fidelity Bank, containing representations of its sol-
d prosperous condition, and proposal to allow to its cus-
interest on daily balances, and to make no charge for
ng nor for exchange in transmitting. And it must be
s true that the draft was sent under an implied contract
hen collected the amount might be remitted directly, or
to appellee's credit, at the option of the Fidelity Bank.
coording to the plain meaning of that agreement, collection
money by the Fidelity Bank was a condition precedent of
nt to enter the credit. And thus comes the question
er the collection made by the Louisville Banking Com-
and entry of the amount on its books to the credit of the
y Company, was, in meaning of the contract, such collec-
y the latter as gave it the right by mere entry on its col-
n register, before receiving the money, to change itself
agent to owner, and appellee from owner to creditor.

general doctrine seems to be "that upon a deposit being
by a cutsomer, in a bank in the ordinary course of busi-
of money or drafts, or checks received and credited as
y, the title to the money, or to the drafts or checks, is im-
ately vested in and becomes the property of the bank."
if checks, notes, etc., are deposited for collection, credited
e depositor on general account, and drawn against, the bank
lder of the paper for value, and if it becomes insolvent it
s part of its assets. (Morse on Banking, section 573, and
orities cited.) And the rule is so extended that when a cus-
er has a deposit account with a bank on which he is accus-
ed to deposit checks, payable to himself, which are entered
is passbook, and to draw against such deposits an endorse-
it of the words "for deposit" on a check so deposited, is, in
absence of a different understanding, presumption of more
n a mere agency or authority to collect; it is a request and
ction to deposit the sum to the credit of customers. (Ibid,
)

ut it is well settled that when a bank receives a draft or note
"collection on account," or what is the same, "collection and
dit," it does not owe the amount until collected. And
ough credit be given therefor prior to collection, the bank is

not precluded cancelling such credit, which is regarded as merely provisional, if the paper is dishonored.

It would, therefore, seem just and reasonable, even if there was no authority to support the position, that if the bank does not, in such case, owe the amount before it is actually collected, it should not be held to have any other right to it than as agent, and that if not bound by an entry of credit it should not have power to bind the real owner thereby.

It has, however, been distinctly, and we think correctly, held that a holder of paper, who delivers it to a bank for collection and credit, is at liberty to treat the bank as an agent until the proceeds are collected by the bank in money, and that authority of the bank to credit the customer does not arise until he has actually received the money. (Levi v. National Bank, 5 Dillon, 104; Marine Bank v. Fulton Bank, 2 Wall., 556; Morse on Banking, section 568; Daniel on N. Instruments, section 394.)

We, therefore, think collection of the draft by the Louisville Banking Company and entry of the amount to the credit of the Fidelity Bank, did not have the effect of investing the latter with ownership, nor changing its relation to appellee, for a mere usage between banks, whereby the collecting bank credits the transmitting bank with the amount collected, instead of remitting, is not alone sufficient to be set up against the real owner of notes or bills to deprive him of his rights. (Morse on Banking, 365; First National Bank v. Grigg, 79 Pa. St., 384.)

It thus follows the only party known by this record, entitled in any event to the money in contest, is the Louisville Banking Company. For we do not see how appellant, as receiver, can legally claim money, never even reduced to his possession, if the Fidelity Bank, while in existence, could not have done so. Nor do we think its creditors have the least interest, as in no sense have they been prejudiced or misled. But it is manifest the Louisville Banking Company was not when it received the draft ignorant of the true owner, and, therefore, did not, nor could, become a bona fide holder of the draft. Moreover, as its disclaimer here of any interest in or right to the money is equivalent to an admission no advances were ever made on the paper by it, and no balances existed against the Fidelity Bank. Consequently, the Louisville Banking Company held the money simply in trust for the true owner, and could not have resisted recovery, even if it had made defense.

It is not necessary to consider the question raised as to the effect of fraudulent conduct of the Fidelity Bank, for the reasons already given are sufficient to make it clear appellee never ceased to be the owner of the draft, and, consequently, is entitled to the money sued for.

Authorities differ somewhat as to the remedy of the holder and owner of a bill or note that has passed through a series of banks in course of collection. But no question exists anywhere of his right to maintain an action against the bank having possession of the paper or money collected, where the transmitting bank has become a bankrupt or, as is the case here, has gone out of existence.

Judgment affirmed.

TY OF LOUISVILLE v. THE LOUISVILLE BOARD OF TRADE.

(Filed September 25, 1890.)

nption from municipal taxation—The appellant, the city of Louis-ing, by its proper officers, levied upon some furniture in use in the trade rooms of the appellee for municipal taxes for the year 1886 building in the city of Louisville, it enjoined their collection, ecause the property was exempt from taxation. The legislative 878 provides that the real estate and any improvements thereon g to the board of trade shall be, and are hereby, "exempted from taxes, so long as such property shall be occupied by said board of purposes contemplated in its organization, and the general council ty of Louisville is authorized to exempt such property so held and l from all taxes authorized to be levied by said general council of y of Louisville."
ity council adopted a resolution exempting said property from all es. Held—That as the proof shows that but two small rear rooms on r, being about one-twentieth of the building, is used by the com-r the purposes of its organization, the residue being rented out for is not exempt from municipal taxation. The true rule is, that an ion from taxation in favor of an institution, while it occupies its g for the purpose of its organization, does not exempt it when rented such portions of it as may be leased, although the rents may be ap-o such purposes.
ites exempting property from taxation should be construed strictly.
junction—A party seeking relief by injunction must make out a clear r equitable interposition; the burden is upon him. Here the petition at least a portion of the property was liable for taxes. It shows that ning is due. This being so, it was the duty of the party asking relief nitely point out the extent to which he was entitled to be relieved; g failed to do so, his petition should have been dismissed.

N. Dembitz for appellant.

own, Humphrey & Davie for appellee.

peal from Louisville Chancery Court.

inion of the court by Chief Justice Holt.

ie appellant, the city of Louisville, having by its proper offi-levied upon some furniture in use in the Board of Trade ns of the appellee, the Louisville Board of Trade, for munic-taxes for the year 1886 upon its building in the city of Louis-e, it enjoined their collection upon the ground, mainly, that property was exempt from taxation.

his claim is based upon a legislative act of 1878, which pro-es: "Any real estate held by the Louisville Board of Trade, the city of Louisville, by purchase in fee simple, not exceed-one hundred by two hundred feet in area, and any improve-nts thereon, shall be, and are hereby, exempted from all State tes so long as such property shall be occupied by said Board Trade for purposes contemplated in its organization. And e general council of the city of Louisville is authorized to ex-pt such property, so held and occupied, from all taxes author-ed to be levied by said general council of said city of Louis-lle."

The property was purchased by the appellee several years after ie passage of this statute. The council of the city adopted a esolution which contains no reference to the limitation in the egislative act relative to the occupation of the property by the

appellee for the purposes of its organization, and which by its terms purports to exempt the property from all city taxes. Unquestionably, however, the council could grant an exemption only to the extent that the legislature could constitutionally, and in fact, authorize.

Conceding that an institution may render such a local governmental service to a city as will authorize its exemption from city tax by the legislature, or by the municipal government, acting under legislative authority, and that the appellee does so, yet the first question presented is whether, upon the facts shown, and under a fair construction of the statute, the property of the appellee is exempt.

The building is five stories high, and when the taxes for 1886 were assessed but two small rooms, constituting a part of the rear of one floor, and which are not over one-twentieth part of the building, probably if that, were in actual use by the appellee for the purposes of its organization.

All of the balance of the large and valuable property, save two or three rooms temporarily vacant, were rented out by the appellee for various purposes, such as banking, insurance and office use generally.

The lower court enjoined perpetually the collection of any city taxes for 1886 upon the building.

What is the meaning of the condition "so long as such property shall be held and occupied by the Board of Trade for the purposes contemplated in its organization?"

Is the renting of it to strangers an "occupation" of it by the board within the meaning of the exempting statute? And next, if it be, is it an occupation by it "for purposes contemplated in its organization?"

The taxation of all property is the just and equitable rule. An exemption from it is a special privilege, one in conflict with the universal obligation of all property holders to aid in the support of the government, and the exemption will not be presumed.

The surrender upon the part of the State of the right to tax must be shown by express and unequivocal language or necessary inference.

The exemption, however meritorious, is of grace, and statutes imposing restrictions upon the taxing power of the State, save so far as they may trust to secure equality of assessment, are to be strictly construed.

These are familiar principles well settled, not only by the decisions of this court, but of the Supreme Court of the United States. It readily strikes the mind as unjust to all other property holders, and as not only likely, but certain, to lead to infinite mischief to permit a corporation to escape the common burden, and secure immunity from taxation by investing its means in property not in use for the purposes of its creation. Before a court will help it to do so by injunction a clear case must be presented.

It is claimed for the appellee that the occupation by a tenant is an occupation by it, within the meaning of the statute, and that as the rents are applied to its uses, that this is an occupation "for the purposes contemplated in its organization."

In support of this view we are referred to the construction which has been given by this court to the word "occupation," as used in our homestead law, but it, unlike the statute under consideration, should be liberally construed. Moreover, if a widow were, by a temporary absence, to lose her homestead right it would be gone forever, while the appellee, provided it renders such governmental service as to constitutionally entitle it

on, may, at any time, regain the right by such a use
erty as its organization contemplated.
ntitled to the exemption of a building worth $100,000,
round that, within the fair meaning of the statute, an
by a tenant is its occupation, and that an application
ts to its uses is an occupation for the purposes of its
on, then equally is it entitled to the exemption from
ion burden of a building worth millions of dollars.
d serve to render its stock very valuable, perhaps, and
i its neighbor the burden which it could well afford to
presumption in its favor should be indulged that will
ch a result and defeat that reasonable equality neces-
lid taxation; and, in our opinion, a fair and reasonable
ion does not admit of it.
ew is sustained by both reason and authority.
e can perhaps be found where the language of the stat-
uestion is precisely like this one, but precedent is not
vhere it is the same in substance.
case of Baltimore v. Grand Lodge of Masons, 50 Md.,
ce the statute exempted the property belonging to be-
and charitable institutions so far as the same was used
purposes of the organizations, it was held that where
institution rented out a portion of its building, such por-
i not exempt from taxation, although the rent was ap-
aid of the charitable purposes of the organization.
ame construction had been previously adopted by the
n Frederick County v. Sisters of Charity of St. Joseph,
34, where it was construed, as it is here, that the applica-
the rents to the benevolent objects of the institution enti-
the exemption of the portion of its property occupied by
nts. The claim was denied.
e case of the Chapel of the Good Shepherd v. Boston, 120
212, the statute exempted from taxation the property of
ble and religious institutions, occupied by them for the
es of their organization, and the right to an exemption of
ty which was rented out, and the rents applied to the pur-
of the institution was denied. Said Chief Justice Gray,
vering the opinion: "In order to exempt real estate be-
g to a charitable institution from taxation, it is not enough
he income derived therefrom should (as all the income of
rporation from whatever source derived must) be applied
purposes for which it was incorporated; but the real estate
must be occupied by the corporation, or its officers, for
purposes."
Pierce v. The Inhabitants of Cambridge, 2 Cushing, 611,
e the statute exempted the property of literary and charita-
nstitutions if actually occupied by them for the purposes of
organization, it was directed that property leased out was
o be considered as in the occupancy of Harvard College so
exempt it from taxation.
the recent case of Morris v. Lone Star Chapter of Masons,
re the Constitution of the State of Texas authorized its legis-
re to exempt from taxation the buildings of institutions of
lic charity, it was held that such buildings only were in-
ded as were used exclusively and actually by such institu-
ns; and that if certain portions of a building belonging to
h an institution were rented out, it was to that extent taxa-
, although the rents were used in furtherance of the charity.
3. W. Rep., 519.)
n the case of the Bank v. Tennessee, 104 U. S., 493, where a
nk was required by its charter to pay a certain tax upon its

capital stock in lieu of all other taxes, and was authorized to hold property for its use as a place of business, it was held that its immunity from taxation extended to only so much of the building as was necessary to the carrying on of its business.

Many other cases might be cited to the same effect.

They establish the rule that an exemption from taxation in favor of an institution, while it occupies its building for the purpose of its organization, does not exempt it when rented out, or such portions of it as may be leased, although the rents may be applied to such purposes.

Desty on Taxation, volume 1, page 119, note, says: "If the buildings, or any portion thereof, belonging to a benevolent and charitable institution, are used for other purposes for a profit, the building, to the extent thus used, is liable to taxation, although the proceeds from such extraneous use are devoted to charitable purposes."

The petition in this case shows that some portions of the appellee's building are rented out, but it does not point out what portions. It discloses the fact that at least a portion of it is liable to taxation, but it does not disclose what portion.

The answer avers that the assessor in assessing the tax in question deducted a proportionable part of the building for the two rooms actually in use by the appellee.

This is denied by the reply and not proven; and it is, therefore, urged that judgment below must be sustained upon the ground that the tax bill is erroneous.

The judgment, however, is that no taxes can be assessed or collected as to the entire building for the year 1886, and it must, therefore, of course be reversed.

But a party seeking relief by injunction must make out a clear case for equitable interposition. The burden is upon him. Here the petition shows at least a portion of the property was liable for taxes. It shows that something is due. This being so, it was the duty of the party asking relief to definitely point out the extent to which he was entitled to be relieved. If he seeks equity, he must do equity. He must show his willingness to pay what he in fact owes, or at least, in a case like this, he must show to the court how much he in fact does not owe. He must, inasmuch as injunction is peculiarly an equitable remedy, separate the fact from the unjust portion of the claim, and ask relief only as to the latter.

This appellee has failed to do, and the judgment is reversed with directions to dismiss the petition.

JACOB, &c. v. WOOLFOLK, &c.

(Filed September 27, 1890.)

Boundary—Streets and alleys—A conveyance having been made of a lot bounded by an alley, it is implied, as matter of law, that the boundary line of said lot extends to the center of the alley. A street or alley, called for as a boundary line, is regarded as a single line, and as a single line it becomes a boundary of the lot. It is the same as a tree or rock that is called for as a boundary. The terminus of the line is ordinarily the center of the tree or rock, and will be so understood unless the language of the deed limits it to the edge of the tree or rock.

A. E. Richards for appellants.

Humphrey & Davie for appellees.

from Louisville Law and Equity Court.

of the court by Judge Bennett.

ellants, as the devisees of John I. Jacob, brought this ejectment against the appellees to recover the possesn feet of ground, the southern half of an alley, fronting l street, in the city of Louisville.

Jacob, the ancestor of the appellants, directed in his all his estate be divided among his children. The ioners, who were appointed to divide his estate, in a suit d for that purpose, laid off the property of said Jacob, a hich is now in controversy, into lots, with appropriate nd alleys. Among other blocks thus laid off was one by First and Second streets on the east and west, and ridge and College streets on the north and south. There signed to Mrs. Tyler, and conveyed to her, lots Nos. 15 The lots thus conveyed were described by their num-y. Subsequently Mrs. Tyler conveyed these lots in the ay, by their numbers. Finally Henry Mead become the ner of these lots, by metes and bounds calling for the alley controversy. But said alley never having been opened , and half of its width having been closed by Mead's pre-or, in the ownership of said lots, Mead extended the fence to include the entire width of said alley, to-wit, twenty He, it seems, not knowing that he was the owner of half alley, and believing that the appellants were the owners it, purchased the same, the conveyance was by deed, he appellants, and in consideration thereof Mead conveyed appellants a piece of real estate lying in another part of the After this Mead, as he says, learned that the appellants o title to the said alley that they conveyed to him and rescinded the contract, each reconveying by a quit claim the parcel of land that the other had conveyed him. Mead , in substance, that, learning that the appellants had no o said strip of ground, the object of the reconveyances was ly to rescind the contract of exchange and place each party atu quo.

w did the conveyance of these lots, calling for the streets alleys as laid off in the plat, or as said by this court, with reference to such streets and alleys, pass the title to the haser to the center of the street or alley, provided the r's title extended to the center thereof? We, in the case of neider, &c. v. Jacob, &c., 86 Ky., 101, and other cases, held it did.

was held in the Schneider case that the street, in such case, to be regarded as a "single line, and as a single line it bees a boundary of the lot. It is as a tree or a rock which is ed for as a boundary. The terminus of the line is ordinarily center of the tree or rock, unless the vendor's title to the perty conveyed extends only to the edge of the tree or rock; in the same manner the street is a 'monumental boundary; if the vendor holds the title to the center of the street he veys to the center thereof as the dividing line;" and if he ns the adjacent property, his vendee calling to abut on said eet, acquires title to its center, also.

As alleys are dedicated as essential ways to the back entrance lots, the same reason exists, when the lots are sold with a ear reference to them as boundaries, for holding that the cen r thereof is the dividing line. In such case the intention o he parties is to be drawn from the deed. As seen, the street o

alley is to be regarded as a single line, and the conveyance is to be treated as being to the center thereof, the same as if a tree or rock had been called for. In other words, the center of the street or alley is one of the lines called for in the deed, and as long as the deed stands unattacked for fraud or mistake it is to be conclusively presumed that it speaks the intention of the parties. Of course the parties may agree in the deed that the edge of the street is to be the dividing line; so, also, may they agree as to the tree or rock.

Where the streets and alleys are designated on the plat, and the lots are purchased and the deeds made in reference to them, although they are never brought into public use, they become a part of the purchaser's rights under the deed, in the manner indicated in the Schneider case, and any restriction of those rights must be found in the deed. To allow the verbal intention of the parties to prevail against this written evidence would be to violate one of the most thoroughly settled rules of evidence.

Mrs. Tyler and her vendees, including Mead, acquired by their respective deeds the title to the center of this alley, and the appellants, at the time they attempted to convey to Mead, had no title to convey to him; he was then the owner of the ten foot strip, and acquired nothing by the conveyance of it by the appellants; and that fact being realized by the parties, as the court below found and, as we think, upon sufficient evidence, they rescinded the contract by reconveyances, which had the effect to reconvey to each party the title that he had theretofore conveyed; and as no title was conveyed by the appellants to Mead, as far as the ten feet were concerned, he certainly, by his contract of rescission, conveyed no title back to them. Such was not the intention. The only object was, by the reconveyances, to put themselves in statu quo, leaving each party, as to title, where he was before he had made the first conveyance. The lower court so adjudged it.

Let the judgment be affirmed.

SPARKS v. COMMONWEALTH.

(Filed September 27, 1890—Not to be reported.)

Criminal law—Instructions—On the trial of appellant, charged with the offense of malicious shooting and wounding, which resulted in a conviction, appellant urges, as prejudicial error, that the court refused to give to the jury an instruction based on the hypothesis that the offense was committed in sudden heat and passion. Held—That as the facts in the case show circumstances indicating that the offense was committed after premeditation, the court properly refused an instruction for shooting and wounding in sudden heat and passion.

J. B. White for appellant.

P. W. Hardin for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, having been convicted of the offense of malicious shooting and wounding one McIntosh, asks for reversal, upon the sole ground the lower court refused to instruct the jury upon the hypothesis the offense was committed in sudden heat and passion.

The testimony shows McIntosh and others were sitting in front
a grocery store when appellant came up, and out of a trivial
atter they commenced to quarrel, both using insulting language.
nd appellant at that place drew a pistol on McIntosh, but be-
g prevented, did not then fire it; but soon went away to a
lacksmith shop, but how long he staid there, or how far off
om the grocery store the shop is, does not appear. But start-
ig from there, as he says, to another place, he passed within a
ort distance of the store where McIntosh still was, when the
tter made two steps towards appellant, using, as the latter
ys, defiant language, but he did not draw any weapon or offer
iolence. Then it was appellant fired his pistol from behind
nother person. Whether he fired in self-defense was properly
bmitted to and passed on by the jury, and is not now an open
uestion.

It seems to us clear, taking appellant's version of the transac-
on, there was a sufficient interval of time from the quarrel and
rawing of the pistol by appellant at the store to time of shoot-
ig for deliberation And as the shooting was the outcome and
sult of hostile feeling, engendered at the store, we see no rea-
on whatever for regarding it as done in a sudden affray, or in
idden heat and passion; nor is there, in our opinion, room for
ny question on the subject.

Judgment affirmed.

BROOKS v. COMMONWEALTH.

(Filed September 27, 1890—Not to be reported.)

1. Criminal law—New trial—The decision of the lower court in overruling
ie motion of appellant for a new trial is not subject to exception, and can
ot constitute ground for a reversal.
2. Evidence—Bill of exceptions—One jointly indicted with appellant,
aving testified against him on the trial, without a nolle prosequi having
en first entered as to the witness, is not considered prejudicial, on consid-
ation of the whole case, as the bill of exceptions does not contain all the
stimony introduced on the trial, or show all that then occurred.
Section 340 of Criminal Code of Practice construed.

Chas. G. Richie for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, Clay Brooks, complains, first, because, his mo-
ion for a new trial was overruled.

In support of it he filed certain affidavits, tending to show that
paper, purporting to have been executed by him, and which
ad been used as evidence against him upon his trial, had been
orged.

The decision of the trial court upon a motion for a new trial is
ot subject to exception, and can not, therefore, constitute ground
or a reversal by this court. (Criminal Code, section 281.)

The other ground of complaint is that the State was allowed
o introduce, as a witness against him, one jointly indicted with
im without first entering a nolle prosequi as to the witness.

It is evident, however, that the bill of exceptions does not con-

tain all the testimony introduced upon the trial, or show all that then occurred.

In the absence of a bill showing all the evidence the second point urged can not be considered.

For aught this court knows the accused may, before the termination of the trial, have confessed his guilt; or it may have been amply shown by testimony other than that of the co-defendant.

Upon such a state of case a presumption in favor of the action of the lower court must be indulged.

Section 340 of the Criminal Code, as amended, provides for the reversal of a judgment of conviction for an error of law, when, upon a consideration of the whole case, the court is satisfied that the substantial rights of the accused have been prejudiced.

In the absence of a part of the testimony this court can not say, even conceding for argument sake, that error was committed in allowing a witness to testify, or in permitting certain evidence to go to the jury, that the substantial rights of the accused havebeen prejudiced. (Commonwealth v. Runnion, &c., 3 Met., 3; Reed v Commonwealth, 7 Bush, 641.)

Judgment affirmed.

SIMRALL & CO. v. CITY OF COVINGTON, &c.

(Filed September 30, 1890.)

Constitutional law—Partial and unequal ordinances of cities—Appellants, residents of Covington, Ky., being insurance agents, and as such represent the Fire Insurance Association of Philadelphia, Pa., and having failed to procure from said city a license to exercise the calling as agent for said company, were fined for violating the provisions of an ordinance of the city of Covington prescribing such license.

Said ordinance is entitled "An ordinance to impose a license tax upon certain insurance agents and solicitors," and provides as follows: "Be it ordained by the city council of Covington, That no person, unless he shall have procured a license therefor, shall transact any business as agent, or solicit for any insurance company not located within the city of Covington, Kentucky; and such agent or solicitor shall procure a separate license for each insurance company for which he shall transact said business; provided, that any resident of said city, who shall have procured a license to transact business for any such company, may employ as many solicitors as he may desire to solicit and procure business for him for said company; and provided, further, that when said business shall be conducted by several persons in partnership, a license to such persons, in the name of the firm, shall authorize each member of the firm to transact the business of the partnership, but the name of each member of the firm shall be specified in the license." The only provision in the city charter authorizing any ordinance upon the subject is: "The council shall have the power to license and tax all exchange, loan and broker's offices, agencies of insurance offices * * * in said city." On appeal it is insisted that said ordinance is invalid for the following reasons, viz.:

First. Because it requires a separate license for each insurance company represented.

Second. Because it is unconstitutional as discriminating unfairly against residents of Covington, who act as agents for insurance companies not located within the city of Covington, whether within the State or without it, while it permits residents of Covington, as agents of insurance companies located within said city, to transact business without the imposition of the license tax. Held—That it properly requires a separate license for each in-

nce company represented, but it is unconstitutional, because it not only iminates between residents of the city of Covington and those residing de of it, whether within or without the State, but it places a burden some within the city, while others of its residents, engaged in a like ess, are exempt. It is unreasonable partial legislation. To be rea- ile, a municipal by-law should be equal in its operation.

idale & Gray for appellants.

A. Byrne for appellees.

peal from Kenton Circuit Court.

nion of the court by Chief Justice Holt.

s appeal questions the validity of an ordinance of the city ovington, entitled "An ordinance to impose a license tax certain insurance agents and solicitors," and which pro-

it ordained by the city council of Covington, That no per- nless he shall have procured a license therefor, shall trans- y business as agent, or solicit for any insurance company cated within the city of Covington, Kentucky; and such or solicitor shall procure a separate license for each insur- company for which he shall transact said business; pro- that any resident of said city, who shall have procured a to transact business for any such company, may employ y solicitors as he may desire to solicit and procure busi- or him for said company; and, provided further, that 'said business shall be conducted by several persons in 'ship, a license to such persons, in the name of the firm, uthorize each member of the firm to transact the business partnership, but the name of each member of the firm specified in the license."

sections provide as to the license fees, and for the prose- nd punishment by way of fine of violators of the ordi-

ly provision in the city charter authorizing any ordi- pon the subject is: "The council shall have the power to nd tax all exchange, loan and brokers' offices, agencies nce offices, * * * in said city," etc.

ppellants, A. G. Simrall & Co., residents of the city of n, are insurance agents. As such they represent in said Fire Insurance Association of Philadelphia, Pa.; and t for a fine having been rendered against them, as indi- for failing to take out license as the agents of the asso- hey are defending against it, upon the ground that the is invalid. The lower court held otherwise, and they ealed.

ntended, first, that the city charter does not authorize f a license tax against an insurance agent for each that he may represent, but only against his business ; and that when he pays the one license fee he may as many companies as see fit to employ him.

pinion, however, a fair and reasonable construction of ge, "to license and tax all * * * agencies of insur- s," gives the power to compel each agent to pay the ach company represented by him It is quite compre- terms; and unless this construction be the true one, representing a dozen companies only, pays as much as the agent of but one; and this, too, although it is e former does twelve times as much business as the t least much more.

It can not well be presumed that the legislature intended such inequality, and a construction is not required, which is likely to work out such a result. It is next urged that the charter provision does not authorize the passage of such an ordinance, and that it is invalid, because it is unequal, unjust and partial.

Counsel for the city refer to decisions of this court, holding that the legislature may impose upon a foreign corporation, proposing to do business in this State, terms and conditions to exercise of its powers. (Commonwealth v. Milton, 12 B. M., 212; Insurance Company v. Commonwealth, 5 Bush, 68.) Undoubtedly this is the declared rule in this State. The extent of this power must not be considered. Certainly it reaches so far that the legislature may provide for the safety of our people in dealing with the corporation.

The rule is founded upon the fact that the exercise of the corporate powers here rests alone upon comity. If the act of incorporation had of itself extra-territorial force, confusion and conflict between the two powers would constantly ensue.

We fail to see, however, that this rule has any bearing upon this case The ordinance affects the individual. He is required to pay the tax and obtain the license. Its penalty for a failure is upon him. Indirectly the interest of the insurance companies may be involved; but the ordinance relates directly to, and dealt with, the individual person; and in this light the question is to be considered.

The person who represents a Covington Insurance Company requires no license; while the representative or solicitor of any other company must obtain a license as to each company he represents. If the representative be a resident of the city, he may employ as many as he may desire to solicit for his company. Thus the ordinance discriminates in two ways. As to the last, however, the appellants are not in an attitude to complain, because they are residents of the city. They are taxed, however, for the privilege of earning a livelihood, while their neighbor, who earns his in the same way, goes untaxed, the only difference being that one works for a city company, while the other represents one located, either in or out of the State, but outside of the city.

A doubt as to the constitutionality of a legislative act must be resolved in its favor; but while the right to license may be delegated to municipal governments by the legislature, yet this authority is to be strictly construed and closely pursued. (Sedgwick on Stat. and Con. Law, 466.)

Municipal corporations may exercise, first, those powers which are expressly granted; and, second, those necessarily implied, or incident to those expressly granted, and which are indispensable to a proper execution of the objects of the corporation. Their authority is not to be so strictly construed as to defeat the legislative intention; but if there be a fair and reasonable doubt of the existence of the power, it should be resolved by a court against the municipality; and especially so if the exercise of it will encroach upon the rights of the individual or the public. The scope of the delegated sovereignty is not to be enlarged by a liberal construction. These principles are elementary, and the citation of authority is unnecessary.

They are necessary to the proper maintenance of legislative authority in this direction. Without them it would dwindle away, resulting in mischief, and behind them, therefore, lies the best of reasons.

The legislature has not, however, attempted, by the charter

f the appellee to authorize it to pass an unequal and
nance. If it had done so the legislative power might
estioned and denied. But the council of the city,
eneral power "to license and tax * * * agencies
e offices," has enacted what is unmistakably such an

he most distinguishing feature of the common law is
or the protection and equality of individual right.
le, therefore, that where the by-law of a municipal-
l under a general grant of power, or by virtue of its
uthority, is unfair and partial in its operation, it will
void. It will not be upheld if it be unreasonable
sive. It must not contravene common right or the
of the State, or make unwarranted or special dis-
is.
Constitutional Limitations, pages 200 and 202, says:
by-laws must also be reasonable. Whenever they
to be so, the court must, as a matter of law, declare
* * * So a by-law, to be reasonable, should be in
ith the general principles of the common law."
llon says: "As it would be unreasonable and unjust
nder the same circumstances, an act done by one per-
and if done by another not so, ordinances which have
can not be sustained. Special and unwarranted dis-
, or unjust or oppressive interference in particular
t to be allowed. The powers vested in municipal cor-
should, as far as practicable, be exercised by ordi-
neral in their nature, and impartial in their opera-
Dillon's Municipal Corporations, section 322.)
ws are enforced in the cases of Mayor of Mobile v.
Ala., 137; Robinson v. Mayor of Franklin, 1 Hump.,
son v. City of Wellington, 40 Kansas, 173, and many
that might be cited. All recognize the rule, which
ental, that the by-laws of a municipality, whether
rt to regulate callings or otherwise, must, as indeed
law, preserve equality of right. Those exercising the
lege must be treated alike. The door must be closed
y discrimination, if we would avoid monopoly and
his principle is as necessary to sound legislation as
tion of the blood is to the human system, or the flow
er to the ocean. It has produced a line of decisions
universally regarded as sound by the courts of the
Thus, in Ex Parte Frank, 52 Cal., 606, an ordinance of
sed under a general charter power, exacting a license
goods, and fixing one rate for selling goods at the time
city, and another and much larger for those without,
nvalid as unjust, partial and oppressive.
r. &c., of Nashville v. Althrop, 5 Caldwell, 554, an or-
scriminating between merchants and other dealers re-
hin, and those without, the limits of the city, and pre-
special rate of taxation for the latter, was declared to
the limit of constitutional legislation.
State we have no constitutional provision as to taxation
; but it is the settled constitutional rule, declared by
ed decision of this court, that every tax must be cer-
ersal, and, so far as practicable, equal and uniform.
can not constitutionally be imposed upon particular
s, while others of the same class or locality, who have
no public service, are exempt.
el v. The Trustees of Richmond, 78 Ky., 542, a provis-

ion of a town charter authorized a tax of five per cent. upon all sales made by auctioneers within the limits of the town, except such as might be made by citizens of the town or county, who were bona fide owners of the property sold. The board of trustees adopted an ordinance fixing the license of auctioneers at $5 for residents of Madison county, and $10 for such as were not residents of that county; and this court held that the charter provision was void, because it, in violation of the Federal Constitution, discriminated against the citizens of other States. The parties, whose rights were involved in this case, were nonresidents of the State, but the court, in the opinion, declared arguendo against the ordinance also, because it discriminated between residents and nonresidents of the county. The same doctrine has been more recently announced by this court in the case of Fecheimer Bros. & Co. v. City of Louisville, 84 Ky., 306.

The ordinance, now in question, not only discriminates between residents of the city of Covington and those residing outside of it, whether within or without the State, but it places a burden upon some within the city, while others of its residents, engaged in a like business, are exempt. It is, therefore, unreasonable partial legislation. To be reasonable, a municipal by-law should be equal in its operation. (Tugman v. Chicago, 78 Ill., 405; Barling v. West, 29 Wise, 307.) This one being clearly an infringement of individual right, partial and unreasonable in its character, can not be sustained.

The judgment is, therefore, reversed, with directions to overrule the demurrer to the petition and for further proceedings in conformity to this opinion.

DUFF v. DUFF, &c.

(Filed September 30, 1890—Not to be reported.)

Limitation—An action to set aside a patent to land, issued about thirty-two years before this suit was brought, during all which time appellant had the right to sue, is barred by limitation.

Wm. Lindsay and D. W. Lindsey for appellant.

John L. Scott for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Bennett.

This is a suit by the appellant to set aside a patent to the appellee, John A. Duff, for four hundred acres of land, upon the ground that the appellee, having had the entry and survey made in the name of the appellant, fraudulently procured an assignment of the same to himself, and the patent to be issued to himself. The patent was issued about twenty-two years before this suit was brought; during all this time the appellant had the right to sue. The statute of thirty years' limitation, to say nothing of others, certainly bars the appellant's rights.

The judgment is affirmed.

)TTINGHAM v. FIREMAN'S FUND INS. CO.

(Filed September 30, 1890.)

:—Forfeiture by sale and surrender of possession of property—In n a policy of fire insurance to recover the value of a house insured, ides that if the property be sold or transferred, or any change take : title or possession, "without written permission in this policy, it id," etc. To defeat the recovery, it was shown that after the con- urance was made, appellant, without permission from the com- a written contract of sale of the insured property, and transferred ion thereof to another before the fire occurred, but had not)onveyance therefor. Held—That, as under the laws of this State, if the equitable title holds the beneficial interest in real estate, and any, must be borne by him, the defense was sufficient to exon-)mpany from liability on the policy.

)rsey for appellant.

& Lockett for appellee.

from Henderson Circuit Court.

of the court by Judge Bennett.

ellee's defense to the appellant's action against it to ıe value of the house insured by the appellee, and which oyed by fire, was that the appellant, before the house oyed by fire, had sold the same and transferred the ı. The jury having found for the appellee the appel- ppealed to this court.

tract of sale relied on by appellee is as follows: "This vitnesseth that we, C. L. and H. A. King, have this ped or exchanged property with Albert Cottingham, s: We, C. L. and H. A. King, give Cottingham the G. gham house and lot for the Albert Cottingham house ırmerly owned by James A. Watson, and the lot west se. Deeds to be made soon.

ıry 24, 1887.

"C. L. and H. A. KING,
"A. G. COTTINHGAM."

icy provides that "if the property be sold or trans- any change take place in the title or possession, with- n permission in this policy," it shall be void, etc. The on which a sale of the property insured vacates the is due to the operation of the sale in divesting the he title to the property insured. The rule seems to be at if the insured, in making the transfer of title, re- ıterest in the thing insured, the policy is not vacated ɜ; pursuant to this rule it has been held by a number ıd elementary writers that the sale, in order to vacate ', must be of the legal title; that the sale of a mere ɜ vendor holding the legal title, will not suffice to va- ısurance. It is believed that the rationale of this rule ıe vendor, in such case, as owner of the legal title, he rted with the equity, retains the risk of the property; e risk of the property remains with the legal title, and destruction of the property falls upon the owner of itle, and in that view it is believed that if the owner he equitable, but not the legal, title, he has not parted insurable interest in the property. But in this State

the purchaser of real estate by title bond takes the risk of the property. He is the beneficial owner of it, and its loss or destruction falls upon him, and not the vendor. (Marks v. Tichenor, 9 Ky. Law Rep., 124; Calhoun v. Belden, 3 Bush, 674.)

It is the vendor's parting with the beneficial interest in the property that vacates his contract of insurance; and where a sale of the legal title is necessary to deprive the owner of such interest, a sale of the equitable title only will not be sufficient for that purpose. But where, as in this State, the beneficial interest is passed to the vendee of the equitable title, the contract of insurance is vacated by such sale. The vendee, in such case, assumes all risk of loss or destruction of the property. Such risk is no longer with the vendor. Hence the insurer's contract of indemnity against the loss and destruction or damage of the insured property is at an end. According to these views the first instruction given for the appellant was more favorable to him than he was entitled to.

But apart from all this, it is evident that the jury found that the appellant had surrendered the possession of the property in violation of his agreement. The second instruction on that subject required the jury to believe that the appellant had before the fire surrendered the possession of the property to the Kings. Of this instruction, limiting the surrender to the Kings, the appellant has no right to complain. The third instruction tells what acts would amount to a surrender of the possession of the property to Kings, to-wit: That of abandoning the possession of the insured house, and taking possession of the house exchanged by the Kings, with their knowledge and consent. This instruction still confines the surrender of the possession to the Kings. Whereas, a surrender to any one else would have been sufficient.

In this respect the second and third instructions are more favorable to the appellant than he was entitled to. The proof is clear that the appellant took possession of this house under the authority of the contract with the Kings, and took said possession with the purpose of making it his permanent home. The jury had the right to infer all the rest.

The judgment is affirmed.

COMMONWEALTH v. PHILLIPS.

(Filed September 30, 1890—Not to be reported.)

1. Criminal law—Barn-burning—Peremptory instruction—Upon the trial of appellant, charged with barn burning, he was acquitted upon peremptory instruction of the court. On appeal by appellant, Held—That in view of the facts and circumstances proven in the case, the action of the court was proper.

2. Excluding witness from court room—The lower court did not abuse its discretion in excluding the witness from the court room, under the rule previously made, after he had testified, although it had been announced that he was not to be put on the witness stand again.

Finley Shuck and P. W. Hardin for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

Upon the trial of the appellee, charged with the crime of burning the barn belonging to W. G. Ramsey, he was acquitted, upon

uptory instruction of the court. The evidence showed barn was burned between 8 and 12 o'clock at night, near 10 o'clock; that the appellee was in the habit of Mrs. Overstreet's at night to visit her young folks, and l her house before supper time that evening, and re- here until about half-past 9 o'clock, at which time he ome; that the barn was not situated between the two ut further on; that the appellee, about two weeks be- urning, had shoes with plates on the heels; that the o or three days after the burning, had no plates on the t whether the shoes had the appearance of having been deprived of the plates does not appear; that some foot ere seen near the barn, with plates on the heels, which that the person was running towards the appellee's it how near the tracks went toward his home does not ior does it appear whether the tracks corresponded with of the appellee's feet; that the appellee said, some time e burning, that said Ramsey was a swindler, and God t let him prosper; that he would lose more than a few corn. This was all the evidence, and it was certainly ient to warrant a conviction. The court did not abuse tion in excluding the witness from the court room, un- ule theretofore made, after he had testified, and was put on the witness stand any more, as announced, after esses were put under the rule.
lgment is affirmed.

ALLEN v. RINEHARDT.

(Filed October 2, 1890.)

ice—General and particular description of property—In an action the specific execution of a contract for the sale of a lot in the city le, fronting on Ormsby avenue, between Brook and Floyd streets, sby avenue now is there was formerly laid off what was known 'lace," and dedicated to the use of the public for a park, but the ing changed their intentions, executed to the owners of the prop- ng thereon a release of their interest in the land formerly com- ark Place," between "First and Brook streets," excepting the upied by the city and improved and now known as Ormsby ave- llee urges as a defense that appellant was not, at the time of e contract, the owner of a portion of the lot, formerly a part of e" and now fronting on Ormsby avenue, because the release in- such portions of "Park Place" as lay between First and Brook old—That the release embraced all portions of "Park Place," ex- n beyond Brook street and including the lot in controversy, for apparent general tenor and meaning of the instrument when as a whole, and such meaning is not confined by the particular to the portion of "Park Place" located between "First and ts." It was the clear intention of the makers of the deed of re- should convey to the lot holders fronting on the whole length of e" the land lying between those lots and Ormsby avenue.

l. Pirtle for appellant.

W. Grinstead and Randolph H. Blain for appellee.

from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

The appellant, P. T. Allen, complains of a judgment decreeing the specific execution of a contract for the sale of a lot in the city of Louisville.

His defense is that the appellee, J. Rinehardt, is not the owner in fee simple of about forty-two feet in depth of the front of the lot, and which binds on what is now Ormsby avenue. This part of the street was formerly known as "Park Place," and consisted of a grass plot in the center, with a way for travel upon each side. The park extended from First street east of a point beyond Brook street, stopping between it and Floyd street. It was dedicated to public use by the original owners, Bryant & Harris, who then sold lots bounding on Park Place. In time the appellee became the owner by purchase from an intermediate holder of one of these lots, Park Place being still in existence.

The lot is on the north side of Ormsby avenue, and between Brook and Floyd streets.

The lot holders binding on Park Place concluded to close it, and have in lieu of it merely a street, to be called Ormsby avenue, with a width of sixty feet, its center line to be the same as the center line of Park Pace. This left a strip of ground, about forty-two feet in width upon each side, between the line of Ormsby avenue and the old line of Park Place. It is the right of the appellee to the portion of the strip in front of his lot that is now questioned.

In order to make the change of streets an enabling act was obtained from the legislature, the provisions of which the city accepted.

Prior to this Harris & Bryant executed a writing, consenting to the change, and releasing any reversionary right, as the appellee claims, to the entire strip of land, left from Park Place upon the north side of Ormsby street, to the lot owners; while the appellant contends that the release only embraced so much of the strip as lies between First and Brook streets; and as the lot in contest lies east of and beyond Brook street, that, therefore, the appellee has no title to the portion of this strip which he claims as a part of the lot, and as constituting the front of it.

The question turns upon the proper construction of the writing executed by Byrant & Harris.

It reads thus: "Whereas, Jamos M. Bryant and Theodore Harris, heretofore laid out and dedicated for public use a certain strip of land, known and called Park Place, in the city of Louisville, Kentucky, said strip of land lying in the center of a street running east and west between First and Brook streets; and whereas, it is not now deemed advisable to improve the said street, in accordance with the plan of said Park Place, as laid out by said Bryant & Harris; and whereas, the owners of the lots fronting on said Park Place are desirous of having the dedication thereof for public use annulled, so that the street in front of their lots can be improved on a more economical plan, and in the same manner as other streets in Louisville; now, therefore, the said James M. Bryant and Roberta S. Bryant, his wife, Theodore Harris and Mary J. Harris, his wife, hereby waive and relinquish any and all reversionary rights in and to the strip of land aforesaid, if the same shall be diverted into a use different from that designed by them, and they hereby consent and agree that the said strip of land may be used for the purpose of a street, on such conditions as may be agreed on between the city of Louisville and the owners of property fronting

; and if it shall be agreed that a street shall be laid out,
ing the whole or a part of the said strip of land, then
ı of the land on the northern and southern sides of said
was heretofore laid out for a street, and as shall not be
r the purposes of a street, may become the property of
ong to the respective owners of the lots fronting thereon,
their respective lots shall be extended out to the line of
eet that may hereafter be laid out and improved along
r the strip aforesaid, the said parties hereby waiving and
ishing any and all reversionary rights in and to the
dedicated by them in Park Place, if the same shall be
iated by the owners of lots fronting thereon, under the
ons herein prescribed.'
'itness whereof the said parties hereunto set their hands
t day of May, 1886."
ppellant contends that, inasmuch as this writing first re-
at the parties to it had theretofore dedicated for public
certain strip of land, known and called 'Park Place,' in
y of Louisville, Kentucky, said strip of land lying in
:er of a street running east and west, between First and
treets," and then relinquishes "all reversionary rights
to the strip of land aforesaid," and to so much of the
the northern and southern sides of "said strip" as had
ɜretofore laid out for a street, but may not be used for
one, that the release as to adjoining lot owners is lim-
any land not used for Ormsby avenue, lying between
d Brook streets, and does not embrace the portion of the
ınting appellee's lot, because it lies east of and beyond
street. In other words, the appellee asserts that the
ɔperated as to the whole of Park Place, while the appel-
tends that it did so as to but part of it.
ow urged that where there is both a general and partic-
scription of property conveyed, that the latter must con-
d that while the release speaks generally of "Park
yet it is particularly described as being between First
ok streets. While this may generally be a proper rule
ance, upon the idea that parties have paid greater atten-
the particular description, and that it is the more apt,
e, to conform to their intention, yet it is not to be uni-
applied.
particular description is, to any extent, obscure, the
one should be resorted to for the purpose of determining
ıises granted; or if they are described by a well-known
nd then the boundary is particularly set out, but erron-
part, the whole will pass. Thus if a certain well-
ity lot be granted by giving its number and the number
lock, or by describing it definitely otherwise, but in a
way, and then the metes and bounds be so given as not
le all of it, yet "the entire lot would pass, because it
ɜ manifest the parties so intended; and the object of all
construction is to arrive at the intention of the parties,
ıould not be frustrated by a mistake in setting out the
boundary." (Rutherford v. Tracy, 48 Mo., 325; Nash v.
Company, 67 N. C., 413; Jackson v. Marsh, 6 Cowen,

nreasonable to suppose, as the parties to this instrument
inally sold the lots binding upon Park Place east as well
ɔf Brook street, that they would have limited the re-
any reversionary right to a part of them. The circum-
ttending the entire transaction, as well as the purpose
in executing the release, forbids such an interpretation
riting; and its words, when the intention of the makers

is apparent, must, if possible, be construed so as to give effect to it. Moreover, if the construction contended for by the appellant be the correct one, then the release operated as to no part of Park Place east of and beyond Brook street, whether used for Ormsby avenue, or left in the shape of strips adjoining it; and certainly it was understood and intended that the avenue was to be opened entirely through Park Place. Here the instrument speaks of "Park Place;" it refers to the plan of it, and it, therefore, became a part of the writing. The answer of the appellant describes this plan, and fixes Park Place as beginning at First street and extending, not merely to Brook street, but to a point beyond there, and the further particular description in the writing should be regarded, not as one of Park Place itself, but as merely referring to its location; or if not, and there be a discrepancy in the description, then the plan must control. The object of the release was Park Place, and not a part of it. The parties evidently intended to relinquish all interest in the whole of it, wherever it might be, and its extent is definitely shown. The reference, therefore, in the form of particular description to its location should not be allowed to limit the extent of the release.

Judgment affirmed.

HENDERSON BRIDGE CO. v. HENDERSON CITY.

(Filed October 7, 1890.)

1. Taxation—Taxing district—Railroad and school taxes—The city of Henderson, under the authority conferred upon it by the legislature, authorizing the imposition of taxes on real estate within its limits for school purposes and the payment of a railroad debt, was authorized as a taxing district to impose taxes upon the property of appellant's bridge, extending from the Kentucky shore over the Ohio river to low water-mark on the Indiana shore. This court has recognized a distinction between powers conferred upon a city to impose taxes for municipal purposes and the right to constitute a community a taxing district. In the first case the right to tax is based upon the benefits and protection derived by the bridge from the municipal government, while in the latter a taxing district may be constituted and taxes imposed by a vote of the people without regard to the extent of benefits derived from such taxation, and no reason exists why a city can not constitute a taxing district as well as a less densely settled community.

2. Municipal taxation—Contract—The city of Henderson having by ordinance, which was accepted by the appellant, granted to appellant the right to construct a bridge on or over the center of Fourth street, and on the line thereof to low water-mark on the Indiana side of the Ohio river, also the right of the use of the land between Water street in said city and low water-mark on the Kentucky side of the Ohio river, extending 100 feet below and 300 above the said Fourth street, for erecting such wharves, elevators or other buildings deemed necessary or convenient for the successful operation of said company. It was also provided in said ordinance that "nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge or any building erected by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto within the limits of said city." Held—That said reservation evidences a contract based upon consideration of extraordinary privileges granted by the city to tax said bridge property for municipal purposes; to hold otherwise would be to construe said reservation as a nudum pactum.

Judge Holt in a separate opinion concurs in the opinion of the court in

i of school and railroad tax, on the ground of a taxing district reated, but disagrees with the court in sustaining the imposi- or municipal purposes by reason of any contract, but agrees to upon the ground of benefits received by the bridge company icipal government.

& Lockett, H. W. Bruce and Wm. Lindsay for appel-

sey, M. Merritt and Jno. Young Brown for appellee.

om Henderson Circuit Court.

f the court by Judge Bennett.

llant was organized under an act of the legislature of approved February 9, 1872, for the purpose of erecting ing a railroad bridge across the Ohio river, and of ertain tolls for the crossing of railroad trains thereon. f Henderson, the appellee, by its ordinance approved 18—, and accepted by the appellant on the 10th day y, 1882, granted to the appellant the right to construct the center of its Fourth street, and on the line thereof er-mark on the Indiana side of the Ohio river, etc. ight of the use of the land between Water street in said w water-mark on the Kentucky side of the Ohio river, one hundred feet below and three hundred feet above 'ourth street, was granted to the appellant for erecting 'ves, elevators or other buildings deemed necessary or t for the successful operation of said company. It was ded in said ordinance: "Nothing herein shall be con- waiving the right of the city of Henderson to levy and xes on the approaches to said bridge, or any building ; said bridge company within the corporate limits of the bridge itself and all appurtenances thereto within ; of said city." The appellant's bridge was constructed) Ohio river at the place designated in the above-named . The appellee caused all that part of the appellant's uated on the Ohio river south of low water-mark on the hore, to be taxed for the purpose of paying the railroad)l taxes that the appellee was authorized to impose and ; real estate within her limits; also the taxes for munic- oses. The appellant contends that as its bridge is not by the city, and as it does not receive any of its bene-)uld not be taxed by the city for city governmental pur- per, or other local purposes which the city government uthorized to levy and collect on the real property within ;. The Louisville Bridge Co. v. The City of Louisville, 81 and other cases are relied on in support of this conten- the Louisville bridge case, and others referred to by all that is decided is that, in order to authorize the city ent to subject real estate situated within its corporate taxation for city or municipal purposes only, there must l or presumed benefits to such property by the city gov- being extended over it. It is upon this principle that lands, taken into the corporate limits of the city merely)urpose of increasing the city revenue, i. e., for the ex- benefit of the city, can not be taxed by the city for al purposes only. There must be some actual or pre- benefit to authorize such taxation. Accordingly, this ld in the case, supra, that the Louisville bridge received

no actual or presumed benefit from the city government proper, and, consequently, the bridge was not subject to city or municipal taxation. But, independently of this principle, this court has long since, and often, distinguished between the power of the city to tax real estate situated within its limits for city or municipal purposes only, and for such district purposes as the legislature might authorize; that the legislature might create a city boundary, or designate any other boundary without reference to existing civil or political districts, into taxing districts for certain local purposes. For instance, it is held in the case of the County Judge of Shelby County v. The Shelby R. R. Co., 5 Bush, 225, that the legislature could create a certain portion of Shelby county into a taxing district for the purpose of aiding in the construction of a railroad through such district. The court in that case approves the language of the court in the case of The People v. Lawrence, 36 Barb., N. Y., 177, to the effect that the "legislature is not confined in such taxation to existing political divisions. They may create a district for the purpose of taxation or assessment." Also in case of Burnett v. Sacramento, 12 California R., 76, "the burden may be levied upon the whole county or town, or on those most immediately benefited."

This court, in the case of the City of Henderson v. Lambert, 8 Bush, 608, has decided that the act of March 9, 1867, authorizing certain counties, cities, etc., to aid in building the Evansville, Henderson and Nashville railroad, and authorizing such counties, cities, etc., to levy and collect a tax for the purpose of paying, etc., any subscription that they might make to the capital stock of said road, had the effect to make such counties and cities, voting said tax, taking districts; and we now hold that the appellee, having voted said tax, is a taxing district. She voted said tax, not under her ordinary powers of taxation for city or municipal purposes, but as a taxing district. In the same case it was held that as the act of March 15, 1869, "provided that all the territory now embraced within the city of Henderson shall be, and is, incorporated as a school district, which shall be under the control and management of a board of trustees appointed by the mayor, etc." Such territory constituted a taxing district, and the right to tax the land within such boundary for school purposes, and the right of the city to tax the same land for city purposes, rested upon a different footing; that the former could not be deemed a city or municipal tax, but was a district tax, notwithstanding it was to be collected by the ordinary collecting agencies of the city. We see no good reason why the boundary of a town or city should not be made a taxing district, as distinguished from the ordinary taxing power of the towns or cities, as well as other designated localities where the e are no towns or cities. Under the power of the city to tax for the ordinary purpose of carrying on the city government she can not impose a tax upon the estate within her limits for the purpose of aiding in building railroads or supporting schools. For such purpose there must be express authority, and that authority need not be conferred upon the city as a city, but as a taxing district, and the authority may be given the city authorities to collect this tax without militating against the proposition that such territory is a taxing district.

The city may, as a taxing district, assess property within its limits and collect the taxes thereon that she would not be authorized to assess and collect for municipal purposes only. In the former case the inquiry is, is the property within the taxing district? And does the act authorize its taxation? In the latter case the inquiry is, is the property benefited, or presumably

d, by the taxation? In the former case the legislature
norized the voters of the district to vote the railroad or
ax upon the assumption that it will be a benefit to that
eding generations, in the way of financial, moral or in-
al improvement. The assumption may turn out to be a
, or the enterprise may be only partially successful, or
be detrimental. The chances, pro and con, must, in
be deemed to have been considered, and each voter must
ied to have agreed to take the risk of a benefit or a detri-
nd to pay the tax voted without reference to how that
may ultimately turn out. After such tax is voted the
f real estate situated in the taxing district will not be
) say that his property thus situated is not benefited by
erprise for which the tax was voted, and in the nature of
an not be benefited by it, none of the real estate may be,
benefited by it, and if one could be relieved of the tax
he was not benefited by it, why not all?. The answer is
) tax is authorized and voted upon the assumption that
be beneficial, and if this assumption turns out to be a
) as to this or that piece of property, the tax must, never-
be paid upon all of it. It has been held by this court in
e of McFerran v. Alloway 14 Bush, 581, that an island,
l in the Ohio river, near the Indiana shore, and which
ot be benefited by the building and the running of a rail-
rough the district to which the island belonged and was
was, nevertheless, liable for the tax that the district
) aid of said road. The court in that case said: "The
n the part of the legislature to establish the district or to
ze the particular precinct to vote the tax is conceded, and
; that the local improvement has been, or is being, con-
l in the taxing district is also admitted, and in such a
seems to us the legislative discretion on the subject must
The court has so often determined that such power ex-
the legislature of this State that it is no longer an open
n, and the benefits to be derived from those living in the
of the improvement, having been determined by the
ure in passing upon the act under which the tax was
l, the court has no revisory power over it. In the judg-
the legislature this tax district is benefited by the im-
nt; and the fact that an actual benefit is not derived by
ng in a remote part of the district, in which it is difficult
each the road or highway, is not an argument against the
ion of the burden."

vell settled that the appellee's jurisdiction extends to the
:er-mark on the Indiana shore; but she can not tax prop-
it is surrounded by said river, such as an island, for city
cipal purposes, for the reasons already indicated, and in
isville bridge case this principle was applied to the
roperty. But it is manifest that the appellee, as a tax-
rict, may tax such property.

ras an island in the Ohio river, fronting the appellee, no
ild doubt that the appellee, as a taxing district, could
Instead, the appellant's property, which is realty, and
across the Ohio river, is taxed. This property is used for
nd can not be less benefited by the appellee than an is-
uld be if situated in the middle of the river, or near the
shore. Yet the appellee, as a taxing district, may tax
nd, and we see no good reason why the same rule should
pplied to the appellant's property.

ppellee also seeks to tax the appellant for municipal pur-

poses generally. This the appellee, under like conditions, according to the decision in the Louisville bridge case, supra, can not do. This, as said, the appellee can not do, because the appellant's property, being situated in the Ohio river, is not sufficiently benefited by the appellee's government to authorize it to tax the appellant's said property for the support of its government proper. So the question is, does the contract entered into between the appellant and appellee, in which the appellant secured certain rights and privileges from the appellee, and in consideration thereof the appellee reserved the right to tax the appellant's entire structure within its jurisdiction, amount to a contract right to tax the appellant's property to low water-mark on the Indiana shore?

It is conceded, according to the Louisville bridge case, that the appellee's jurisdiction to the Indiana shore is for police purposes only. But it is clear that this is owing to the fact that the property, situated in or over the water of the Ohio river, not being actually or presumably benefited by the city government, is not subject to the payment of the municipal taxes; consequently the jurisdiction of the appellee on said water is, of necessity, ordinarily confined to police purposes only. So, as said, the question is, has the appellee the power to tax said property by reason of a contract made with the appellant?

Now the appellant obtained from the appellee the right to construct its bridge or approaches on or over the center of its Fourth street, and on the line thereof to low water-mark on the Indiana side of the Ohio river, etc., also the right to the use of the land between Water street, in said city, and low water-mark on the Kentucky side of the Ohio river, extending one hundred feet below and three hundred feet above the said Fourth street, was granted to the appellant for erecting such wharves, elevators or other buildings deemed necessary or convenient for the successful operation of said enterprise.

In consideration of said grant it was agreed: "Nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any buildings erected by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto within the limits of said city."

The appellant contends it was only meant to reserve the right to tax such property of the appellant as was therefore subject to taxation by the city government, and as that part of the bridge, situated on the water of the Ohio river, was not, for the reason above indicated, subject to taxation, the reservation relates to that part of the bridge, etc., that the appellee had the right to tax under the law. It is evident that the contract was well considered and prudently drafted by men skilled in that kind of work, and it is not presumed that they engaged in a mere nudum pactum, but they meant to set forth a business transaction. Now that business transaction was evidently this: The appellant desired rights and privileges that it did not possess, and which it could not possess without the consent of the appellee. So it is said to the appellee, grant these privileges, and you may tax what? Only the approach to said bridge? No, because the appellee already had the right to tax that, and it had made no concessions that could possibly be construed as waiving that right. What right, then, was granted? Why, the right to tax the "bridge itself." The bridge, as distinguished from its abutments and approaches, is that part that is over the water. Now the appellee, according to the Louisville bridge case, in its mu-

apacity, had no right to tax that part of the bridge over
r. Why then say that it did not waive the right to tax
'aive a right, there must be a claim of right to waive.
s said, as the appellee had no right to tax the bridge,
s, in fact, no right to waive; as an abstract proposition
ght to tax the bridge on the water, according to said
s contention is true. But it is equally true that the ap-
d the right, if asserted and agreed to, to claim that the
hould be taxed, in consideration of the privileges
This claim of right, it must be presumed, was asserted
ed to and expressed in the contract by the term "not
the right." If the contract does not mean this, then it
)thing. It is not supposed that the contracting parties
ınt to reserve a right that they already had, and about
ıere was no possible ground of dispute. But when it is
ed that the right to tax the bridge to the Indiana shore
legitimately obtained by contract, and that the appel-
ed to the appellant rights and privileges essential to its
ıe, designed to make money, and is making a large
, it is entirely reasonable to suppose that the appellee
)ntract for the right to thus tax the appellant, in con-
n of granting these essential rights and privileges, by
ıe appellant acquired the right to construct and operate
able a business enterprise. As said, the privilege was
to the appellant upon the consideration of the appellee
g the right to tax the entire property to the Indiana
hich was expressed by the term "nothing herein shall
rued as waiving" the right. To give the contract any
it means this, otherwise it would be a mere nudum

ppellant, at least for the purpose of collecting taxes,
e considered as a part of a railroad; consequently falls
he principle announced in Elizabethtown & Paducah R.
ustees of Elizabethtown, 12 Bush, 239. Opinion by Judge

dgment is affirmed.
Pryor dissenting.

Justice Holt delivered the following separate opinion:

gislature, by authorizing the imposition and collection of
oad and school taxes upon the real estate within the city
reated a taxing district. The power to collect these taxes
refore, conferred upon the appellee as such a district,
appellant's property being within it, is liable for them.
the municipal taxes proper the appellant's property is
he corporate limits, and, in my opinion, receives such
from the municipal government as render it both legally
ly liable for them.
these grounds I concur in an affirmance of the judgment
)wer court.

KENTUCKY SUPERIOR COURT.

BRADY v. COOPER.

(Filed November 5, 1890.)

Where the settlement of a fiduciary in the county court is ex parte, no exceptions having been filed by any one, it is only prima facie correct, and is not a final adjudication of the rights of the parties, even though they had notice; and those complaining have the right, by original bill, to surcharge the settlement. It is only where the parties, being sui juris, have invoked the jurisdiction of the county court, and the court has passed upon their exceptions, that the judgment rendered is final between the parties, and the only remedy of the complaining party is by appeal.

Rives & Spalding for appellant.

Hugh P. Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Young.

J. H. Brady, in March, 1889, by his deed of assignment, conveyed to H. P. Cooper all of his estate of every kind, save that which by law was exempt from execution, in trust for the benefit of appellant's creditors. Appellee accepted the trust; took charge of his estate, etc.

Appellee, as assignee, etc., on the 2d day of September, 1889, made a settlement of his trust with the county judge of Marion county, and which settlement was approved and confirmed 4th March, 1889.

This suit was brought by appellant Brady on the 26th December, 1889, against appellee Cooper to surcharge the settlement made by him as his assignee, on the 2d of September, 1889, and to recover a balance of $141.40 as part of his homestead exemption in his hands.

The appellee demurred to so much of the appellant's petition as seeks to surcharge the settlement; and the court sustains the demurrer, and dismissed the petition.

The appellee makes the point that courts of equity have now no jurisdiction of suits in equity to surcharge settlements of fiduciaries made and approved in the county court, since the acts of May 5, 1880, and May 9, 1884, General Statutes, pages 394-5. But that the only existing remedy is by appeal from the county court to the circuit court.

Previous to the revision of our statutes, when the settlement of the fiduciary was ex parte, or had been confirmed without exceptions in the county court, a suit in equity, brought in the circuit court to surcharge a settlement, was the exclusive remedy. (12 Ben Mon., 510.)

Upon the revision of our statutes county court settlements, made with fiduciaries, were declared to be only prima facie evidence, but there was no provision in them for an appeal from the judgment of the county court. Consequently the only remedy for dissatisfied parties was by a bill in equity to surcharge, assailing, by averment and proof, the particular items objected to in the settlement.

This continued to be the remedy until the legislature, on the 5th of May, 1880, passed an act to regulate the appellate jurisdic-

e courts of the Commonwealth. It is provided in said
ppeals shall be to the circuit court from all orders and
i of the county court in cases of bastardy; in settlement
ounts of personal representatives, guardians, commit-
rsons under disability and assignees, under deeds of
the benefit of creditors, and of certain other subjects
court jurisdiction, therein mentioned.
)sequent act, approved May 9, 1884, the time for an ap-
judgments of the county court was fixed at sixty days,
be tried in the same manner that appeals from judg-
the circuit courts are now taken, excepting that the
ipers and copies of the orders and judgments are to be
e trial, instead of a transcript.
pinion the object of the legislature in providing for ap-
the county courts to the circuit courts by the fore-
, provided only for appeals in those cases where the
ind beneficiaries, who were sui juris, have invoked the
n of the county court, and the court has, upon their
, adjudged upon the matter of difference presented.
ent thus rendered is final as between them, and the
ly of the complaining party is by appeal.
re the settlement of the fiduciary is ex parte, and no
appearing to have been filed by any one, such a set-
only prima facie correct, even though the parties had
l it is not a final adjudication of the rights of the
d those complaining have the right, by original bill,
ge the settlement. Any other rule might work incal-
schief upon the rights of infants, lunatics, creditors
beneficiaries, and would place their property rights in
of dishonest fiduciaries. And especially is this so, in
e statute, which only provides for notice in cases
parties are residents of the county.
ror in the court below to sustain appellee's demurrer.
t erred in dismissing the petition, as the plaintiff was
a judgment for the balance, admitted to be due him
gnee, as shown by the settlement.
ment is reversed and the cause remanded for fur-
dings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

PRICE, GD'N, &c. v. NICHOLS.

1, 1890. Appeal from Webster Circuit Court. Opinion of the
residing Judge Barbour, reversing; Judge Young, dissenting.
) personal property of a decedent, set apart to the widow as
distribution and sale, vests in her for the benefit of herself and
ildren of the decedent residing in the family. And while the
without restraint, sell or give away the property, if she chooses
if, having married again, she dies, without having disposed of

the property, the title is cast upon the children, and not upon the surviving husband.

F. M. Baker for appellants; Towery & Bourland for appellee.

CITY OF NEWPORT v. MILLER.

Filed October 1, 1890. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Towns and cities—Obstruction on sidewalk—A stump, two feet high, and about twenty-two inches in diameter in the sidewalk of a city, about four inches from the curbing, was a nuisance, and as it was not a suitable thing out of which to construct a hitching post, the fact that it was intended to be used for that purpose did not excuse the failure of the city to remove it. Therefore, the city is liable for an injury to one, resulting from his falling over the stump at night, there being no light or other thing to indicate where the stump was.

2. Same—Evidence—While a city may place hydrants, gas plugs, etc., on the sidewalks near the curbing, it has no right to place useless obstructions at such places, and if a person is injured by falling over such obstructions the city is liable. The court, therefore, properly refused to allow a witness to state that the hydrants, etc., were as dangerous as the stump. Moreover, the question as to which was the more dangerous would, in any event, have been one for the jury, and not for the witness.

3. Same—The mere fact that the plaintiff knew that on some of the streets of the city stumps were allowed to stand, or that he had possibly, upon some former occasion, casually noticed that there were stumps on the street in question, was not such knowledge as, under the circumstances, required him, as a reasonable, cautious man, to anticipate the danger before him.

4. Instruction as to contributory negligence—The court properly refused an instruction as to contributory negligence, which excluded the idea that the plaintiff's negligence must have been such as but for it the injury would not have been sustained.

E. W. Hawkins for appellant; A. T. Root for appellee.

FENLEY'S ADM'R v. KENDALL.

Filed October 8, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Judge Young, reversing.

Interest—Death of obligor—A note, executed while the conventional interest law was in force, payable one day after date, with 10 per cent. interest from date, bears only 6 per cent. interest after the death of the obligor. The cases holding that such a note bears 10 per cent. until paid were not intended to abrogate the statute, which provides that a greater rate than 6 per cent. shall not be collected as against a deceased obligor after the maturity of the note.

Collins & Fenley for appellant; Wm. Goebel for appellee.

NATIONAL BANK OF LEBANON v. BOLES.

Filed October 8, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge Young, affirming.

Refusal of bank to honor check—Where the amount in bank to the credit of a depositor equals or excels the amount of a check drawn by him, the bank is bound to honor his check, and if it refuses to do so it is liable to an action by him for damages. The fact that the holder of the check has a right of action against the bank for dishonoring the check does not deprive the drawer of the right to sue and to recover the damages sustained.

Samuel Avritt for appellant; Rives & Spalding for appellee.

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DECEMBER 15, 1890. No. 12

KENTUCKY COURT OF APPEALS.

PIKE v. GREENBAUM.

(*Filed Oct.* 7, 1890—*Not to be reported.*)

e receipt—Unpaid purchase money for whisky—Vendor's lien—Appel-holder of warehouse receipts for twenty barrels of whisky, hav-d said receipts by sale and transfer from John Shurr. Said ls as follows, viz:

NDERSON HAND-MADE SOUR-MASH WHISKY, OWNED AND CONTROLLED BY S. J. GREENBAUM.

LOUISVILLE, KY., March 31, 1888.

in S. J. Greenbaum's Distillery Bonded Warehouse, No. 61, strict of Kentucky, the whisky herein below described to be held , and subject to the order of Mr. John Shurr, Quincy, Illinois, on return of this receipt to S. J. Greenbaum, Louisville, Ky., dorsed, and on payment of government tax and storage, at the cents per barrel per month from date, and upon the payment ys due hereon. Then follows description of the barrels by ers; the quantity of each; date of bond, and March, 1885, is me when tax is due.

pleaded as defense by appellee to an action for the recovery of said whisky are, that neither the government tax nor storage the holder of the receipt prior to or on March, 1885; nor was e price of the whisky ever paid or tendered, and the acceptance urr was protested for non-payment, and the whisky had been mmission merchant, at the instance of appellee, and the pro-r applied to pay the tax, charges and purchase money. *Held*—receipt gave notice, in general terms, that said whisky was sub-ayment of "all moneys due," it was sufficient to put purchasers notice of claims for purchase money; and the vendor, there-tled to the prior equity.

D. M. Rodman for appellant.

Lieber & Lincoln for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellant brought this action to recover value of twenty barrels of whisky, for which two warehouse receipts were, March 31, 1883, executed to Jno. Shurr, and by him, August 1, 1883, sold and delivered to appellant, being as follows:

BELLE OF ANDERSON HAND-MADE SOUR-MASH WHISKY, OWNED AND CONTROLLED BY S. J. GREENBAUM.

No. 83. LOUISVILLE, KY., March 31, 1883.

Received in S. J. Greenbaum's Distillery Bonded Warehouse, No. 61, Seventh District of Kentucky, the whisky herein below described to be held for account, and subject to the order of Mr. Jno. Shurr, Quincy, Illinois deliverable on return of this receipt to S. J. Greenbaum, Louisville, Ky., properly indorsed, and on payment of government tax and storage, at the rate of five cents per barrel per month from date, and upon the payment of all moneys due hereon. Then follows description of the barrels, by serial numbers, the quantity in each, date of bond, and March, 1885, is named as time when tax is due.

The facts pleaded as defense to the action are, that neither the government tax nor storage was paid by the holder of the receipt prior to or on March, 1885; nor was the purchase price of the whisky ever paid or tendered, but the acceptance therefor, given by Shurr, was duly protested for non-payment; and, consequently, appellee was compelled to sell the whisky, which he did do, through a commission merchant, and the proceeds thereof were wholly applied to pay the tax, charges and purchase money. The meaning and effect of the act of March 6, 1869, under which recovery is sought by appellant, has been determined by this court, in Western Bank v. Marion County Distillery Co., 9 KY. LAW REP., 500, which does not differ materially from this case. It was there held, that "to entitle a warehouseman to assert a lien for purchase money as against a holder of a warehouse receipt, it is not necessary that the amount of the purchase money unpaid should be set forth in the receipt. It is sufficient, if it appears from the receipt that the purchase money is unpaid, without stating the amount." In that case "payment of the purchase price of said whisky," was, in terms of the receipt, made one of the conditions of delivery of the goods by the warehouseman. Here, however, a condition of delivery is, in the language used, "payment of all moneys due hereon," which words, it is argued, do not necessarily or even properly relate to purchase money for the whisky.

Though not in terms stated in the receipt that the whisky was sold by Greenbaum to Shurr, it would have been manifest to any one examining the paper that such was the character of the transaction, and that the money mentioned was purchase money. For the identical brand of whisky, which Greenbaum was at top of the receipt described as owner and controller of, is described in the trade-mark impressed on the face of it. Besides, the whisky being in a bonded warehouse from, nor to, which Shurr could remove it before the tax was paid, shows he was neither consignor or owner

he receipt was given. As, therefore, the nature and extent nbaum's lien was, in the language of the case cited, "so ap- s that any one of ordinary business capacity, in reading the must have been informed of appellee's equitable right to chase money, it is such a compliance with the statute as the warehouseman a superior equity to that of the pur- of the receipt.

o tender of the purchase money having been made by ap- judgment of the court below dismissing the action must be

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PUSEY'S TRUSTEE, &C. V. WATHEN, &C.

(*Filed Oct.* 2, 1890.)

ition—General devises—Limitation—In 1874 a testator, by his will of his estate by giving to his widow a specified sum, and directed is five children be made equal in the division, and empowered his o pay said legacies in bonds, bank stock and choses in action, the d bonds to be paid at their saleable value at the time of payment. itor is also directed to sell and convey all of his real estate, and, by his wife's share is to be made equal to the shares of the several iving at the time of final distribution.

the executor instituted suit in the Hardin Circuit Court and had l species of property valued and allotted to the devisees. Among and stocks were ten Daviess county bonds, each for $500, which ed to the trustee of Hettie C. Cunningham, at the value of $3,860, the court.

after the delivery of said bonds, it was adjudged, in Daviess Cir- , at the suit of appellee, Wathen, and his wife, formerly Hettie C. am, that said bonds were valid, to the amount of $1,360 only, and the residue.

, 1888, they brought this action against the executor and other nd devisees of the testator, his widow being then dead, asking for contribution by each of them, to extent of one-sixth of difference between the sum at which they were appraised in the ientioned and their value according to the judgment of the rcuit Court.

ntes of both five and ten years are pleaded in bar of the action. t section 6, chapter 23, title "Contribution," General Statutes, apply to this case; it only applies to contribution between ho are *heirs-at-law*, to compensate one who has received a devise of perty, the title to which shall prove invalid. The appellee, Hettie as a general devisee, and as such was independent of statute, contribution, when title to any part of the estate devised was it her cause of action accrued upon the delivery of the bonds in as barred by limitation when this action was instituted.

tation of five years bars an action under section 6, chapter 23, of tutes.

obson, Geo. DuRelle, James Montgomery, Byron Bacon t McPherson for appellants.

h & Straus for appellees.

from Hardin Circuit Court.

of the court by Judge Lewis.

probated in the Hardin County Court in January, 1874,

A. H. Cunningham disposed of his estate in the following manner: Having directed a specified sum paid to his widow and enough to those of his children, who had not received advances, to make them equal to those who had, he provided substantially, in clause 8, that the residue of his estate, real, personal and mixed, should go to his five children, to be equally divided among them. And following provisions for an equal division among the survivors of the estate of any one or more of his children, all daughters, dying without children, and for guardians and trustees of those then under age, is clause 14, as follows: "I hereby direct and empower my executor herein to pay part or all of any of the legacies herein willed to my said wife or children in bonds, stocks, bank stocks and choses in action; the stocks and bonds to be paid at their saleable value at the time of payment."

In succeeding clauses his executor is named and empowered to sell and convey all his real property, except sale of the dwelling-house and lot was not to take place until expiration of five years, during which period his widow was to have right to occupy it. By a codicil an amount was to be given to her equal to the shares of the several children living at time of final distribution.

It appears that the executor instituted, in the Hardin Circuit Court, an action in equity for a division of the personal estate, consisting principally of stocks, bonds and notes, and commissioners of court, appointed for the purpose, having ascertained and reported the saleable value of each item, judgment was rendered, authorizing the executor to make, and he, in May, 1874, did make an equal division, as provided by the will, among the several devisees.

Among other bonds and stocks left by the testator there were ten bonds, each for $500, with interest coupons attached, issued by the county of Daviess, which were, in the division mentioned, allotted to I. D. Allen, then trustee of appellee, Hettie C. Cunningham, and charged to her at $3,860, their saleable value, as reported by the commissioners and adjudged by the court.

But it appears that after delivery of the bonds to Allen, trustee, an action was instituted in the Daviess Circuit Court by A. G. Howard and others, and judgment was rendered therein, enjoining the Daviess County Court levying tax to pay either principal or interest of certain enumerated bonds adjudged to have been issued in excess of the number and amount authorized by law, and, therefore, void, those allotted to Allen, trustee, in the division mentioned, being included.

Subsequently, however, appellants, Richard and Hettie C. Wathen, late Cunningham, being then married, were, upon their petition, made parties to that action, and at a re-trial it was, in 1888, adjudged that her said bonds were valid, to the amount of $1,360, including the same ratio of coupons attached, but void to the amount of $3,640, including coupons.

Thereupon, in April, 1888, they brought this action against the executor and other children and devisees of A. H. Cunningham, his widow being then dead, asking judgment for contribution by each of them to the extent of one-sixth of amount of difference between the sum at which they were appraised in the division mentioned, and their value, according to judgment of Daviess Circuit Court. And judgment having been rendered, according to prayer of the petition, defendants prosecute this appeal.

The statutes of both five and ten years' limitation are pleaded in bar of the action. But appellees seem to rely for relief alone upon section 6, chapter 23, title "Contribution," General Statutes, as fol-

: "Where any real or personal estate shall be devised to any
of the heirs-at-law of the testator, and the title to the same, or
art thereof, shall prove invalid, such devisees shall have con-
tion from the others, unless it shall appear, from the will, such
ot the intention of the testator."
their remedy be derived solely from that section, it results that
tatute of five years' limitation applies; for section 2, article 3,
er 71, provides, that "an action upon a liability, created by
te when no other time is fixed by the statute creating the lia-
', shall be commenced within five years next after the cause of
accrued."
en the cause of action in this case accrued, whether at the
the bonds in question were delivered, in 1874, or upon rendi-
of judgment by the Daviess Circuit Court in 1888, of course, de-
upon the proper meaning and effect of the words, "shall
invalid."
nifestly to so construe that phrase as to make actual recovery
dgment of court the only cause of the action, authorized by
n 6, would result in continuing liability of devisees to contri-
n for an indefinite period that might, in many cases, be longer
even fifteen years. It seems to us if such had been the legis-
intent, apt and unambiguous words would have been used to
ss it, especially as invalidity of title of property devised may
fficiently proved to justify contribution, without waiting for
encement of an action to recover it by a stranger. Moreover,
h the right to contribution is given by the statute, still it is
upon the theory of an implied warranty of title and under-
by the other devisees to contribute of what they received
h to restore the losing one to an equal footing. And there is
e better settled than that a breach of an implied warranty of
o personal property must be regarded as occurring, and cause
ion accruing, immediately upon delivery, if in fact the title is
nvalid. Scott v. Scott, 2 Mar., 219; Chancellor v. Wiggin, 4
, 202; Tipton v. Tipton, 1 Met., 570.
not clear that title to the bonds in question *has*, in meaning
statute, proved invalid. On the contrary, it may be con-
d, with much plausibility, that the loss has been sustained by
ees, not on account of defect of title, but because they were, in
worthless and void. But in either case the cause of action
d upon delivery of the bonds.
do not, however, deem it necessary to decide that question,
e, satisfied for another reason, section 6 does not avail appel-
It was intended to apply alone to specific devises, between
and general devises there is a well defined distinction, under-
and evidently intended by the Legislature to be preserved, in
t to contribution on account of invalid titles of property de-
; but, as it was deemed necessary to explicitly provide in sec-
, not as respects contribution on account of payment of the
r's debts. That section is as follows: "As respects the pay-
of the testator's debts there shall be no distinction between
c and general devises, except as herein provided."
language of section 6 appropriately refers to and describes the
, not of an estate generally, but of a particular part or thing
fied and distinguished from all other parts or things of the
kind, the title to which is acquired at death of the testator,
virtue of the will; and such is a specific devise. Pomeroy's
y, section 1130. But if it had been the purpose to make that
applicable to general devises, the language would have

been: "When * real or personal estate shall be devised to * the heirs-at-law of the testator, and the title to * * any part thereof shall prove invalid * the one, or those of them to whom such part or parts fall shall have contribution," &c.

Previous to adoption of the Revised Statutes, when section 6 first became part of the statute law, a specific devisee was not entitled to contribution on account of invalidity of title of the property devised to him. And, as will be seen, he is not now entitled under that section, unless he be an heir-at-law of the testator.

But general devisees were always and are now independent of statutory enactment, both liable and entitled to contribution when title to any part of the estate devised is invalid. For as a result of applying the maxim, "equality is equity," to a division and distribution of a testator's general estate, warranty of both title and soundness are implied, and for a breach thereof, or for the equitable cause of fraud or mistake, such contribution may be enforced between general devisees.

The bonds in question were not devised to Hettie C. Cunningham, identified and distinguished as particular things or parts of the estate, but were devised generally to the heirs-at-law of the testator, no more to her than to any other one. Nor did she acquire title to them, in virtue of the will at death of the testator, but by allotment in a division among all the devisees.

In our opinion, whether appellee was entitled to contribution, in virtue of the provision of section 6, chapter 23, on account of breach of the implied warranty, or on the ground of mistake, her cause of action accrued upon delivery to her of the bonds, and, as a consequence, recovery is barred by limitation.

Judgment of the lower court must, therefore, be reversed and cause remanded for dismissal of the action.

SHELBY V. LEWIS.

(*Filed Oct.* 4, 1890—*Not to be reported.*)

Judicial sale Description of land—This controversy involves the construction of a mortgage describing the land conveyed and ordered sold to satisfy the claim of a surety for indemnity, and the court decides that the description is sufficiently definite to subject the land to the payment of the debt.

Hill & McRoberts for appellant.

R. C. Warren and D. R. Carpenter for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Pryor.

The controversy in this case relates to the boundary of a tract of land purchased by the appellant, Mary Steele Shelby, at a sale by the commissioner of the Lincoln Circuit Court, in the case of the National Bank of Stanford v. Shelby, jr. That proceeding was to foreclose a mortgage executed by Isaac Shelby, jr., to John W. Shelby, who was the surety of Isaac to the bank for a large sum of money.

In the mortgage to John Shelby, and in the deed to Mrs. Shelby, the land mortgaged and purchased by Mrs. Shelby is bounded on

ı by the land of Moore, and the tract *now owned* (the mort-
cription) by the grantor *purchased from Felix Gibson*. The
e and commissioner's deed both fix the line of the tract pur-
y Isaac Shelby, the grantee of Felix Gibson, as the south-
ıdary of the tract. The Felix Gibson tract of land contained
, and was conveyed by Felix Gibson to the grantor in the
e. If the line of the 101 acres is the southern boundary the
controversy was properly subjected to the payment of ap-
lebt.
sisted by the appellant, such being her defense, that Isaac
ever purchased the 101 acres of Gibson, but that he pur-
nly sixty-six acres, that was subsequently conveyed to
ınd that thirty-five acres of the 101 was purchased by Isaac
r., in his life-time and added to the main farm that was sub-
y conveyed to his son, Isaac Shelby, jr.
›pellee says that the line of the 101 acres is the boundary,
ıppellant that the line of the sixty-six acres is the boundary,
this sixty-six acres was the land actually purchased of Gib-
ıaac, jr., and conveyed by him to Helms. Shelby, jr., says
c Shelby, sr., in his life-time purchased from Gibson the
'e acres and added it to his farm, called "Arcadia," and
legal title to the whole 101 acres being in Gibson, and Isaac,
ıg purchased the "Arcadia" farm, Gibson conveyed to him
e 101 acres, sixty-six acres of which he conveyed to Helms,
he thirty-five acres a part of the "Arcadia" farm. It also
hat this thirty-five acres was appraised as a part of that
l as being embraced by the mortgage under which the fore-
as had and purchased by the appellant.
ıer appears that Mrs. Shelby mortgaged this land after she
l it to Centre College, and in that mortgage embraced the
e acres in controversy and described it as the land pur-
ıder the judgment of the national bank.
College is brought into the case on the ground that the
rtgaged did not embrace the thirty-five acres, but that it
to Isaac Shelby, jr., who is indebted to the appellee, and
re College should be compelled to sell the farm, known as
," to satisfy its mortgage, leaving the thirty-five acres to
Shelby's, jr., debt.
ıin, we think, from the testimony that the thirty-five acres,
ıe of the mortgage to John Shelby, was regarded as a part
.rcadia" farm—it adjoined it. The farm containe l a large
f acres. The sixty-six acres of the Gibson tract had been
rom it, and it is perfectly reasonable that the purchaser
ve regarded it as a part of the "Arcadia" farm and made
nder that belief. Besides it appears that the appellee was
of Shelby, jr., and was entitled to a part, at least, of the
of the sale that was paid over to him by virtue of the
. Nor is there any reason why the ambiguity should not
ıed. It was entirely competent to show what was intended
arties, and that the line of the sixty-six acres was the
instead of the 101 acres.
gment below is, therefore, reversed, with directions to ad-
land as being embraced by the sale had under the judg-
he Lincoln Circuit Court, and for proceedings consistent
opinion.

CRABB V. POTTER & CO.

(*Filed Oct.* 7, 1890—*Not to be reported.*)

Homestead—Abandonment—A widow, without infant children, was not in the occupancy of a tract of land containing 114 acres, in which she owned a life interest, when it was levied upon and sold to satisfy her debt, and upon a motion made for a writ of possession she claimed the land as her homestead.

The evidence shows that she had, for three or four years, made her home with a widowed niece, a mile or more from the land, not claiming it as her homestead until after the sale; but, on the contrary, had divided it between her three children, two sons and a daughter, one son having purchased the interest of his brother, had possession of two-thirds of it, while his sister possessed one-third. *Held*—That she had clearly abandoned her homestead right, and will not be permitted, after the sale, to claim it.

Dulaney & Mitchell and E. W. Hines for appellant.

John M. Galloway for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Lewis.

It appears that under an execution on a judgment against appellant and others, in favor of appellees, her life estate in 114 acres of land was, in June, 1887, purchased by them.

But to a motion for writ of possession, made at the February term, 1888, of the court that rendered the judgment, she made defense that she was, at time of the sale, a *bona fide* housekeeper with a family, and entitled to a homestead right in the land, for which she asked judgment.

The evidence shows that when the land was sold appellant, who was a widow without infant children, was not in occupancy of the land, but was then, and had been for three or four years, residing with a widowed niece and step-daughter in the village of Rockfield, one mile or more from the land.

A temporary absence from a homestead does not, as is well settled by this court, forfeit right to it, provided there be an intention to return to and occupy it as such by the debtor. But the evidence in this case, as it seems to us, shows an intention on the part of appellant to abandon the land as a home, and to cease keeping house there. For while she occasionally returned there, staying with her married daughter, she did not resume housekeeping; nor did she act as, or claim to be, head of the household there any more than she did at the house of her neice, where she staid greater part of her time. She had three children, two sons, one married and residing in the neighborhood, the other a non-resident of the State, and one daughter, married to Sanders.

As evidence of her intention to cease housekeeping and abandon the 114 acres as a homestead, she, in 1886, divided it between her three children, the son remaining in the neighborhood, getting two-thirds, having purchased the share of his non-resident brother, and the daughter the other third, and each of the two took possession of the part allotted, and have been respectively in possession ever since. When a debtor is neither in possession, nor sets up claim to land as his homestead at the time it is levied on and sold, he can not afterwards be heard to make such claim, unless his absence was temporary, and his intention to return to and occupy it as a home-

d before and continued up to such sale. For it is too late to resume the possession, and for the first time make the

t has not testified in this case, and her homestead right termined from the circumstances proved, which, in our ıow she abandoned the homestead, and would not have ıed it if the sale had not taken place.
ıt affirmed.

WILSON, &C. V. BRYAN, &C.

(*Filed Oct.* 2, 1890.)

ontingent devise—B. died in 1854, and in his last will and testa- the following language, viz: "It is my will that my estate should gether and jointly used and enjoyed by my children until the omes of age, and then the land to be equally divided in valus ıy sons that may then be living. If any of my sons should die y bodily heirs, his portion of my estate to be divided amongst 's and sister that then may be living. And further, all my per- e to be sold and the proceeds to be divided amongst those of my ıen living, giving to my daughter, Sallie B. Cassell, as much as her equal with my sons. If she should marry or die, then her my estate to go to her children. In the division of my estate ors will be governed by the charges made in my book marked B, ıake them all equal." In 1861 the youngest son arrived at the age -one years, when the allotment of land among the sons was made t.

pellees are children of a son of the testator, who died subsequent ɔtment, and they claim an interest in the lands left by two of tes- ıs who died without children, subsequent to the allotment. *Held*— ɔellees in right of their father was entitled to the share in the land he two deceased sons of the testator, that their father would have heir at law if living. It was clearly the intention of the testator sons should share his land equally, and that when the divisɔn was h son was to be vested with the absolute title to the portion alloted The only event which would disturb this scheme of division was ı of a son or sons before the time for division, viz: The arrival at is youngest son.

ıugh & Bronaugh for appellants.

Morton for appellees.

al from Jefferson Court of Common Pleas.

ion of the court by Judge Lewis.

'. Bryan died in 1854, leaving a will, upon construction of the lause of which decision of the two cases before us depends. lause is as follows: "It is my will that my estate shall be ɡether and jointly used and enjoyed by my children until ungest comes of age, and then the land to be equally divided ıe amongst my sons that may then be living. If any of my ıould die, without any bodily heirs, his portion of my estate livided amongst his brothers and sister that then may be liv- And further, all my personal estate to be sold, and the pro- divided amongst those of my children then living, giving to my ıter, Sallie B. Cassell, as much as will make her equal with

my sons. If she should marry or die, then her portion of my estate to go to her children. In the division of my estate my executors will be governed by the charges made in my book, marked B, so as to make them all equal. Furthermore, it is my will, if my wife should desire it at any time, that any one of my sons should live with and take care of her, his mother, while she may live, that he be paid out of my estate what my executors, or two disinterested persons may think his special attention worth to his mother; and it is my will, that if any of my slaves should become unruly and disobedient, my executors may sell them at any time, or any other species of my property that they may think advisable for the benefit of my children."

It appears M. Bryan, the youngest son, became of age September 20, 1861, and then the children, five sons and one daughter, agreed, in writing, and did divide and partition the estate, in pursuance of the will, deeds being executed to each son for the tract of land allotted to him.

Appellees, W. T. and S. H. Bryan, are children of A. S. Bryan, son of testator, who died in 1863; and the controversy in the two actions, brought by appellees and tried together, is in relation to the lands left by two other sons of the testator, who died at different times subsequent to 1863, intestate and without children, the two surviving brothers and sister having taken possession and claimed said lands, to the exclusion of appellees.

It seems to us if each portion of the clause quoted be considered in relation to and dependence upon all other parts, as manifestly should and was intended by the testator to be done, there is not much difficulty in determining the nature and object of the scheme devised for disposal of his real estate among his five sons. That scheme was, we think, to have his estate, in his own language, "kept together and jointly used and enjoyed by all his children," until the arrival of his youngest son to the age of twenty-one, and then for a division to take place among those of his sons living, which, according to the natural import of the language used, involved an absolute title of each of the sons to the particular tract of land falling to him in that division. And we think it is equally clear the event, and the only one contemplated by the testator or correct grammatical construction permits, upon which that scheme was to be modified or altered, was to be the death of a son or sons before the time arrived for the division to take place. The close connection of the sentence in which the condition or contingency is mentioned with that providing for division, for one immediately follows the other, shows that the condition and only one intended upon which the devise of an absolute estate could be defeated, was occurrence of the death of one or more of his sons before his youngest became of age.

The case of Duncan v. Kennedy, 9 Bush, 580, is almost exactly like this, and, we think, conclusive the construction we have given of this will is correct.

It thus results appellees, in right of their father, was entitled to the share in the land left by the two deceased sons of the testator, that he, their father, would have taken, as heir-at-law, if living.

And the judgment is affirmed.

BOSQUETT, &c. v. HALL.

(*Filed March* 8, 1890—*Not to be reported.*)

Homestead—What constitutes a family—In an action to satisfy a debt by subjecting land claimed as a homestead, the debtor must show that he is a *bona fide* housekeeper with a family.

The persons residing with the debtor in this case were infant children, to whom the debtor was under no natural or legal obligation to support, and did not, in legal contemplation, constitute a family which entitled the debtor to the exemption.

Bush & Robertson and J. H. Irwin for appellants.

James C. Poston for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

To entitle a person to the benefit of homestead exemption, he must, when a debt against him is attempted to be satisfied, be a *bona fide* house-keeper, with a family, whether such debt was created before or after the homestead was acquired.

"In legal contemplation, whomsoever it is the natural or moral duty of the debtor to support, or is dependent upon him for support may be considered and treated as a member of his family." Bell v. Keach, 3 Ky., 42. And accordingly an infant brother or sister, or aged and helpless parent, or even a bastard child may, and have been held to, constitute a family in the meaning of the statute.

But the persons in this case, residing with the debtor, though infant children, have no natural or legal obligation on the debtor for support, being strangers in blood to him. He may at any time separate from and cease to support or care for them without violating any legal or natural obligation.

And to so extend the operation of the statute as to exempt the homestead in such case would be not only contrary to the policy of it, but place it in the power of a debtor by subterfuge and fraud to defeat his creditors. The construction and operation of the homestead law must be determined by some well defined rule that is reasonable and just, not according to the mere will or caprice of the debtor.

It seems to us appellee is not entitled to benefit of the homestead exemption, and the judgment must be reversed and cause remanded for further proceedings consistent with this opinion.

MASSIE V. COMMONWEALTH.

(*Filed Oct.* 2, 1890—*Not to be reported.*)

Criminal law—Jurisdiction—From a judgment of conviction for horse stealing, in the Montgomery Circuit Court, appellant seeks a reversal for want of jurisdiction in the court trying the case. The horse was stolen in Montgomery county and taken to the county of Bourbon, and there sold. Appellant was arrested in Bourbon county, at the instance of the Montgomery county authorities, taken back to that county and convicted. *Held*—That section 24 of Criminal Code of Practice, directing that the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county, was to prevent a conflict of

jurisdiction in cases where it belonged to more than one county, and was not inserted in the Code for the benefit of the criminal.

Wood & Day for appellant.

P. W. Hardin for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted and convicted of horse stealing in the Montgomery Circuit Court. He is insisting he was tried by a court having no jurisdiction of the offense by reason of section 24, Criminal Code. That section provides: "If the jurisdiction of an offense be in two or more counties, the defendant shall be tried in the county in which he is first arrested, unless an indictment for the offense be pending in another county." The horse was stolen in Montgomery county and taken to the county of Bourbon, and there sold. He was arrested in Bourbon at the instance of the authorities in Montgomery county; taken back to that county and convicted. He could have been indicted in either county, and as he was arrested in Bourbon, following the letter of the statute, the accused says he ought to have been tried in Bourbon. This provision was not inserted in the Code for the benefit of the criminal, but to prevent a conflict of jurisdiction in cases where it belonged to more than one county. That is, the offense being as complete in Bourbon county as in Montgomery, and there being no indictment in the latter county; if the authorities in Bourbon had arrested the accused for the commission of the offense in that county, the Montgomery court could not have ousted the Bourbon court of jurisdiction, the effect and object of the section being to give the county jurisdiction when arrested that first makes the arrest, unless an indictment is already pending for the offense in a county having jurisdiction.

The testimony in this case is conclusive against the accused, both by his voluntary confessions and the testimony of those who saw the accused riding the horse on his way to Paris, where the horse was sold by Finch on the public streets of Paris, with the accused standing not far from where the horse was being sold. The court properly refused to give instruction A because the instruction in substance had already been given. Instruction B was on the question of jurisdiction, and should have been refused.

Judgment affirmed.

LYONS, &C. V. LANCASTER, &C.

(*Filed Oct.* 4, 1890—*Not to be reported.*)

Fraudulent conveyances—Henry Lancaster died in 1881, leaving a widow Mary H., three sons, R. B., B. J. and Thos. H. Lancaster, and two children of a deceased daughter, and the owner of three tracts of land: 194 acres in which his wife had a life estate; 100 acres and 226 acres, aggregating 5[illegible] acres. He was, however, at the time largely in debt. After his death B. J. and Thos. H. Lancaster became involved financially and made assignments for the benefit of their creditors to R. B. Lancaster, who, in 1884, brought a suit to settle the insolvent estate of B. J. Lancaster. But in order to ascertain the interest of B. J. Lancaster in the estate of his father, subject to the payment of his debts, a settlement of the estate of his father was decreed by the court, and it was adjudged that the land left by Henry Lancaster

first subjected and sold to pay debts against his estate amounting to about $5,640, that one of those debts was about $1,146, which B. J. Lancaster owed to Fletcher Wilson, Henry Lancaster being surety for purchase money of sixty-five acres of land, the title of which was in B. J. Lancaster, and that sale be made of it and proceeds applied *pro tanto* to pay the debt; that B. J. Lancaster was indebted to the estate of his father in about $1,816, to pay which his interest in the estate was to be first subjected; that the widow was entitled to a life estate in the 194 acre tract, and also to dower interest of one-third of the other two tracts, and that the sale of the 520 acres was to be made subject to her use and occupancy for life; that B. J. and Thos. H. Lancaster were entitled to $1,000 out of the proceeds of sale in satisfaction of their homestead right, provided the land sold for enough to pay debts against the estate. The land was sold by the commissioner, and the 520 acre tract was purchased January 7, 1885, by Fletcher Wilson, at the price of $7,761, for which three bonds, payable in six, twelve and eighteen months, were given. The tract of sixty-five acres was purchased at the same time by B. J. Lancaster at the price of $785, for which he executed his bonds.

In an action by the creditors of B. J. Lancaster to subject both tracts of land alleged to have been paid for by him, but fraudulently attempted to be transferred, the 520 acre tract to his wife, Susie Lancaster, and the sixty-five acre tract to M. H. Lancaster, his mother, and also certain personal property upon which an attachment was levied. *Held*—That the purchase of the 520 acres by Wilson is proven to have been made in collusion with B. J. Lancaster. Wilson having made payments on the land, is entitled to a lien for same, but beyond his claim, the residue is subject to the payment of the debts of B. J. Lancaster, and that as to the sixty-five acres of land, although Mrs. M. H. Lancaster may have paid the purchase money, there is no written evidence of the transfer of the title, and said land is also subject to the payment of the debts of B. J. Lancaster, who holds the legal title. There being no identification of the articles of personal property levied on, the attachment was properly dissolved. B. J. Lancaster being indebted to his father's estate in a sum exceeding $1,000, he was not entitled to any thing on his claim of homestead.

H. W. Rives for appellants.

Thompson & McChord and Rountree & Lisle for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal by the plaintiffs in consolidated actions brought by W. H. Lyons and others against B. J. Lancaster and others, who have prayed a cross-appeal.

Henry Lancaster died in 1881, leaving a widow, Mary H., three sons R. B., B. J. and Thos. H. Lancaster, and two children of a deceased daughter, and owner of three tracts of land: 194 acres, in which his wife had a life estate; 100 acres and 226 acres, aggregating 520 acres. He was, however, at the time, largely in debt.

After his death B. J. and Thos. H. Lancaster became involved financially, and each of them made a deed for benefit of creditors, the assignee of B. J. being R. B. Lancaster, who in 1884, instituted an action for settlement of his trust. But in order to develop and subject the interest of B. J. in the estate of his father, Henry Lancaster, it became necessary to settle his estate, his personal representative being made party to the action for that purpose, as was also the assignee of Thos. H. Lancaster. And in December, 1884, judgment was rendered in that action, substantially as follows: That the land left by Henry Lancaster be first subjected and sold to pay

debts against his estate, reported by the master at about $5,640; that one item of those debts was about $1,146, which B. J. Lancaster owed to Fletcher Wilson, Henry Lancaster being surety, for purchase money of 65 acres of land, the title of which was in B. J. Lancaster, and that sale be made of it and proceeds applied *pro tanto* to pay the debt; that B. J. Lancaster was indebted to the estate of his father about $1,816, to pay which his interest in the estate was to be first subjected; that the widow of Henry Lancaster was entitled to a life estate in the 194 acre tract, and also to dower interest of one-third of the other two tracts, and that the sale of the 520 acres was to be made subject to her use and occupancy for life. It was further adjudged that B. J. and Thos. H. Lancaster were entitled to $1,000 out of the proceeds of sale, in satisfaction of their homestead right with which to buy a homestead, provided the land sold for enough to pay debts against the estate, &c., as provided in the judgment.

In pursuance of that judgment sale was made by commissioner of court, and the 520 acre tract was purchased January 7, 1885, by Fletcher Wilson at the price of $7,761, for which three bonds for equal amounts, payable in six, twelve and eighteen months, were given. The tract of 65 acres was purchased at the same time by B. J. Lancaster, at the price of $785, for which he executed his bonds.

The first one of the present consolidated actions was commenced in November, 1885, the object of all which was to subject to the satisfaction of debts of the several plaintiffs, against B. J. Lancaster, the two tracts of 520 and 65 acres alleged to have been paid for by him, but fraudulently attempted to be transferred, the first one to Susie Lancaster, his wife, and the other to his mother, M. H. Lancaster, and also certain personal property upon which an attachment was levied.

By the judgment rendered, from which this appeal was taken, the attachment was discharged, upon the ground the personal property was not liable to the plaintiffs' debts, but the two tracts of land were found subject and directed sold to satisfy the debts sued on, but it was adjudged Fletcher Wilson had a prior lien for the amount bid by him at the public sale mentioned, and interest, out of which amount, however, B. J. Lancaster was adjudged entitled to receive the sums paid by him to Wilson, with interest, after deducting one per cent. per annum interest from January 7, 1885, which Wilson was adjudged entitled to. The amounts paid to Wilson by B. J. Lancaster were not fixed in the judgment, but the master was directed to ascertain and report them at the next term. It was farther adjudged that the sale and acceptance by the chancellor was to be upon condition there was enough bid on the 520 acres to make $7,761, Wilson's debt and interest, and the additional sum of $812, value of the life estate of Mary H. Lancaster, widow of Henry Lancaster.

To decide this case it is necessary to refer somewhat in detail to the various transactions of Wilson, B. J. Lancaster, his wife, Susie Lancaster, and his mother, Mary H. Lancaster.

It appears there was an arrangement between Wilson and B. J. Lancaster by which Wilson was to buy the 520 acres, sold under the judgment of December, 1884, giving his own note for the purchase money, and then sell it to Susie, wife of B. J. Lancaster, at the same price bid by him, taking her and his notes therefor. In a few days after the sale, having bought the land, he did sell it to her at the same price, and she and her husband gave him their notes,

bearing seven instead of six per cent. interest, for which he was liable.

It is, however, stated by Wilson, and to be taken as true, he was compelled to bid a few hundred dollars more than B. J. Lancaster had authorized him to bid, and having thus purchased the land on his own account, his subsequent sale to her can not, as argued, be fairly regarded as made in pursuance of any previous arrangement with B. J. Lancaster. It does not make any difference why or how he came to do the very extraordinary thing of making himself personally liable to the amount of more than $7,000 for land, his subsequent conduct showed he did not want, and then immediately selling it at the same price to a married woman who could neither pay, having no estate, nor thus bind herself to pay. As there is no other apparent motive, it may be conceded a desire to befriend B. J. Lancaster alone induced Wilson to make the sacrifice and run the risk he did. But the question is, does the law tolerate that mode of doing favors, the probable effect of which is to place property actually paid for by a debtor out of the reach of his creditors. For such, seems to us, was the design and the end of the arrangement between Wilson and B. J. Lancaster, Mrs. Lancaster, so far as this record shows, having no participation in the transaction from beginning to end, except to sign the notes when requested. However commendable it may be for a man in the condition B. J. Lancaster found himself to struggle for the proper support and maintenance of his wife and children, there are certain acts which, in legal contemplation, are fraudulent, and in plain terms of the statute, voluntary conveyances are fraudulent and void as to creditors. And if the arrangement was brought about by B. J. Lancaster, with the design and effect that he was to and did pay for the land, or to the extent he did pay, it is legally as much a voluntary conveyance, and, therefore, fraudulent as to his creditors, as if having himself the title, he had conveyed the land to his wife.

Whether he did pay for the land, or pay all that Wilson has received of the purchase money, depends upon the facts as this record shows them.

When the arrangement was made B. J. Lancaster, his wife and eight children resided with his mother, then eighty-eight years of age, on the home place. And Wilson states that the sources to which he looked for the money, for which B. J. Lancaster and his wife had given their notes, were ,first, the amount to which B. J. Lancaster was entitled in lieu of his homestead right in the lands of his father. Second, he was aware of the fact Mrs. Mary H. Lancaster had made her will, in which the residue of her estate was devised to Mrs. B. J. Lancaster, and that he calculated would be so applied after death of the testatrix. But the only visible property possessed by Mrs. Mary H. Lancaster at that time, beside her life estate in the land, was what she had purchased at the sale made by the assignee of B. J. Lancaster, amounting to a little over $1,000 in value, all of which was perishable in its nature and needed for her own support and that of the family of B. J. Lancaster, then living with her.

It appears that previous to the arrangement mentioned B. J. Lancaster, Mattingly and Miller had made contracts for building turnpike roads, and the first named owned a considerable number of mules, which, at the assignee's sale, were purchased by Mattingly at about $2,900; and as testified by B. J. Lancaster, Mattingly, being desirous of quitting the undertaking, agreed to sell the mules to Mrs. Mary H. Lancaster at the price he gave, and look to her for payment. And

accordingly B. J. and his mother entered into a written agreement, by which he was to give his care and attention to making the turnpikes, and carrying on the farming business, in consideration of which she was to board and clothe him and his family and pay such sums for educating his children as he might call on her for. Some money was made by the turnpike contracts, how much does not appear, and the mules were subsequently sold for a profit of about $1,000.

It is manifest Mattingly looked to B. J. Lancaster, and not to his mother, for payment of the price of the mules, and that all that was realized by that transaction was the anticipated result of B. J. Lancaster's skill and energy. For it is not reasonable to suppose that either the capital or the skill of an old woman, verging on ninety years of age and with but little more property than necessary for her subsistence, would be counted or relied on in such transaction as that.

It farther appears that at sale of the 65 acre tract B. J. Lancaster became purchaser at little more than $700, for which he executed his own notes. But it is claimed that the proof in this case authorizes the belief all of that sum which has been paid was done by Mrs. Mary H. Lancaster, and that the land belongs to her and ought not to be made subject to payment of debts of B. J. Lancaster. But no written evidence exists showing she purchased the land or was in any way bound to pay the purchase price.

We think this record shows the case of an insolvent debtor attempting, not merely to provide necessaries of food and raiment for his family, and suitable education of his children, which the law permits, but to make permanent investment in land for future income and support, worth many thousand dollars.

If such investment was attempted to be made in the debtor's own name it would be necessarily exposed to satisfy his creditors. And it is equally liable when made in the name of his wife, if the skill, labor and means of the debtor husband has and was prearranged to contribute all, and the wife's means and efforts nothing. For though it was expected she would get the bulk of her mother-in-law's estate, it is evident the will was so made as to carry out the purpose of putting title of the land beyond reach of B. J. Lancaster's creditors, while keeping a large and valuable estate for his use practically under his sole control and management. Such devises the statute forbids, and makes inoperative and void.

The lower court, while adjudging all the land subject to payment of B. J. Lancaster's debts, decided that he was entitled to receive the sums paid by him to Wilson with interest. We think that an error, for all that has been paid to Wilson should be applied as payments on the notes given him by B. J. Lancaster and wife, and to that extent lessen his debt, for the balance of which he has a lien on the land. But he is not entitled to the additional one per cent. interest, for the transaction being fraudulent as to creditors, he can not be permitted to make interest or profit out of it.

We think the court also erred in allowing to B. J. Lancaster any thing in lieu of his supposed homestead right. For it was found by the judgment of December, 1884, that he owed to the estate of his father more than his share amounted to in the residue of that estate left after payment of debts against it, and nothing appears from this record to the contrary.

As by the judgment of December, 1884, Mary H. Lancaster was entitled to a life estate in the 196 acres and dower right in the rest of the land, and her estate was expressly exempted from the sale directed by that judgment, and her right to possession, use and occu-

pation was therein recognized, and up to her death, in June, 1885, enjoyed without interruption, we think the lower court erred in adjudging in this case her estate was entitled to any thing in lieu of such life and dower right; and having now no such claim her devisees are not entitled to any proceeds of sale of the 520 or 65 acres of land.

There is no identification before us of the personal property attached, or evidence it was subject to attachment, and discharge of that attachment was properly adjudged.

From what has been said the judgment must, on the cross-appeal by the defendants in the action, be affirmed, but for the errors indicated reversed on the appeal and remanded for further proceedings consistent with this opinion.

Judge Lewis delivered the following response to petition for extension of opinion.

We decided that the mules were purchased by Mattingly at the assignee's sale for the benefit and use of B. J. Lancaster, and as calculated and expected by the parties at the time, Mattingly has been repaid the purchase price by B. J. Lancaster and not by his mother. Consequently they became again, as they were before the assignee's sale, his property and subject to payment of his debts. But it appears to us upon examination of the record these mules had been sold at a profit of about $1,000. And what we attempted to say in the opinion was that to the extent the proceeds of such sale had been paid to Wilson the notes given by B. J. Lancaster and wife should be credited thereby, and that the balance of such proceeds, if there be any balance not paid to Wilson, should be applied for the benefit of his creditors, by either paying it to them or on the Wilson notes. And of course we desired to be understood that if there were any of that lot of mules unsold, they were still subject to his debts. But as there is before us no means by which to identify any other personal property, we had no other alternative but to affirm so much of the judgment as discharged the attachment.

Petition for extension of the opinion overruled.

HERALD V. COMMONWEALTH.

(*Filed Oct.* 4, 1890—*Not to be reported.*)

Criminal law—Instructions—Self-defense—The appellant seeks to reverse a judgment of conviction for murder. The jury, in the instruction upon the subject of self-defense, were told that the appellant must have seen no safe means of escape. The appellant had killed the deceased with an ax, and the instruction noticed is complained of because of the fact that the appellant was on his own premises, being a tenant of the deceased, and was not bound to retreat when attacked while on said premises. The jury should not have been told that the appellant had the exclusive right to hold possession of the oats, &c., because the difficulty did not occur about an effort to hold possession of the premises or crops, and the instruction as to self-defense was not prejudicial error.

E. D. Walker for appellant.

P. W. Hardin for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was convicted of the crime of murdering Dock Stevens, by striking him on the head with an ax, and his punishment fixed at confinement in the penitentiary for life. The usual instructions appertaining to murder, manslaughter and self-defense were given. The jury, in the instruction upon the subject of self-defense, were told that the appellant must have seen no safe means of escape, &c. This instruction, in the particular above mentioned, is complained of, because of the fact that the appellant was on his own premises, being a tenant of the deceased, and was not bound to retreat, if attacked while on said premises.

This construction is undoubtedly the law, but it is equally true that in instruction No. 6 the court told the jury that if the appellant was attacked by deceased while on said premises as tenant, he was not bound to retreat, but might stand his ground, &c., and the jury was also expressly told that the preceding instruction was modified to that extent. But the jury should not have been told that the appellant had the exclusive right to hold possession of the oats and protect the premises against tresspassers, &c., because the difficulty did not originate over an effort on the part of the appellant to protect the oats or premises. Upon that subject the appellant says: "When I met him he threw the oats down and said, 'where are you going?' and I said, I am going to fix the water gap; and he said, 'by God, you needn't do that; I am going to throw you out, and run the thing myself;' I said, I allow you won't; and he said, 'yes, by God, I will, too,' and then he said 'you did not get mad the other day, because I called Dave, Jim Tendall, but you got mad because you were jealous of me and your wife.' I said, you are a damned liar; then the fight commenced, he commencing it by throwing a rock at me." From the foregoing extract it appears that there was no fight about the crop or right to the premises; nor did the fight grow out of any controversy about the premises. The deceased was on the premises to take care of one-third of the oat crop to which he had the right, and he had the right to be there for that purpose. It is true that he was storing them in an out-house, to the use of which he had no right, but the fight did not grow out of the appellant's effort to protect the property. It is true that the deceased threatened to disposses the appellant and resume the control of the premises; but there was no effort on the part of deceased to carry out said threat by force, and it is true that the fight was not about said threat.

The judgment is affirmed.

McCLANAHAN V. McCLANAHAN, &C.

(*Filed Oct.* 9, 1890—*Not to be reported.*)

1. *Division of land—Commissioners sworn after inspection of land*—In an action in the county court for the division of land, the commissioners appointed to report upon the division verbally agreed upon their repor before having been sworn, afterwards having been informed that an oath was necessary to qualify them to act as such commissioners, and having taken said oath, entered upon the land and agreed upon the same report as before, which was presented to court, and confirmed, to which appellant objects, because the view was had and report agreed upon before the oath was administered. *Held*—That the commissioners have complied with the requirements of the law, substantially and literally, and the report was properly confirmed.

2. *Question of fact*—The witnesses as to the fairness and unfairness of the report of division being about equal in number, and the lower court having decided in favor of the report, that finding will not be disturbed.

R. K. Smith for appellant.

J. B. Clarke for appellees.

Appeal from Bracken County Court.

Opinion of the court by Judge Bennett.

This action was instituted in the Bracken County Court to divide a tract of land which the appellant and appellees owned jointly, as heirs of their deceased father. This is an appeal by the appellant from the judgment of said court confirming the commissioners' report of division.

The first ground of objection urged, is that the commissioners were not sworn, as required by the Civil Code, before proceeding to act.

The facts are, that the commissioners did act and verbally agree on the division without having been sworn; that they then learned that they should have been sworn before proceeding to act, and, upon learning of which, they were sworn, and then re-entered on the land and re-examined it and arrived at the same conclusion that they had reached before, and then made their report of division in writing, which was reported and confirmed by the court. It seems to us that this was sufficient. If the commissioners, at the time of their appointment, had been sufficiently well acquainted with the land to divide it, and had, after being sworn, made the division upon the knowledge of the land thus previously acquired, and have based their report thereon, would any one doubt their right to do this? Surely not. In such case they have sworn to the unofficial information which they had previously acquired. Now the law requires them to make, under oath, a fair and impartial division, according to quality, &c. This they should not do without first acquiring by inspection a knowledge of the land, if they can only obtain that knowledge after their appointment, and having taken the oath, no man would be qualified to serve who had any previous knowledge upon the subject. The same rule would apply, in such case, as is applied in the jury system. But it seems that persons who were honest, competent and possessing the most thorough acquaintance with the land, would make the best commissioners, and if they could act upon a knowledge that they had been a life-time acquiring by observation, &c., their report would be that much more trustworthy; but the objection of the appellant would exclude from their minds the knowledge thus acquired.

Second: As to the fairness of the division, according to quality, &c., a number of witnesses for the appellees, fully as many as for the appellant, swore that the division was fair and equal in value. The trial judge believed these witnesses, and we see no reason for reversing his decision.

The judgment is affirmed.

JOHNSON v. COMMONWEALTH.

(*Filed Oct.* 4, 1890.)

1. *Criminal law—Indictment—Uttering forged order*—This appeal questions the validity of an indictment against appellant, charging that he "did utter and publish as true a certain false, *forged and counterfeited* order." It is urged that it charges two distinct offenses. Section 5, article 9, chapter 29, General Statutes, provides: "If any person shall *forge or counterfeit* any deed, will, testament, bond, writing obligatory, bill of exchange, order, promissory note for the payment of money, or other thing or any acquittance or receipt for money or property, or other thing, with intention to defraud another, or shall knowingly utter or publish as true any such instrument as above described * * * shall be confined in the penitentiary not less than two nor more than ten years." *Held*—That the use of the conjunctive *or* between the words "utter" and "published" in the statute does not indicate that they were intended to describe two separate offenses, as the two words are in a legal sense synonymous. The use of the conjunctive *or* between the words "forge" and "counterfeit" does not indicate that two separate offenses are described by the words. Strictly speaking, a counterfeit order presupposes the existence of a genuine one. While a counterfeit order is a forged one, a forged order may or may not be a counterfeit one, and the use of the terms "forge or counterfeit," as used in the statute, were used in their general sense as importing what is false and as synonymous.

2. *Demurrer*—A demurrer to an indictment is the proper method of raising the objection that two distinct offenses are charged.

Jas. R. W. Smith for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This appeal really presents but one question. The indictment charges that the appellant, Henry Johnson, "did utter and publish as true a certain false, *forged and counterfeited* order." It is copied in the indictment, which also fully states how the order was uttered. Objection by demurrer was made to the indictment upon the ground that it charges two offenses.

This was a proper mode of raising the question. Criminal Code, section 165; Ellis v. Commonwealth, 78 Ky., 180.

The statute under which the indictment was found, provides: "If any person shall *forge or counterfeit* any deed, will, testament, bond, writing obligatory, bill of exchange, order, promissory note for the payment of money or other thing, or any indorsement or assignment of a bond, writing obligatory, bill of exchange, order or promissory note for the payment of money or other thing, or any acquittance or receipt for money, or property, or other thing, with intention to defraud another, or shall knowingly utter or publish as true any such instrument as above described, * * * shall be confined in the penitentiary not less than two, nor more than ten years." Section 5, article 9, chapter 29, General Statutes.

It is contended, as this statute has the disjunctive "*or*," that to utter a forged order is one offense, and to utter a counterfeit order is another; and that as the indictment charges the accused with uttering a "forged *and* counterfeited order," the demurrer should have been sustained. In other words, it is claimed that he is charged with uttering a forged order, and also a counterfeit one.

It is also contended, as the statute uses the words, "utter or publish," in the disjunctive, that uttering the writing is one offense and publishing it is another; and as the indictment charges that the accused "did utter *and* publish," therefore, two offenses are charged.

This last contention is certainly unfounded. Legally, the words "utter" and "publish," as used in this statute, are synonymous. It serves, however, to illustrate to some extent, at least, that the first contention is also without support.

The statute does not use the words "forge or counterfeit" for the purpose of stating two offenses.

This evidently was not so intended and it should not, therefore, be so construed. If the writing uttered be either forged or counterfeited, it is the same offense. The words are merely descriptive. It is the same offense, whether the writing was, strictly speaking, forged or counterfeited.

The offense is the uttering of a particular paper, which is set out in the indictment. In one sense, or perhaps strictly speaking, a counterfeit order presupposes the existence of a genuine one. A counterfeit order is a forged one, but a forged order may, or may not, be a counterfeit one; but we are inclined to the opionion that the words "forge or counterfeit" were used in the statute in their general sense, and as importing that which is false; and that their use in it is, therefore, to be regarded in the same way as the use of the words "utter or publish."

The fact, therefore, that the evidence showed a forged order only, and which was not in the strict sense of the term a counterfeit one, did not constitute a variance between the indictment and the proof; and for the reasons already given in suppport of the indictment the instructions complained of were not erroneous.

The appellant could not well have been misled as to the writing he was charged of fabricating, because it was set forth in the indictment.

Judgment affirmed.

BUTTS, &C. V. ALDERSON.

(*Filed Oct.* 7, 1890—*Not to be reported.*)

Judicial sale—Notice to purchaser of motion to quash sale—A purchaser of land at judicial sale is entitled to notice of motion to quash sale bond, by reason of insolvency of the surety; and, therefore, the second sale, made after the order quashing the sale bond, was invalid.

R. Gudgel for appellants.

Appeal from Rowan Circuit Court.

Opinion of the court by Judge Pryor.

There is nothing in the record showing that Butts had any notice that the sale bond, given by him for the purchase of the land, would be quashed by reason of the insolvency of the surety.

In the absence of notice that the motion to quash the sale would be made the sale made the second time was invalid, and exception should have been sustained to the commissioner's report of sale.

The judgment is, therefore, reversed and remanded for proceedings consistent with the opinion.

CLARK, SHERIFF, &c. v. WATER CO.

Response of Chief Justice Holt to application of Louisville Water Company for writ of error to the Supreme Court of United States. (For opinion of the court, see 12 KY. LAW REP., 809).

The Louisville Water Company, by its acceptance of a charter granted by the Legislature of Kentucky, in 1882, exempting it from the payment of State taxes, did not thereby enter into a contract with the State that was impaired by the revenue law of 1886. The right to the writ of error is not to be determined by what the applicant claims, but by what the State court has, in fact, decided; and the State court in this case has decided that no valid contract of exemption ever existed; therefore, the decision contravenes no statute impairing the validity of a contract, and the writ does not lie for the want of jurisdiction prescribed by the statute of Congress.

This is an application for a writ of error to the Supreme Court of the United States, under section 709 of the United States statutes, which provides: "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error."

An unlimited right of appeal to the Supreme Court of the United States from the judgments of the highest court of a State does not exist. It is limited by the statute, and unless a case within it is presented the Supreme Court has no jurisdiction.

The writ does not go, as a matter of course, and must be denied in all cases, save those enumerated in the statute. Whether this one falls within it, is, therefore, to be determined.

The applicant, the Water Company, claims that by its acceptance of the terms of the State statute of 1882 a contract between it and the State was created, whereby it was exempted from the payment of State taxes, and that this alleged contract was impaired by our State revenue law, enacted in 1886. In other words, it is claimed that the Supreme Court of the United States has appellate jurisdiction, because the last named statute violates that provision of the Federal Constitution, which forbids the passage by any State of any law impairing the obligation of contracts.

The right to the writ is not to be determined, however, by what the applicant claims, but by what the State court has, in fact, decided. If a contract existed, and it has by its judgment upheld a statute impairing its validity, then a question is presented, of which the Supreme Court of the United States undoubtedly has appellate jurisdiction, and the writ should be granted, or the citation signed.

Upon the other hand, if no question cognizable upon appeal by the Supreme Court, under the provisions of the statute relating

thereto, has been decided by the State court, then the writ does not lie.

The judgment of this court in the case is, that there never was any contract. Its opinion is not based upon any State statute that is claimed to be repugnant to the Constitution of the United States. It can not be claimed that the judgment gives effect to any State statute, which impairs the obligation of a contract; and the provision of the Federal Constitution upon this subject is aimed, as its language shows, at such legislation. The judgment does not rest to any extent upon the validity of any such statute, either expressly or by fair intendment. No such statute was considered by the court in reaching its conclusion, as its opinion shows. Its decision that no valid contract of exemption ever existed is not, of course, reviewable by the Supreme Court. To give it jurisdiction the judgment must have resulted from the State court giving effect to legislation enacted subsequent to the making of the alleged contract, and which the applicant claims impaired its obligation.

If the question were, to my mind, doubtful, the application would be granted, as it would, of course, still be left to the Supreme Court to determine its jurisdiction; but the cases of Knox v. Exchange Bank, 12 Wall., 379; Lehigh Water Company v. Easton, 121 U. S., 388; New Orleans Water Works v. La. Sugar Company, 125 U. S., 18, and Hopkins v. McLure, 133 U. S., 380, appear to me to be decisive that the writ will not lie for want of jurisdiction. If this conclusion be incorrect, it is gratifying to me to know that correction may be had through any judge of the Supreme Court of the United States.

The application is denied.

MANION v. LOUISVILLE, ST. LOUIS & TEXAS R. R. CO.

(*Filed Oct.* 4, 1890.)

Condemnation of land for railroad purposes—Damages—The appellee, under the provisions of chapter 18, General Statutes, instituted a condemnation proceeding in the county court for the right of way through the lands of appellant for the construction of its railroad, and after the damages had been assessed by a jury and judgment rendered thereon, appellee notified appellant that it would abandon its right to enter the land, whereupon this suit was instituted by appellant to recover the amount of damages adjudged, alleging that appellee failed to notify appellant of its intention of abandonment until the time, within which an appeal could be prosecuted, had expired. *Held*—That under our statute, it is plain that the right of the owner to compensation does not attach until the entry of the corporation on the condemned land; nor does the corporation acquire any right to enter until the damages assessed are actually paid or tendered to the owner; but it is liable for all the costs of the condemnation proceeding, and no more.

Jno. Young Brown for appellant.

Yeaman & Lockett and Helm & Bruce for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

The General Statutes, chapter 18, provides: "Upon confirmation

of the report of commissioners by the county court, or the assessment of damages by said court, as herein provided, and the payment or tender to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court and all costs adjudged to the owner, the railroad company shall be entitled to take possession of said land or material, and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it."

The Louisville, St. Louis & Texas Railway Company sought to condemn the land of the appellants for the use of the corporation, and having applied to the Henderson County Court for the appointment of commissioners to go upon the land to ascertain its value and the damages that would be sustained by the appellant by reason of the taking and use of the property, subsequently abandoned the condemnation proceedings, and refused to pay the damages assessed against it.

The commissioners appointed fixed the value of the property, including the incidental damages sustained, at $750.00. The report was filed in the county court, and the appellants summoned to show cause why the report should not be confirmed; and on the hearing in that court, both the appellants and the railway company filed exceptions to the report of the commissioners, and a jury was empaneled and assessed the entire damages at $800. A judgment was then awarded in favor of the railway company by which, upon the payment or tender of the money, the title to the land described should vest in it for the uses for which it was condemned, and a commissioner was appointed to execute a deed, in pursuance of the judgment, after the payment or tender of the money.

The proceedings under the statute is, first, the appointment of commissioners, upon the application of the company, to assess the damages. Then report, in writing, fixing the amount or sum to be paid, and describing the land condemned. A summons, upon the filing of the report against the owner, to show cause why the report should not be confirmed; and if no exceptions are filed by either party, the report is confirmed. When exceptions are filed (and they seem to have been filed in this case) a jury is empaneled to try the issues of fact, if any, made by the exceptions. This issue of fact generally arises as to the *quantum* of damages, and the verdict of the jury is conclusive, subject to the right of appeal to a higher tribunal. After verdict, if not set aside, the county court is required to enter a judgment, in the nature of the finding, and to make an order for the conveyance of the title on the payment of the money. From the judgment either party may appeal, within thirty days, to the circuit court, where the case is tried *de novo* All this proceeding was gone through with, and a judgment entered, but no appeal prayed by either party, and after the expiration of thirty days, the time for the appeal, the railway company notified the appellants that they would abandon the right to enter. This action was then instituted to recover the damages assessed, the appellants alleging, in substance, the proceedings had, with reference to the condemnation and the failure of the appellee to notify the appellant of its intention, not to enter or use the property until after the time had expired for taking the appeal. A demurrer was sustained to the petition, and this appeal prayed. The question presented in this case is: Has the owner of the land condemned a cause of action against the corporation for the damages awarded before its entry on the premises for the use contemplated, or before its acceptance in

some manner, by which the owner is divested of the title or the enjoyment of his estate.

It is conceded that the owner may become, and is, in fact, made the involuntary vendor of his land under the exercise of this sovereign power, and while there may be no contract between him and the corporation by which it can occupy the land, still there must be some means of enforcing the judgment, if a liability exists. The principle inquiry then is: When does the liability of the corporation arise?

We think it plain, under the statute, that the right of the owner to compensation does not attach until the entry of the corporation on the condemned land; nor does the corporation acquire any right to enter until the damages assessed are actually paid or tendered to the owner. It is true that a corporation might accept the terms of the assessment in such a way, regardless of the statute, as would authorize a recovery of the damages by the owner, but we are considering now a proceeding, under the statute alone, where there has been no payment or tender of the money, or entry by the party causing the condemnation. The statute expressly provides, that when the corporation or railway company pays the damages and all costs, or makes a tender to the owner of the amount, the company shall be entitled to enter and use and control the property for the purpose for which it was condemned. The corporation has no interest in the property until this is done; nor is the owner divested of his title, in whole or in part, until this provision of the statute has been complied with. As said, in Lamb v. Schottler, 54 California, 319: "In a legal sense the land has not been taken until the act transpires, which divests the title or subjects the land to the servitude." When compensation is made, under the statute of this State, the title vests, and not before; and the owner of the land holds it up to that time as if no condemnation had taken place.

In such proceedings the rights of each party is determined in most of the States by statutory regulations, and in England the company is bound to take the land it selects, so in many of the States of this country the confirmation of the report fixing the damages gives to the owner a right to sue for the compensation; and, in fact, it has been held in one or more cases, in the absence of an express statute, that after judgment, or a confirmation of the assessment, the corporation may be compelled to pay. Water Commissioners of Jersey City v. Vroom, 72.

This court held, in the case of Caye's ex'or v. Calmes, 3 A. K. Marshall, 36, that an action could not be maintained on a judgment of the county court assessing the damages that would result to the land of Calmes by the erection of a mill-dam by Caye. That such a judgment created no contract relation between the parties, and Caye, having proceeded to erect the dam without paying the money, was liable only in an action *ex delicto* for the injury done, and not *ex contractu*. The case referred to by counsel, in 8 Bush, 98, of Duncan v. The Mayor of Louisville, in which the city was compelled to take the property condemned, was under a statute regulating the manner in which the city could avoid liability, and that was by dismissing the petition before final judgment; and the city, failing to do so, this court held it was an election to take the property.

In Garrison v. The City of New York, 20 Wallace, 201, where damages had been allowed by the commissioners, and their report confirmed, the Legislature authorized an appeal from the order, where no such right existed at the date of the confirmation, and further gave power to the Supreme Court, in Chambers, to vacate the order

of confirmation, and appoint other commissioners. This was acted upon by the court, and other commissioners appointed to award damages. It was held, on the appeal of the property owner, that no contract existed by reason of the confirmation of the original commissioner's report as to the damages; and, further, "until the property is actually taken, and compensation is made or provided for, the powers of the State over the matter is not ended." In this State compensation must be actually paid or tendered before any right passes to the railway company, and, hence, there is no reason for requiring it to pay for property, with the title and possession in the owner, as it existed before condemnation. It is liable for all the costs of the proceeding, but no more. Nor does such a doctrine work any hardship on the owner of the land. He complains, not only of the damage to be measured by the actual value of his land, but says there are incidental damages, such as affect the value of the balance of the tract, and this is allowed also. Now where the company concludes not to enter and inflict this injury the owner ought not to insist upon the damages.

The weight of authority undoubtedly is, that in the absence of statutory provisions the effect of provisions for condemnation is simply to fix the price at which the party condemning can take the property, and that even after condemnation or judgment the purpose of taking the property may be abandoned, without incurring any liability to pay the damages awarded. Lewis on Eminent Domain, section 656.

Such is the correct rule on the subject, and to adjudge otherwise would require the applicant, whether a private corporation or a State or municipality, to submit to the imposition of exorbitant values upon property condemned for public use, and to often take possession or purchase that which would be detrimental, instead of beneficial to the public interests. Whether the power is exercised by the government or by a corporation to whom that power is delegated the same rule should apply. The right is given for the reason that the public good demands the use of the property, and the rule applicable to the State should also apply to the corporation.

The judgment sustaining the demurrer and dismissing the petition is, therefore, affirmed.

Gear v. Dubuque Railroad, 20 Iowa, 323; St. Louis, &c. v. Teters, 68 Ill., 144; 17 Ohio, 103; State v. Cincinnati R. R., —.

STEWART V. POWELL.

(*Filed Oct.* 9, 1890.)

Antenuptial contract—Revocation of will by marriage—James Stull married Mrs. Buckley, but four or five months before the marriage he made an antenuptial contract with her, by which he gave to her for life, a tract of land and some personal estate, and by a will executed at the same time, he gave to his daughter, now the appellant, said property after the death of his intended wife. After the marriage the chancellor granted a divorce and cancelled the contract, and after the death of Stull, his will was offered for probate and rejected. *Held*—That the antenuptial contract having been annulled by the chancellor, the will stood unaffected by it and was properly refused to be admitted to probate, because it was revoked by the marriage consummated after its execution.

W. L. Gordon and C. J. Pratt for appellant.

Yeaman & Lockett for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Pryor.

James Stull, of Webster county, married a Mrs. Buckley, and prior to the marriage entered into a contract fixing the right of property, by reason of the marital relation. He gave to her a tract of land and some personal property during life, and at her death he directed by a will, written at the same time, that the property should pass to one of his daughters, Mrs. Stewart, then Lilly Stull. The marriage was consummated in some four or five months after the contract had been entered into, but afterwards annulled by the decree of the chancellor in which a divorce was granted.

In the execution of the will or a part of its contents he "wished its contract carried out and observed, but that contract by a court of competent jurisdiction has been canceled, and the parties left as if the marriage relation had never existed. The will was offered for probate and rejected in the circuit court on the ground that the marriage revoked it. The statute provides: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, where the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative or next of kin." In this case the will and the antenuptial contract were both executed long before the parties became man and wife, nor did the will in any manner affect the right of Mrs. Buckley under the antenuptial agreement, and the case stands as if the will had been executed prior to the marriage, and in the absence of any contract whatever. The case of Stewart v. Mulholland, 10 KY. LAW REP., 824, was the will of a woman made at the time of the marriage under an agreement with her husband that it should be made, and while the antenuptial contract, the will and the marriage were all executed on different days, they were so near each other, and each directly relating to the same matter, that this court held them to be simultaneous transactions. It was the wife's estate disposed of by the consent of her husband, and in the execution of a power conferred on her by that agreement —in fact the property should be regarded as her separate estate under such circumstances. This court referred to Osgood v. Bliss, 141 Mass., 474, and to the will of Ward, 70 Wis., 257, under statutes similar to the statute of that State, where the will of the married woman was sustained. We find no ruling to the contrary. The wife, when laboring under the disability of coverture, has no power to make a will, while the husband may at all times, if competent to do so, dispose of his property by will, subject to the right of his wife to such part of his estate as the law gives her, at his death. But as to the wife she is powerless, unless in the exercise of some power conferred on her or in the disposition of her separate estate, where, although general, the estate before marriage may become separate estate by reason of an antenuptial contract, giving to the wife the power to dispose of it as if she was a *feme sole*.

In Stewart v. Mulholland, the court was discussing the power of a married woman to make a will, and did not adjudge in that case that the will was executed before the marriage; but in effect held that it was simultaneous with the marriage, and made in pursuance of the contract made by the husband and wife, by which the power to devise was given.

The language in the opinion of Stewart v. Mulholland to the effect: "The marital rights having been settled by their agreement, and no one else being interested directly or indirectly interested but the husband, why should it be revoked?" was applied to the case then before us where the *feme* was empowered to make a will, that by the contract conferred on her the power to dispose of it as her separate property. In our opinion the marriage in this case revoked the will, and the judgment rejecting the paper as the last will of James Stull is affirmed.

SANDFORD, &C. V. CITY OF COVINGTON.

(*Filed Oct.* 11, 1890—*Not to be reported.*)

1. *Boundary—Dedication for streets*—Appellants being the owners of two lots of land, and in the possession thereof, instituted this action to quiet their title and requiring the city of Covington to relinquish its claim asserted to portions of said lots, as constituting parts of Sixteenth street. The lots are a part of what was known as block 10 in the Southgate subdivision, which was originally bounded on the east by Greenup street; west by Scott street; south by a line through centre of Seventeenth street, extended; north by a line through centre of Sixteenth street, extended.

The dispute is as to whether or not the deeds under which appellants claim cover and give title to the southern half of Sixteenth street, between Greenup and Scott streets. The deeds to appellants give as a boundary line to the lots the centre of Sixteenth street, *extended*. There is no evidence showing that their vendors, either immediate or remote, ever dedicated the portions of said lot to the public as a part of Sixteenth street. The word "*extended*" was not intended to mean that a dedication had already been made, but simply that Sixteenth street when, or if ever, extended would occupy that space.

2. *Evidence—Plat*—A plat made by direction of the city, showing that the space now in controversy was an open street, was not competent evidence to establish a dedication, as there is no evidence that the owner had given her consent to same or had any knowledge of it.

Timmins & Schmidt and Wm. Lindsay for appellants.

W. A. Byrne for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

In their petition appellants state they own and are in possession of two lots of land, which appellee, city of Covington, is claiming as parts of Sixteenth street, and taking steps to have them graded and paved, an ordinance having been passed for that purpose. And they, therefore, pray judgment quieting their title and requiring appellee to surrender its claim.

It appears that Richard Southgate once owned a large body of land, an undivided one-sixth of which he devised to his daughter, Mary L. Hawthorne, with power to dispose of it by deed or will to any one of her children, or other lineal descendant of the testator; but in case of her death without living children and without disposal of the estate, it was to pass to surviving children of the testator.

In the division under the will block No. 10 fell and was conveyed

by commissioners of court to Mrs. Hawthorne. And she and her husband, in 1885, by separate deeds, conveyed to her daughter, Mrs. Walsh, and son, W. H. Hawthorne, alternate lots in block 10, numbered from 1, which she got, to 16, received by him. And in May, 1887, they made, respectively, deeds to appellants, which they contend were intended and do cover the land in controversy.

Block No. 10 seems to have been originally bounded on the east by Greenup street; west by Scott street; south by a line through centre of Seventeenth street, extended; north by a line through centre of Sixteenth street, extended. And the dispute in this case is whether, as appellants contend, the deeds under which they claim cover and give title to the southern half of Sixteenth street, between Greenup and Scott streets, or whether, as appellee contends, title to that part of block 10 was reserved with design of the owners to dedicate it for public use.

The deed from Mrs. Hawthorne to Mrs. Walsh contains the following description: "Lot No. 1, in block 10, in Southgate subdivision, of the city of Covington, bounded as follows: Beginning at a point at the intersection of the east side of Scott street with the centre of Sixteenth street, *extended;* thence southward with the east side of Scott street seventy feet; thence eastward at right angles to Scott street 150 feet to a fifteen and one-half foot alley *to be laid out;* thence northward with west side of said alley seventy feet to the centre of Sixteenth street; thence westward to the place of beginning." The description in the deed from Mrs. Walsh to appellants of the parcel conveyed, which was taken from the north side of lot 1, is thus: "Beginning at a point on the east side of Scott street, 421 feet northward from the intersection of the centre of Seventeenth street, extended, with said east line of Scott street, twenty-five feet; thence eastward at right angles thereto between parallel lines 150 feet, being same width in rear as in front."

Lot 16 being in the north-east corner of block 10, is described in the deed from Mrs. Hawthorne to W. H. Hawthorne as beginning at the intersection of the west side of Greenup street with the centre of Sixteenth street, extended; thence southward with the west of Greenup street seventy feet; thence westward at right angles thereto 150 feet to said alley; thence northward therewith seventy feet to centre of Sixteenth street; thence eastward to beginning. And in the deed from the latter to appellants the beginning corner of the parcel conveyed, which is taken from the northern side of lot 16, the beginning corner is described as 421 feet north of the intersection of the west side of Greenup street, with centre of Seventeenth street extended; thence with said line twenty-five feet, &c.

Clearly the two deeds of Mrs. Hawthorne cover the south half of what is called Sixteenth street, between Greenup and Scott; for the beginning corner of each of the two lots, 1 and 16, thereby conveyed is described as being on the centre line of Sixteenth street, extended, and that line of course is the north boundary of both. There can be no more doubt of the two deeds from Mrs. Walsh and W. H. Hawthorne covering the same land, for the beginning corners of the two parcels conveyed, being the northern portions of lots 1 and 16, described as 421 feet north from the centre line of Seventeenth street, extended, are exactly where Greenup and Scott streets respectively intersect the south line of Sixteenth street, and as extension of the lines north therefrom twenty-five feet reach the centre line of Sixteenth street, the south half thereof is necessarily included..

It thus follows that appellants have the legal title and rightful

possession of the disputed land, unless it was prior to date of the conveyances to them dedicated for public use as a street. It is well settled doctrine of this State that a dedication of land for public streets or highways may be made by parol, and the fact established by parol testimony. But there is no evidence before us of any act or declaration on the part of Mrs. Hawthorne, or the original owner which shows a dedication of what is now called Sixteenth street, to public use, unless the deeds made by her to Mrs. Walsh and W. H. Hawthorne be so construed. For while the land of Southgate appears to have been made a subdivision of the city of Covington, and laid off by commissioners into blocks, with a view to a division among the devisees, there is nothing to show that Mrs. Hawthorne, or any one else having authority, ever passed the title or did any act showing an intent to dedicate that part of Sixteenth street, between Greenup and Scott streets.

It has been held that when a sale of lots has taken place, according to maps showing squares, lots and streets laid out, and such lots are conveyed by deeds, describing them as binding on or bounded by designated streets, a dedication may be implied for benefit of purchasers of adjacent lots whose rights thus become involved, whether the municipality has formally accepted the dedication or not. Roman v. Town of Portland, 8 B. M., 237; Wickliffe v. City of Lexington, 11 B. M., 155. But when lots sold, are not bounded by, but so described as to actually include a space that might constitute part of, a street extended, it must appear there was a dedication by the proprietor, and that it was accepted and recognized by the municipality, in order to divest subsequent purchasers of the title and possession. Gedge v. Commonwealth, 9 Bush, 61; Wilkins v. Barnes, 79 Ky., 323.

There is no room for construction as respects the deeds of Mrs. Walsh and W. H. Hawthorne to appellants for the south half of Sixteenth street was actually conveyed thereby, and no other land is conveyed. Nor do we think the two deeds from Mrs. Hawthorne, fairly construed, contain an implied dedication or reservation of the land in dispute for the purpose of dedicating it as part of Sixteenth street. For the centre line of Sixteenth street, extended, is made the north boundary line of lots 1 and 16, and the southern half of the space that would constitute Sixteenth street, if it was extended between Greenup and Scott streets is, in terms too plain to be misunstood, conveyed to Mrs. Walsh and W. H. Hawthorne. Nor do we think the word "extended" was intended to mean, or does properly mean, that a dedication had already been made, but simply that Sixteenth street when or if ever extended would occupy that space.

The evidence is that the purchaser of the north half of Sixteenth street, between Greenup and Scott, claimed and held it under his purchase until the city of Covington purchased the right to use it as a street. And the southern half was never so sold, nor any claim set up to it by appellee, until just previous to commencement of this action. On the contrary, the ground, by reason of its elevation above both Scott and Greenup streets, was inaccessible for purpose of street travel, and in the undisturbed possession of appellants and their vendors until the ordinance in question was passed.

It appears that some time before Mrs. Hawthorne divested herself of title to the land in dispute, a map was made by a person and paid for by appellee, upon which the space between Greenup and Scott was described as an open street. But as there is no evidence the owner of the land in dispute ever authorized or accepted that map,

it can not be regarded as more than a mere *ex parte* proceeding by appellee, not binding on the owner, or effectual for any purpose.

In our opinion there is nothing in this record to show an express dedication of the land in controversy for a public street, nor any act on part of the owners creating an implied dedication, and, consequently, appellee has no right to now appropriate or use it for such purpose without compensation to appellants.

And the judgment is, therefore, reversed, and cause remanded for further proceedings consistent with this opinion.

DESHAZER V. COMMONWEALTH.

(Filed Oct. 14, 1890—*Not to be reported.)*

Criminal law—Barn burning—The indictment for barn burning and the instructions given on the trial were in accordance with the principles of law governing such cases, and the judgment of conviction is affirmed.

P. W. Hardin for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Holt.

This appeal is from a conviction to the penitentiary for two years for barn burning. No brief is on file for appellant, George Deshazer, and we are at a loss, after an examination of the record, as to the ground upon which he expected a reversal.

Section 3, article 7 of chapter 29, of the General Statutes, says: "If any person shall willfully and unlawfully burn a * * barn * * * where wheat, corn or other grain, grass, fodder * * is usually kept, * * * he shall be confined in the penitentiary not less than one nor more than six years."

The indictment is sufficient. It charges that the accused "did unlawfully, willfully, feloniously and maliciously set fire to, burn and destroy a barn, the property of value of one James T. Duncan, and which said barn was then a place where corn and oats were usually kept, and in which said ba.n were then and there stored at the time it was so as aforesaid burned by said Deshazer, corn and oats."

No exception was taken during the trial to any ruling of the court, save to the instructions which were given to the jury.

They submitted to them in proper language and with all proper qualifications the question whether the accused burned the barn, and whether it was of the character named in the statute. They were required to believe this in the affirmative to the exclusion of a reasonable doubt.

Indeed the presumption of his innocence, and that he must not be convicted unless they believe him guilty beyond a reasonable doubt, was presented to the jury in proper form in more than one instruction, and all of the instructions given were as favorable to him as he had a right to expect.

The evidence was sufficient to authorize the verdict, and the judgment is affirmed.

BRYANT, &C. V. WOOD, &C.

(*Filed Oct.* 11, 1890.)

Surveys—Laches of holder—Limitation—Waste—In 1849 appellee obtained a warrant for a survey, and the survey was made in 1853, but no return of the survey was ever made to the register of the land office. Appellee never entered into possession of the land surveyed, and in 1888 he instituted this action against appellants to restrain them from committing waste by cutting timber. The petition alleges that appellants were in possession of the land and had obtained a patent for it in 1884; appellee is claiming that he is the equitable owner of the land. *Held*—That an equitable owner of land may maintain such an action, but the long delay, unaccounted for, shown in this case is such laches as deprives him of all rights under his survey and evidences abandonment of same. Public policy requires that he should perfect his claim under the survey by obtaining a grant within a reasonable time.

N. A. Richardson for appellants.

R. D. Hill for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The appellee, Jesiah Wood, obtained a warrant from the clerk of the Whitley County Court, in 1849, for the survey of six hundred acres of vacant land. The survey was made on March 2, 1853. It does not appear to have ever been returned to the register of the land office, and was never carried into grant by the issual of a patent. With the making of the survey the appellee allowed the matter to rest. He does not appear to have ever had the possession of the land; nor does he account, in any way, for his failure to obtain a grant to it.

In 1888, or thirty-five years after the making of the survey, he brought this action against the appellants, who, as the appellee avers in his petition, are in possession of the land, and who obtained a patent for it in 1884 to restrain them from committing waste upon it by cutting the timber. He claims to be the equitable owner of it, by virtue of his survey.

The appellants claim, first, that their demurrer to the petition should have been sustained, because the petition is insufficient, inasmuch as it does not aver that the appellee is in possession of the land, and asserts only an equitable title to it. It is true an action of ejectment can not be maintained upon a mere equitable right; but this is not such an action, but one in equity to stay waste; and when it was brought even the equitable owner of land, although not in possession, had the right to maintain such an action. General Statutes (ed., 1888), page 1,387.

It is true that the judgment is for the land; but the appellee asserted equitable ownership in his petition, and the appellants, in their answer, not only asserted ownership in themselves, with a prayer that their title be quieted, but also asked that the appellee be estopped from asserting any claim to the land. Under these circumstances the court did not err in taking control of the question of ownership. This brings us to the second claim of the appellants, which is, that the appellee, as against them, has no right or title upon which he can recover. This he must do, if at all, upon the strength of his own right.

His warrant appears to have been obtained under the act of the Legislature, of February 8, 1835, as amended by the act of February 21, 1837. Under these acts, he was required to do what was required of the holder of treasury warrants, under which vacant lands had been theretofore surveyed, and it was provided, that on the return of the plat and certificate of survey to the register, he should record them and issue a grant, as under the prior existing law. Loughborough's Statute Laws of Kentucky, pages 386-388.

So far as we have been able to find the act of February 6, 1815, was in force up to that time, relative to the period within which this return should be made. 5 Littell's Laws, page 266.

It provided that it should be done within one year from the date of the survey, and after remaining in the register's office for six months a grant should issue.

If this were done, the grant related back to the time of the survey, and the title dated from the making of it.

The act further provided, that if the survey was not returned within the time named, it might be returned afterward, and a grant issued; but in such case the patent was effective only from the date when the survey was returned.

Various acts were thereafter passed, giving until a time named in them to return the survey; but the statutory rule has always existed, so far as we have been able to find, that unless the survey was returned to the land office within the time given, the grant should only relate to the time when such return was, in fact, made.

The Revised Statutes of 1852 required the return to be made within four months from the making of the survey, while our present law fixes the time at six months; and each provide, that if done within the time named the title granted is to relate back and take effect as of the date of the survey; but that if returned after the time named, as is allowable, the legal title vests in the grantee only from the issual of the patent. Revised Statutes, chapter 102; General Statutes, chapter 109.

The party by the survey acquires a claim to the land, or what has been termed by this court, "an inchoate title." Flippin v. Hays, &c., 3 Met., 215.

If he fails to return the survey to the land office, within the time fixed by the statute, this inchoate right still exists, and may be perfected by grant, vesting him with the legal title from the time of its issual.

This certainly does not mean, however, that this inchoate right is to exist forever. It can not well be supposed that the Legislature so intended. Take, for instance, the case now presented. The appellee has never carried his survey into grant. It was made thirty-five years ago. He furnishes no reason for this long delay, and, doubtless, none exists. He has never, so far as the record shows, been in possession of the land; and now, after the State has granted it to others, and they have paid for it and are in possession of it, and have likely improved it, more or less, he springs up, as if from a Rip Van Winkle sleep, and asserts claim to it. We are aware that section 3, chapter 109 of the General Statutes provides, that "every entry, survey or patent made, or issued under this chapter, shall be void, so far as it embraces lands previously entered, surveyed or patented;" but this certainly does not, by inference, even authorize one, who has merely had a survey made of land, to lie by for any length of time without carrying it into grant, and then after others, acting in good faith, have expended their means for it, and have, perhaps, improved it, and are in possession of it to claim it,

although more than a quarter of a century has elapsed, without further step upon his part, and without ever having been in possession of the land.

Whether you term it an inchoate right or title which he acquires, it is but an equity. The law looks to, and public policy requires, a perfection of it by grant within a reasonable time.

The party may lose the inchoate right by neglect or laches on his part. He may, by long delay, lead the State and individuals, acting in good faith, to believe that he has abandoned it, and all intention of perfecting it by grant.

It is, of course, impossible to fix any certain period of time within which this shall be considered as having taken place; each case must, to some extent, rest upon its own circumstances; but certainly the unreasonable and long delay which has occurred in this instance, and which is entirely unaccounted for, coupled with the non-possession, and a lack of any thing showing a purpose to convey the survey into a grant, authorizes a court of equity to say that the party, by reason of his neglect and laches, shall be deemed to have abandoned his claim, and lost his inchoate right.

The judgment is, therefore, reversed, with directions to dismiss the petition.

L. & N. R. R. Co. v. Ingram.

Same v. Quisenberry.

(*Filed Oct.* 14, 1890—*Not to be reported.*)

Condemnation for railroad purposes—Excessive damages—Rule as to compensation—On an appeal from a judgment assessing damages in a comdemnation proceeding, an objection being made that the damage assessed was excessive, there being nothing to show that such verdict was the result of passion or prejudice, it will not be disturbed.

The rule laid down by this court, by which to fix compensation in condemnation proceedings, is, first, to ascertain the value of the entire tract, excluding all consideration of the question of the enhancement of the value of the land resulting from the proposed improvement; then, what will be its value after the appropriation of such part of it as may be taken? The diminution in value of the entire tract is as much a taking within the meaning of the Constitution as is the strip of land upon which the road bed lies. The general enhancement of value of the tract not taken by reason of the improvement can not be set off against the value to be ascertained according to the foregoing rules. But the "ordinary inconvenience and damage that may result from the prudent operation of the road may be set off by the benefits and advantages, if any, that may be reasonably anticipated from the construction and operation of the road."

F. W. Darby for appellant in both cases.

Geo. W. Duvall for appellant against Ingram.

Blue & Blue and Wm. Marble for appellee, Ingram.

Geo. W. Duvall for appellee, Quisenberry.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Bennett.

These two cases are heard together. Each case is a proceeding by

the appellant to condemn a right of way through the appellees' tract of land.

The jury, in the case against the appellee, Ingram, assessed the actual and incidental damage to his land at $850. The complaint here that said damage was excessive can not be considered, for the reason that the verdict of the jury does not seem to have been influenced by passion or prejudice, and unless it appears that the verdict was so influenced, we, according to a long line of cases, can not disturb the verdict.

In a case like this, where private property can not be taken for public use, unless just compensation therefor has been previously made, the following rules has been laid down by this court. See Asher v. L. & N. R. R. Co., 10 KY. LAW REP., 187. First, to ascertain the value of the entire tract, excluding all consideration of the question of the enhancement of the value of the land, resulting from the proposed improvement; then what will be its value after the appropriation of such part of it as may be taken. The difference in value thus found, still excluding the enhancement, is the true compensation to which the owner is entitled. How much less is the land worth after the taking than before the taking, excluding always the question of enhancement of value by reason of the improvement. The value is not reached by determining the value of the strip taken for actual use; but its value, when considered in its relation to the entire tract, which includes every direct damage or injury tending to diminish in value the entire tract by reason of the use and appropriation of the strip for the contemplated purpose, all of which enters into the estimate of compensation." The dimunition in value of the entire tract is as much a taking, within the meaning of the Constitution, as is the strip of land upon which the road-bed lies. It is this taking that the owner is entitled to compensation for, without reference to any supposed or actual enhancement of the value of the land in that neighborhood, including that of defendant. Such general enhancement of value of the tract, not taken by reason of the improvement, can not be set-off against the value to be ascertained, according to the foregoing rules.

But the "ordinary inconvenience and damage that may result from the prudent operation of the road may be set-off by the benefits and advantages, if any, that may be reasonably anticipated from the construction and operation of the road."

It is a mistake to say that appellant only got an easement to the road-bed. The compensation for this slip of ground was for its fee, if the owner thereof possessed that kind of title, and to the extent of this strip the appellant owned a distinct and fee simple right through the appellee's land.

If there were any errors committed in admitting evidence to go to the jury, they were not prejudicial to the substantial rights of the appellant. The instructions given by the court were as favorable to the appellant as it was entitled to.

The judgment is affirmed.

In the case of Quisenberry the damage assessed was $800. We can not say that the jury was influenced by passion or prejudice. Hence, we can not disturb their verdict. The rules as to fixing compensation, laid down in the case, *supra*, is applicable in this case, and the errors complained of in admitting evidence did not prejudice the substantial rights of the appellant.

The judgment is affirmed.

MITCHELL V. COMMONWEALTH.

(*Filed Oct.* 14, 1890—*Not to be reported.*)

1. *Criminal law—Evidence—Dying declaration of an accomplice*—Upon the trial of appellant charged with aiding and abetting another in the commission of murder, the declaration of the principal, exculpating appellant, made just before he was hung by a mob, was incompetent. Dying declarations are only allowed when made by the deceased where his death is the subject of investigation, and this is allowed from mere necessity. But this testimony having been admitted without objection, appellant received the benefit of it.

2. *Witness compelled to answer question tending to degrade him only*—Appellant offered himself as a witness, and on cross-examination was asked if he had not once been in a State prison. This question he was required to answer over the the objection of his counsel, and his response was that he had been in the Ohio penitentiary. *Held*—That this was not error. In cases where the answer of the witness would convict him of crime or show such infamy as would render him incompetent, he should not be compelled to answer, but such questions as when answered only tend to disgrace witness, he may be compelled to answer. Besides the privilege in such cases as would render the witness infamous or rather make him guilty of a crime is to be exercised by the witness alone. It is for his protection and not that of the party on trial that the law interposes and says you shall not be compelled to answer.

3. *Instructions*—The court properly refused an instruction offered by appellant that aiding in commission of the crime must be by force of arms. It also properly refused an instruction offered directing the jury to find for the defendant, as his guilt was clearly shown by the evidence.

Jno. D. Wickliffe and Chas. Carroll for appellant.

P. W. Hardin and N. W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Mitchell, was convicted of the murder of one Lavine, a peddler, near the town of Belmont, in Bullitt county. There was a change of venue to the county of Nelson, where the conviction was had. His confederate in the crime, Ardell, had been taken from the jail, in Bullitt county, by a mob and hung, and in order to a fair and impartial trial the prosecution against the appellant was conducted in another venue.

The man murdered was near the L. & N. railroad, at the house of a man by the name of Collings, exhibiting to Collings or his family some of his goods, when Mitchell, the appellant, approached the house, asking for buttermilk. The milk was given him and his associate, Ardell, who was not in sight of where the peddler was making a display of his wares, also drank some of the milk, it having been taken to him by Mitchell. The two, Ardell and Mitchell, started on their way down the railroad and stopped near a cut in the road, either to rest or in wait for the doomed man. The deceased reached the railroad and while passing through a cut the two men started after him, or in the direction of the deceased, walking rapidly.

The witness who saw them was going in an opposite direction, and had gone so far as to place himself where he could not see the shot fired that took Lavine's life. He heard the report of the pistol and the exclamation and cry of the deceased, who was making his

way from the two men. He returned and found that the deceased had been shot in the abdomen, and from that shot he died in Louisville in a few days after his removal to that city. Parties started in pursuit of the two guilty men, who were taking a circuitous route, with a view of avoiding detection, and when arrested they both denied having been on the L. & N. road at the point where the shooting took place. The appellant, however, finally said that Ardell was the man that did the shooting, and that it was done against his, Mitchell's, protest. Ardell heard Mitchell's statement and said, in substance, that he was the guilty man, and that Mitchell was in no manner to blame. Ardell also proclaimed Mitchell's innocence at the time he was hung by the mob, and the men who had taken the law into their own hands, fearing that Mitchell might be innocent, returned him to jail, that he might be tried by a judge and jury.

On the trial below the accused offered to prove by a witness the confession made by Ardell, at the time he was hung by the mob, exculpating Mitchell from all blame and making himself the murderer. This testimony was objected to and sustained by the court, and is one of the errors complained of.

Dying declarations are only allowed when made by the deceased, where his death is the subject of the investigation, and this is allowed from mere necessity, so as to prevent the murderers from going unpunished; and we know of no instance where the declaration or confession of a confederate in crime is allowed, unless a part of the *res gestæ*, to exculpate or convict one charged with a criminal offense. In this instance the accused had the benefit of the confessions made by Ardell at the time the assault was made and also when the two were taken before the magistrate. What took place at each time seems to have gone to the jury without objection, and in this manner the appellant had the benefit of Ardell's statement that he, Ardell, was alone guilty.

The appellant offered himself as a witness, and, on cross-examination, was asked if he had not once been in a State prison. This question he was required to answer over the objection of his counsel, and his response was that he had been in the Ohio penitentiary. This is another error urged.

In cases where the answer of the witness would convict him of crime, or show such infamy as would render him incompetent, he should not be compelled to answer; but such questions, as when answered, only tend to disgrace witness, he may be compelled to answer. These two men who committed this murder were, doubtless, tramps, traveling through the country unknown and for the purpose of making their living in a dishonest way, and when offering himself as a witness the Commonwealth had the right to inquire, as of any other witness, what had been his pursuits in life; where he had lived; in what places he had resided; if he had ever been confined in prison, with a view of showing what credit should be attached to his testimony as well as to enable the jury to arrive at the truth of the question at issue.

It is true that where the issue involves a former conviction, the record of that fact being the best evidence, must be produced; but we see no reason for conceding to a witness the right to refuse answering a question that may tend, when answered, to disgrace him or to lessen the weight of his testimony. Besides the privilege in such cases as would render the witness infamous, or rather make him guilty of a crime, is to be exercised by the witness alone. It is

for his protection and not that of the party on trial that the law interposes and says you shall not be compelled to answer.

The instructions offered by counsel for defense were all given but two, and they were properly refused. The accused was indicted for aiding and abetting the murder. The instruction was that the aiding must be by force and arms. Such instruction was properly refused. The other instruction was to find for the defendant. The testimony shows the guilt of both. They were in wait for the peddler, at the mouth of the cut, and would have robbed him, if the shot had taken his life at once. In this it failed, and the fear of exposure, from the cries of the wounded man, caused them to flee for safety.

The story of the accused as to the manner or cause of the killing is, itself, incredible. He states that when himself and Ardell started on their journey, after resting by the road side, that Ardell was some thirty yards ahead of him, and he then saw a man with a pack walking slowly ahead of Ardell. When Ardell came up to him he said to the man: "*Sheeney, what time is it.*" *The man answered: "I have no time," and raising his stick struck Ardell on the head, when Ardell drew his pistol and shot him;*" and when reproved for it by Mitchell, Ardell said he was mad; could not help it; he, the deceased, had struck him on the head. The appellant not only acquits himself, but makes a case of self-defense on the part of Ardell, placing the peddler, who was at the mercy of the tramps, as the offender, striking Ardell on the head with a stick, in this lonely spot, without any provocation whatever. This statement, and their conduct after the murder, is inconsistent with the theory of innocence on the part of either.

In our opinion the instruction was proper, and the judgment is now affirmed.

CHRISTIAN, TRUSTEE OF JURY FUND, V. BYARS.

(*Filed Oct.* 14, 1890.)

County attorney's compensation—Forfeited bail bonds—A person was arrested on a warrant, charging him with the offense of shooting another person with intent to kill him, and taken before a justice of the peace, who admitted him to bail in the sum of $5,000, to appear before him for examination. The bail bond was given, and the accused failed to appear, whereupon the justice indorsed "forfeited" on the bond, and returned it to the circuit court, where a judgment of forfeiture was rendered, and after a collection of a part of the money, the county attorney, who had prosecuted the case before the justice and before the circuit court, as assistant to the Commonwealth's attorney, claimed his commission of thirty per cent. for prosecuting before the justice and fifteen per cent. additional for his services in the circuit court under section 9, article 3, chapter 5, General Statutes, and under the act of April 28, 1884. *Held*—That the county attorney is only entitled to his commission of fifteen per cent. for services in the circuit court. The commission of thirty per cent. is allowed only on fines and forfeitures that final judgments are rendered on in the lower courts, and not on merely preparatory proceedings for the circuit court.

P. W. Hardin for appellant.

J. E. Byars, E. W. Hines and Byars & Terry for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Bennett.

Robert Bigbee was arrested upon a warrant charging him with the offense of shooting another person with intent to kill him. The justice of peace, before whom Bigbee was taken for examination, took his bail in the sum of $5,000, to thereafter appear before him to answer said charge. Bigbee did not appear, thereupon the justice indorsed upon the bail bond the word "forfeited," with his signature thereto, and returned the bond to the clerk of the circuit court, where it was docketed and summons served thereon, and judgment was obtained thereon against the sureties and a part of the money collected. The county attorney, who prosecuted in the justice's and circuit courts, in the latter as assistant of the Commonwealth's attorney, claims thirty per cent. of the sum realized for prosecuting in the examining court, and fifteen per cent. additional for assisting the Commonwealth's attorney in the circuit court. The circuit court allowed the appellee both sums. The appellant, as trustee of the jury fund, has appealed.

Section 9 of article 3, chapter 5, General Statutes, provides, in substance, that in all prosecutions for misdemeanors, before any county judge, police judge, justice of the peace, &c., the county attorney shall receive thirty per cent. of all fines and forfeitures imposed or recovered in such prosecutions, provided, &c. The act of April 28, 1884, makes it the duty of the county attorney to assist the Commonwealth's attorney in prosecutions in the circuit court, and fixes his compensation at fifteen per cent. of all judgments in favor of the Commonwealth for fines and forfeitures, &c.

The only jurisdiction, in a case like this, that the justice has is to take the bail bond, and if the defendant does not comply with its stipulations by appearing, &c., to indorse on the bond "forfeited," and return it to the clerk of the circuit court, where it is proceeded on in every respect as other forfeitures on bail bonds that are taken in said court. Except the taking of said bond and the indorsement thereon of the word "forfeited" by the justice the jurisdictional power is exclusively in the circuit court. It is in that court that all proceedings against the bail must be had, irrespective of the amount of the bail bond. The justice has no jurisdiction over it whatever, except to take it and make the indorsement. This he does as an examining court, to determine whether or not the accused shall be held to answer the charge in the circuit court; if he concludes to hold him over to answer said charge the case, as well as the bail bond, is turned over to the circuit court. His power thereon ceases. And if he forfeits the bail bond that, also, is turned over to the circuit clerk, and the justice's power over that likewise ceases.

The taking of the bond and the forfeiting of it are in no sense a prosecution before the justice. It only prepares the way for a prosecution by the circuit court in case of a forfeiture.

The term fines and forfeitures, as mentioned in the General Statutes, of which the county attorney is entitled to thirty per cent., evidently means judgments for fines or on forfeitures rendered in the county judge's, or police judge's or justice's courts, and not thirty per cent. on merely preparatory proceedings for final action in another court. Were the rule otherwise, and as contended for by the appellee, it would cost the Commonwealth seventy per cent. of the money collected on such forfeitures for collecting it, which, unless the case was contested, would not require more than ten minutes of the attorney's time, and but little legal skill or learning.

Certainly the charging of such fees in like cases in private practice

would be regarded as an extortion; and it is presumed that the lawmakers never meant to authorize such charges against the Commonwealth. The statute, *supra*, should be so construed as not to allow such charges, unless it expressly allows them; but, as said by a fair and reasonable construction of said statute, the fines and forfeitures thereon mentioned refers to such as are prosecuted to judgment in said courts, and not to such as said courts have no jurisdiction of, except to send them to the circuit court for trial and judgment. It is clear that the appellee was only entitled to fifteen per cent. of the forfeiture collected.

The judgment is reversed, with directions to allow the appellee only fifteen per cent.

BERRY V. COMMONWEALTH.

(*Filed Oct.* 14, 1890—*Not to be reported.*)

1. *Parties to actions—Surety*—This action was instituted in 1881 by the treasurer of Franklin county, suing for use of Franklin county and Franklin County Court against appellant, surety on the county levy bond of Hawkins, sheriff of Franklin county. *Held*—That under the act, approved March 9, 1868, creating the office of treasurer of Franklin county and prescribing his duty, the treasurer is authorized to receive all money due, or to become due to said county, and to sue for and receive all unpaid balances due the county from sheriffs and other collecting officers of the county.

2. *Pleading—Answer*—The answer of appellant, alleging that two of the sureties on the former bond, executed before the levy was made by the county court, would sign the bond and become jointly bound with him as sureties, was insufficient, as there was no allegation of the further fact that he had been deceived and misled by the county judge, before whom the bond was executed.

3. *Verdict on immaterial question*—The finding of the jury that appellant signed the bond, upon the faith and with the knowledge that the two persons named were sureties upon the original bond, was not at all material one way or the other, inasmuch as that bond was not obligatory upon them, which it is to be presumed appellant knew.

Wm. Lindsay and J. & J. W. Rodman for appellant.

D. W. Lindsey and Geo. C. Drane for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Lewis.

Judgment was rendered in this case for the plaintiff, John W. Pruett, treasurer, suing for use of Franklin county and Franklin County Court, against appellant, surety in the county levy bond of Hawkins, sheriff of Franklin county.

It was held, in the case of Owens v. Ballard County Court, 8 Bush, 614, that in order to give the county court the right to institute an action against the sheriff and his sureties there must be an order of the court, designating the person to whom the money due the county is to be paid, and then the sheriff, upon proper demand made, refusing to pay, is liable. It was further held that to authorize a county court to institute an action for recovery of money allowed to a county creditor, in satisfaction of his claim, as provided in section 6, article 2, chapter 26, Revised Statutes, substantially

embodied in corresponding section and chapter of the General Statutes, it is necessary that an allegation of fact be made, showing substitution of the county to rights of such creditors.

But by an act, approved March 9, 1868, the office of county treasurer, for the county of Franklin, was created, and that officer is empowered to collect, receive and receipt for all money due the county from collecting officers thereof, and to be held by him subject to order of the county court. It is also made his duty to institute actions against all delinquent sheriffs or collectors of that county; and it is thereby made the duty of the sheriffs and collectors, in October of each year, to settle their accounts with the treasurer and pay over any balance due by them.

Section 4 of that act provides: "It shall not be lawful for any one, except said treasurer, to receive any money due, or to become due, to said county: *Provided, however*, That the sheriff or collector may, as heretofore, pay off claims against the county, out of the county levy, and receive credit therefor in said settlement."

It seems to us it was evidently intended by that act that in case of defalcation or failure of the sheriff to collect and pay to county creditors the amounts severally due them the county treasurer is to have the power to sue for, and recover, such unpaid allowances as well as what may be found due the county when a settlement is made. For, manifestly, it was not intended county creditors should lose their claims or the right to look to the county court for payment, on account of the defalcation of the sheriff or collector of the county levy.

It appears that the original county levy bond of the sheriff was executed in December, 1880, previous to the county levy, which was not made until the May term, 1881, of the county court. But although, as heretofore held by this court, the sureties in that bond were not bound thereby, because it was executed anterior to order of court fixing the amount of county levy, still two of them, in June, 1881, moved the court, requiring the sheriff to give additional security. And the county court did then require a new bond, and the one in which appellant is surety was executed. But it is alleged by him as a defense he executed the bond upon the faith two of those who were sureties in the original bond, would sign and become jointly bound with him in the one executed in June, 1881.

Even if such had been the fact, as alleged, it would have been no defense to the action in the absence of allegation and proof of the further fact he had been deceived and misled by the county judge, before whom the bond was executed. The only fact having any bearing found by the jury was, that appellant signed the bond upon the faith and with the knowledge that the two persons named were sureties upon the original bond, which was not at all material, one way or another, inasmuch as that bond was not obligatory upon them, which it is to be presumed appellant knew.

It seems to us as the amount of the judgment is for what was found due in the settlement made with the sheriff by the county treasurer, there was no alternative but a recovery therefor against the sheriff and his sureties.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

KEENY V. BURKE.

(*Filed Oct.* 29, 1890.)

Homestead—A debtor is not entitled to a homestead as against a debt created before the erection of the improvements on the land, although the debt is evidenced by a note executed subsequent to the erection of the improvements.

In this case the debtor was not entitled to a homestead as against a debt created for lumber used in the erection of the improvements on the land, and it is immaterial that a part of the lumber was not delivered until some of the improvements had been put upon the land, and after the debtor had moved thereon and occupied it as a homestead, as the lumber was so delivered under a contract made before the land was occupied or the improvements erected.

O. H. Waddle for appellant.

W. C. Curd for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Yost.

The appellant recovered a judgment against the appellee before a justice of the peace for $73.45, evidenced by a note, of date March 30, 1878.

Upon a return of *nulla bona*, he instituted this action to enforce the satisfaction of the judgment and attached in the hands of one Crawford, a sufficient sum so to do.

Appellee's defense was, that he was a *bona fide* housekeeper with a family, and that the sum which Crawford owed him was the balance due him on the purchase price of a tract of land which he had owned and occupied as a homestead since 1876, and had sold to Crawford a short time before the institution of the action, with the intention of re-investing the proceeds in the purchase of another homestead for himself and family.

Upon hearing the evidence the court dismissed appellant's petition and discharged his attachment; and from that judgment he prosecutes this appeal.

The questions to be considered in this opinion are: Was the debt created before the erection of the original improvements on the land; and if so, was the appellee entitled to a homestead thereon and, therefore, to the proceeds of its sale? Section 16, article 13, chapter 38, General Statutes, provides, that the homestead exemption shall not apply to sales under executions, attachment or judgment, at the suit of creditors, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon.

The evidence shows that the considerations of the note was the balance due upon a bill of lumber bought by the appellee, to be used in erecting the original improvements on the land sold to Crawford. But the contract for the lumber was made before the land had been occupied as a homestead by the appellee, and before the erection of any of the improvements thereon, and that the note

was executed some time after the lumber had all been delivered for the amount found due the appellant on a settlement made between the parties.

The fact that a part of the lumber was not delivered until some of the improvements had been put upon the land, and after the appellee had moved thereon and occupied it as a homestead, matters not, as it was so delivered under a contract made before the land had been occupied or the improvements thereon erected.

The further fact that the date of the note is subsequent to the appellee's occupancy of the land avails him nothing, for it matters not how often the evidence of the liability may have been changed, as long as it can be traced to a debt contracted before the erection of the improvements on the land, its collection can not be defeated by the homestead plea.

There can be but one construction placed upon the statute, and that is, that a debtor will not be allowed to improve his land not occupied as a homestead, so as to affect existing creditors. Fisk v. Hunt, 81 Ky., 585.

We are of the opinion that the debt sued on existed prior to the erection of the improvements on the land, afterwards sold to Crawford, and that by the express provisions of the statute the land, or the proceeds of its sale, could be subjected to its payment.

Therefore, the judgment is reversed and the cause remanded, with instructions to enter a judgment in conformity with this opinion.

SUPERIOR COURT ABSTRACTS.

Bess v. Hagan, &c.

Filed October 8, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Judge Young, affirming.

Suit to vacate judgment—Death of plaintiff before action commenced—In a suit to vacate a judgment, upon the ground that "Charles Hagan," the plaintiff in the judgment, had died before the commencement of the original action, the burden was on the plaintiff to show that the "Charles Hagan," referred to in his petition, was the plaintiff in the original action. And there being two Charles Hagans, father and son, and the son, having sworn to the petition and signed his name to it, it must be concluded that it was the son who instituted the suit and bid for and purchased the property at the sale under the judgment, as "Charles Hagan," the father was dead at the time.

R. J. Elliott for appellant; J. T. A. Baker for appellees.

McGee, &c. v. Allen.

Filed October 8, 1890. Appeal from Cumberland Circuit Court. Opinion of the court by Judge Yost, reversing.

Judicial sales—Improvements made by purchaser before confirmation—The accepted bidder, at a judicial sale, acquires no title whatever to the property until the sale is confirmed, and if he puts improvements on the land, and the court afterward refuses to confirm the sale, he has no right of

action against the purchaser, at a subsequent sale, to recover the value of his improvements.

M. O. Allen for appellants; Sandidge & Sandidge for appellee.

LOWRY v. DIXON.

Filed October 8, 1890. Appeal from Livingston Court of Common Pleas. Opinion of the court by Judge YOST, affirming.

Ferries—Section 20 of chapter 42 of the General Statutes was intended to protect the licensed owner of a ferry against the encroachments of a licensed rival in his business, and was not intended as a protection against an unlicensed ferryman. Therefore, while the licensed owner of a ferry may have an action in damages against any person encroaching upon his rights, he can not maintain an action under the statute, unless he alleges that the defendant was the licensed keeper of a ferry.

J. W. Bush and Hendrick & Grayot for appellant; J. C. Hodge for appellee.

CITY OF COVINGTON v. GEYLER.

Filed October 8, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge BARBOUR, reversing.

1. *Master and servant—Respondent superior*—The liability of one person for damages arising from the negligence or misfeasance of another, on the principle of respondent superior, is confined in its application to the relation of master and servant or principal and agent, and does not extend to cases of independent contracts not creating the relation of principal and agent, and where the employer does not retain the control over the mode and manner of the performance of the work under the contract.

2. *Municipal corporations—Liability for acts of contractors*—In determining whether the relation of principal and agent exists as between a city and its employe, the same tests apply as in the case of an individual employer; and when the city retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the city is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.

Where, by the terms of a contract between a city and a contractor, the work to be done in making the excavation for a cellar, preparatory to building a house upon a lot owned by the city, was to be under the direction of certain city officials, who were to have entire control over the manner of doing or shaping all and every part of said work, the city is liable for injury resulting to a building on an adjoining lot, from the wrongful acts of the contractor or his servants. But the contractor is also liable, as he can not escape liability for his wrongful acts, upon the ground that they were done by the direction of the city officials.

3. *Rights of adjoining lot owners—Injury to neighbor's property by excavations on one's own lot*—If a land owner changes the natural condition of his soil by erecting buildings on it, he does not thereby take away from his neighbor the right to the use and enjoyment of his land, to the full extent that he might have enjoyed it had no such change been made; and he can not recover damages for any injury he may have sustained by reason of the exercise by his neighbor of any of his original rights, unless they be exercised in an unskillful, careless or negligent manner, or unless being reasonably certain that injury would result from his acts, such neighbor failed to apprise him of his intention, or to afford him an opportunity to use proper preventives. Therefore, in this case the city had the right to make the excavation on its own land, provided it apprised the plaintiffs, or they knew of its purpose, and were afforded an opportunity to make proper provision for the prevention of injury to their building.

4. *Same*—The defendants had no right to remove any of plaintiff's soil, and unless the plaintiffs gave their consent thereto, defendants are liable

for the damages, which were the natural and proximate result of such removal.

5. *Punitive damages*—It was error to instruct the jury that they might award punitive damages, as there was no evidence that the injury was done willfully, or with circumstances of recklessness or oppression.

6. *Husband and wife—Proof of wife's knowledge to show husband's knowledge*—As the plaintiffs, who are joint owners of the injured property, are husband and wife, it was competent for defendants to show that the wife was present and saw the work of excavation, as conducing with other circumstances to show knowledge on the part of the husband that the work was being done, and his consent thereto; but any agreement by the wife concerning the excavation was incompetent as evidence, as she was a married woman, and could not bind herself by such a contract, and there is nothing to show that she had any authority from her husband to make such a contract.

7. *Right of husband and wife to testify for each other*—It was not proper to allow both husband and wife to testify, although they were joint owners of the injured property. The right of both husband and wife to testify for either, or both, is confined to an action for lost baggage or its value.

W. A. Byrne and O. P. Schmidt for appellant; J. F. & C. H. Fisk for appellee.

O. & N. Railway Co. v. Newhoff & Sons.

Filed October 8, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Railroads—Bailee for hire*—In an action against a railroad company to recover for the loss of plaintiffs trunks by fire while stored by the company in its depot, the company was liable, if it was negligent in storing the trunks in an unsafe place, or if the employes of the company, after discovering the fire, could, by the exercise of ordinary care, have saved the trunks, the defendant's relation to the plaintiff being that of a bailee for hire. There was, therefore, no occasion for the application of the rule that to authorize a recovery of damages for an act of omission or commission, the injury complained of must be the direct, or at least the proximate natural consequence of the act complained of, and the court properly refused to so instruct the jury.

2. *Instructions to jury*—The correctness of instructness will not be considered on a part only of the evidence, as it will be assumed that they are correct; if it is possible that they could be sustained by the omitted evidence.

W. F. Browder for appellant; J. E. Gaither for appellees.

Bourne v. Bourne.

Filed October 15, 1890. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Deeds—Parol reservation of rents*—While the legal title to rents is incident to the reversion and passes with it unless expressly reserved, a parol agreement between the parties to a deed that the grantor shall have the rents arising out of a lease made by him prior to the grant is valid. Such an agreement does not contradict or vary the terms of the deed, but simply operates as the grant of a personal right in the rents of the land for the time stated.

2. *Same—Parol reservation of growing crops*—As a general rule growing crops pass by a conveyance of land as appurtenant to the realty unless reserved by the grantor, but a parol reservation is sufficient.

G. C. Drane, Lindsey & Botts for appellant; J. W. Greene for appellee.

Munnell v. Barnes.

Filed October 15, 1890. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Yost, affirming, Judge Young not sitting.

1. *Promise to pay debt of another*—When goods are sold and delivered to one person upon the faith of another's promise to pay for them, such a

promise is not a collateral but an original undertaking, and is enforceable, although not in writing, the credit being given to the person making the promise to pay. And he is bound, although the person to whom the goods were delivered may be jointly liable with him for the debt.

2. *Same*—Where goods were sold to one person upon the faith of another's promise to pay for them with the proceeds of certain property which he expected to sell, and the person making the promise afterward sold the property and failed to apply the proceeds as promised, he thereby rendered himself liable for the debt.

Cornelison & McKee for appellant; Stone & Sudduth for appellee.

CHESAPEAKE & NASHVILLE RAILROAD CO. v. BROWN.

Filed October 15, 1890. Appeal from Allen Circuit Court. Opinion of the court by Judge YOUNG, affirming.

1. *Reversible errors*—No error can be taken advantage of on appeal unless it was specifically relied upon in the grounds for a new trial.

2. *New trial—Excessive damages*—A new trial will not be granted because of excessive damages, unless the damages are so great as to strike the mind at first blush as having been superinduced by passion or prejudice.

3. *Railroads—Use of defective cars*—It is the duty of a railroad company to see that its passenger cars are in the best condition, and if it knowingly uses a car that is unsafe and liable at any moment to cause a wreck, and a passenger is killed or injured in consequence thereof, the company is guilty of criminal negligence.

M. A. Alexander for appellant; Lewis McQuown for appellee.

CITIZENS' NATIONAL BANK v. BOSWELL'S ADM'R.

Filed October 15, 1890. Appeal from Fayette Court of Common Pleas. Opinion of the court by Judge YOUNG, reversing.

1. *Suit for settlement of decedent's estate—Parties to action*—A bank in which a decedent held stock is not a necessary party to an action for the settlement of the decedent's estate, the bank having no lien upon the interest in the stock.

2. *Executor has no right to sue to compel transfer of bank stock to devisee*—Although the personal property of a testator upon his death vested in his personal representative, and he alone had power to sue for and reduce it to possession, yet after the property was divided by commissioners appointed by court, and the report of division was confirmed, the title vested in the respective devisees to whom the property was allotted, and, therefore, one of the devisees to whom certain shares of bank stock were allotted alone had a right of action against the bank to compel it to transfer said stock to her as directed by the judgment of the court. Therefore, it was error to render judgment in an action brought by the administrator, requiring the bank to make the transfer.

3. *Power of court to compel bank to issue stock certificate in certain form*—The court would have had full power, in an action by the devisee, to adjudge in what way and manner and form the certificate should be issued by the bank.

W. O. Harris for appellant; J. D. Hunt for appellee.

GOOD v. COMMONWEALTH.

Filed October 15, 1890. Appeal from Webster Circuit Court. Opinion of the court by Judge YOST, reversing.

1. *Sale of liquor by clerk—Peremptory instruction*—Upon the trial under an indictment for selling liquor the only witness for the Commonwealth testified that he bought a pint of whisky at defendant's store-house from defendant's clerk; that he had never bought any whisky or other liquor from defendant, and never, except on this occasion, had bought any at his house, and that he did not know whether defendant kept whisky for sale at his house or not. *Held*—That as it did not appear that the whisky sold was de-

fendant's whisky, or that defendant kept whisky for sale, the court should have given a peremptory instruction to find for defendant.

2. *Same—Evidence*—The defendant having introduced his clerk as a witness, the court properly permitted him to state, upon cross-examination, that while in defendant's employ he had sold whisky to other parties and that defendant had a Government license for the sale of liquors.

3. *Instructions to jury*—An instruction which assumed as true that defendant's clerk was in the habit of selling liquor to others was improper.

F. M. Baker for appellant; P. W. Hardin for appellee.

COLLINS v. BROWN.

Filed October 15, 1890. Appeal from Larue Circuit Court. Opinion of the court by Judge BARBOUR, reversing.

1. *Acts of clerk de facto*—The acts of one who is county clerk *de facto* are binding on third parties, and especially should they be so on mortgagors who have procured him to take their acknowledgments.

2. *Pleading legal conclusion*—An answer of mortgagors denying that the person before whom the mortgage purports to have been executed and was attempted to be acknowledged, was the clerk of the county court, is not true. Such allegations are but the conclusions of the pleader. It was necessary to aver such facts as would show that the person professing to be clerk was neither the clerk *de jure* nor *de facto*.

3. *Sale of mortgaged bond—Rights of assignee for creditors*—Where a mortgagor, subsequent to the execution of the mortgage, has made an assignment for the benefit of creditors, and in an action to enforce the mortgage lien the assignee answers, asking that he be allowed to settle the trust estate, and that all the land of the debtor be sold together, alleging that in this way much more can be realized for the general creditors than if the mortgaged land be sold separately, the relief asked by the assignee should be granted. To allow each lien holder to enforce his lien in an independent action would result not only in subjecting the estate to unnecessary cost and expense, but in the sacrifice of the interests of other creditors.

Smith & Hubbard for appellant; I. W. Twyman for appellee.

ROE'S ADM'R v. CAINFAX'S GD'N.

Filed October 15, 1890. Appeal from Carter Circuit Court. Opinion of the court by Judge BARBOUR, reversing.

1. *Parol testimony to add to consideration recited in deed*—As the claim of the grantees in a quit claim deed that the consideration recited in the deed was the only one, is consistent with all the circumstances attending the transaction, while the additional consideration claimed by the grantors is very near twice as much as the land with a perfect title was worth, the version of the grantees should be accepted as the true one.

2. *Presumptions in favor of chancellor's findings*—In the absence of an original paper, the execution of which is denied, this court must accept the chancellor's conclusions upon this point as correct, as he had the paper before him.

B. E. Roe and B. F. Bennett for appellant; J. B. Wilhoit and E. B. Wilhoit for appellee.

MOORE, BREMAKER & CO. v. STEGE & REILING.

Filed October 15, 1890. Appeal from Hardin Circuit Court. Opinion of the court by Judge YOUNG, reversing.

1. *Assignments for creditors*—The fact that an assignment for the benefit of creditors was designed to hinder and delay a pressing creditor by preventing him from obtaining a lien by attachment, does not render it void.

2. *Same—Attachment obtained by collusion*—The court will not set aside as fraudulent an assignment for the benefit of creditors, at the instance of an attaching creditor, who, by fraudulent collusion with the debtor, was endeav-

oring, by his attachment, to obtain an undue advantage over other creditors. He who appeals to equity must come with clean hands.

S. H. Bush for appellants; W. H. Marriott for appellees.

SHROUT v. SHROUT.

Filed October 15, 1890. Appeal from Nicholas Chancery Court. Opinion of the court by Judge YOST, reversing.

1. *Divorce—Cruel treatment*—While an appellate court should give great weight to the judgment of the lower court in refusing a divorce, and should never reverse such a judgment, unless the grounds relied upon have been clearly established, the court is of opinion, in this case, that the evidence clearly establishes the wife's right to a divorce, upon the ground that her husband has treated her in such a cruel and inhuman manner as indicates a settled aversion to her, and that his conduct is such as to destroy permanently her peace and happiness.

2. *Same*—There is no act of a husband toward a wife that so clearly indicates a settled aversion to her, none that will so permanently destroy her peace and happiness, and none so cruelly inhuman as to charge her falsely with being untrue to her marriage vows.

Wm. Lindsay and Kennedy & Son for appellant; Hanson Kennedy for appellee.

ALEXANDER v. COMMONWEALTH.

Filed October 22, 1890. Appeal from Jefferson Circuit Court. Opinion of the court by Judge YOUNG, affirming.

Suffering gaming—One may be guilty of suffering gaming on premises "in his occupation or under his control," within the meaning of the statute, although he was neither the owner nor the renter of the premises. It is sufficient that he was in control during a single game, and suffered the game to go on; and he will not be heard to say that his possession was unlawful.

Aaron Kohn for appellant; P. W. Hardin for appellee.

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KENTUCKY COURT OF APPEALS.

KELLER, &c. v. WILSON, &c.

(Filed September 4, 1890.)

1. Judicial sale—Infants—Vacating judgment—Appeals—K. was the owner in fee simple of a lot in Paducah, and was the owner of a life interest in an adjoining lot, in which her children owned the remainder. Prior to June, 1878, both lots were sold by the tax collector for city taxes, and the city became the purchaser, and, by virtue of its charter, entitled to a lien on the property, which it could enforce by a suit in equity. In 1878 the city brought its action for this purpose. K. and her children were made parties, and properly summoned. Two of the children were over fourteen years of age, and the petition showed this fact. On April 14, 1879, a judgment was entered directing a sale of the lot, in which the children had an interest, to satisfy the amount of taxes due on both lots, but no answer by either a guardian or guardian ad litem was filed. The sale was made, and the title conveyed by a commissioner. This action was brought by K. and her children, on October 19, 1886, to recover the property, seeking to set aside the judgment in favor of the city, and to annul the proceeding thereunder.

The old action by the city was redocketed in the fall of 1887, and a motion made to vacate the judgment and annul all the proceedings under it, upon the ground that it was void. Held—That the judgment was not void, but the fact that the infants were not represented by a guardian made it erroneous only, and no appeal has been taken from it.

The youngest child arrived at the age of twenty-one years in 1884, more than two years before the institution of this suit, and the right to annul the judgment in the court rendering it is limited by section 391, Civil Code of Practice, to twelve months after arrival at age of an infant, and more than three years had elapsed before the motion to vacate the judgment was made.

2. Agreement to redeem—Admitting that the attorney for the city agreed that the rents of the property should be applied to the satisfaction of the claim for taxes, still the attorney could not thus bind the city, in the absence of authority from it to do so.

Bullitt & Reeves for appellants.

E. W. Bagby and Thos. E. Moss for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The appellant, Elizabeth Keller, was the owner in fee simple of a lot in the city of Paducah, and of a life estate in an adjoining lot, with remainder to her children, who are also appellants. Both lots were sold for her city taxes by the city collector, prior to June, 1878, and purchased by the city. Its charter provides that such a sale shall create a lien upon the property sold for the taxes, which may be enforced, as any other lien debt, by a suit in equity.

June 29, 1878, the city brought its action for this purpose, Mrs. Keller and her children being made defendants. All of them were properly summoned. Two of the children were then infants, but over fourteen years of age. The petition disclosed this fact.

Upon the motion of the defendants the city was forced to elect against which lot it would proceed; and it elected to prosecute the action against the lot in which the children were interested.

April 14, 1879, a judgment was rendered, without the infants being represented by either a statutory guardian or one ad litem, fixing the amount of the tax claim, declaring it to be a lien on the lot, and ordering its sale.

It is urged that the lot in which the children were interested was thus made liable, not only for the taxes owing thereon, but for the other taxes of Mrs. Keller, and for which, in part, the other lot had been sold. The judgment, however, determined that the lot, now in contest, was liable for the tax; and if not void, and now beyond question, the parties affected by it are without remedy.

The city became the purchaser at the sale, and in 1880 it was conveyed to it by the court through its commissioner. It is insisted that if the judgment of sale was merely erroneous, that yet the purchase by the city should be set aside, upon the ground that it had no power, under its charter, to make it. The charter provides that it may purchase property within or without the city. This should be construed to mean for governmental purposes; but in purchasing it for its taxes it was executing such a purpose; and, in our opinion, no valid distinction can be drawn between a purchase by the city at a sale for taxes, under a levy by its collecting officer, and under a decretal sale for a like purpose.

In 1883 the city sold and conveyed the property to one Bettie Wilson. She failing to pay for it, the city sued for the purchase money, obtained a decree of sale, it was sold, and Mrs. Wilson again became the purchaser, executing sale bond for the price, with the appellee, Iseman, as her surety.

Failing to pay the sale bond, execution issued upon it, the lot was sold thereunder, and Iseman became the purchaser. It was conveyed to him by the sheriff, in 1886, and he is now in possession of it.

This action was brought by Mrs. Keller and her children on October 19, 1886, to recover the property; or if that can not be done, then its value. The pleadings do not require a consideration of a right to the latter relief. No basis is presented by them for it, and the only question is the right to have the judgment of sale in favor of the city, and the proceedings thereunder, annulled.

The old action by the city was redocketed in the fall of 1887,

and a motion made by the appellants to set aside the judgment and annul all the proceedings under it, upon the ground that it was void. The two actions were consolidated, and, upon hearing, the lower court refused the appellants any relief.

The judgment in favor of the city was not void. The fact that the infants were not represented by a guardian made it erroneous only. No appeal has ever been taken from it. It fixed the rights of the parties, and is binding until vacated or reversed. (Simmons, &c. v. McKay, &c., 5 Bush, 25.)

The youngest child of Mrs. Keller became of age in 1884. The right of an infant to show cause against a judgment in the court rendering it, is limited by section 391 of our Civil Code to twelve months after his arrival at majority, and in this instance two years or more elapsed from the time when the youngest child became of age until this action was brought, and three years before the motion to vacate the judgment in the old suit was made.

It is urged that the attorney for the city for the collection of back taxes agreed with the appellants, after the purchase by the city, that he would rent out the property until the rents paid the tax claim, and then they were to have the property, and that he did rent it, and received at least enough rents tc pay the taxes properly chargeable to this particular lot.

Even if this claim were supported by competent evidence, or by testimony of a satisfactory character, yet the attorney could not thus bind the city, in the absence of authority from it to do so, and the judgment is affirmed.

BAILEY, &c. v. McCONNELLL, &c.

(Filed September 13, 1890—Not to be reported.)

1. Ejectment—Pleading—In ejectment the answer of defendant failing to allege that the land defendant claimed, or was in possession of, was any part of the land described in the petition, was defective under subsection 2, section 125, Civil Code of Practice.

2. Boundary—The line to be run, according to the call of a patent describing the line as beginning at a corner on a branch and running "up the branch and binding thereon," must follow the water course, regardless of the calls for courses and distances in the survey.

J. D. Jones for appellants.

L. T. Moore for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lewis.

Th first paragraph of appellants' answer to apellees' petition contains a denial that the plaintiff is, as alleged, owner, and entitled to possession of the land in dispute; but the answer is defective, and the demurrer to it was properly sustained, because it is not, as required in such case by subsection 2, section 125, Civil Code, stated therein whether or not defendats claim any part of the land sued for, and though it is stated one of them owns, and is, and has for fifteen years been in possession of two tracts of land, patents for which are filed, they are not so described as to be identified, or to show a conflict with plaintiff's land, boundary and description, of which are set out in the

petition. There were thus two issues presented to and tried by the chancellor. The first was one of fact, whether the plaintiff was the owner by inheritance from the patentee of the tract described in the petition and alleged therein to cover the land sued for. The second, being one of law, is, whether one of the lines described in the patent as beginning at a corner on a branch and running "up the branch and binding thereon," shall follow the water course, or be run according to actual courses and distance now found by survey. It has been so long and well settled, that in such case the line must follow the water course, that it is needless to now discuss the question.

No brief has been filed for appellants; but, as we are satisfied no erorr was committed to his prejudice by the chancellor as to the issue of either fact or law, the judgment is affirmed.

COMMONWEALTH, BY AUDITOR'S AGENT v. MACKIBBEN.

(Filed September 18, 1890.)

Constitutional law—Exemption of waterworks from taxation—This was a proceeding under the auditor's agent act to have the waterworks, belonging to the city of Newport, listed for State taxation by the county court.

It was urged, as a defense to such taxation, that under an amended act said property " is exempt from State or county taxes so long as the same remained unproductive," and that same are unproductive. Held—That the act exempting said property from taxation is in violation of the first section of the bill of rights, it being an exclusive privilege, resting upon no consideration of public service.

It is a private corporation, from which individuals derive a profit, and is not a necessary part of the municipal government of the city rendering public services, which may be a consideration for such exemption.

E. W. Hines and Jesse Arthur for appellant.

Chas. J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Bennett.

This was a proceeding, under the auditor's agent act, to have the water-works, belonging to the city of Newport, taxed by the county court for State purposes. The county court refused to have said water-works listed for taxation for State purposes upon the ground that by an amended act of the legislature of this State said property was exempted from "State or county taxes as long as the same reamined unproductive;" and, as the same was not productive at the time the request was made and acted on, said property was exempt from State taxation. The case is here on mandamus to compel the judge of said court to list said property for taxation.

If the amended act, exempting said property from taxation, is unconsttutonal, the court ought to have listed said porperty for State taxaton. So the question is: Had the legislature the constitutional power to exempt said property from taxation?

Upon that subject the first section of our bill of rights declares: "That no man, or set of men, are entitled to exclusive separate public emoluments or privileges from the community, but in

consideration of public services." It is not contended that the act, authorizing the building and operating of said water-works, required any "public service to be rendered to the State." It is equally clear that the amended act, exempting said property from taxation, did not require any public serivce to be rendered the State inconsideration of such exemption. It is equally clear, as matter of law, that the exemption, to be constitutional, must be made in consideration of public services rendered, or to be thereafter rendered, and such services must be expressed in the act making the exemption, or in the act to which the amended act, making the exemption, is an amendment.

Therefore, as none of the acts, appertaining to said water-works, required the appellee to render any public services to the State, in consideration of the water-works property being exempted from State taxation, it is clear that if the appellee stands on the same footing as an individual, the act, exempting said property from taxation, is unconstitutional. So the question is: Was the power granted to the appellee to construct and operate said water-works granted to it as necessary to carrying on its municipal government as a political power, or simply as a private corporation, for the convenience or profit of its citizens? If the former, the exemption is constitutional; if the latter, it is not. But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property, necessary to carrying on its municipal government as a political power, is not subject to State taxation; but if it is not necessary for such purpose, then it must be treated as the property of a private corporation, and is subject to State taxation, unless it is expressly exempted in consideraiton of public services.

The case of the City of Louisville v. Commonwealth, 1 Duvall, 298, aptly illustrates the foregoing views. In that case it is said: The same reason exempts the public property of Louisville, used for carrying on its municipal government as exists for exempting the public property of counties, etc. "But so far as any of its, the city's property, may be used, not for that purpose, but only for the convenience or profit of its citizens individually or collectively. This it owns and uses as a private corporation, and, like the property of all such corporations, not expressly exempted," in consideration of public services, of course, "it is a legal subject of assessent for taxation." Now, are appellee's water-works necessary for carrying on its municipal government as a political power, or are they an enterprise entered into by the appellee for the convenience or profit of its citizens? If the latter, it can not be constitutionally exempted from State taxation, except in consideration of public services. We do not entertain a doubt that it is the latter. The following extract from Bailey v. New York, 3 Hill, 539, deciding that the city, in erecting water-works, acted in its private, not public, character is correct law.

"The powers conferred by the several acts of the legislature, authorizing the execution of this great work, are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a speical private franchise, made as well for private emolument and advantage of the city as for the public good. The State, in its sovereign character, has no interest in it. The whole investment, under the law, and the reveune and profits to be derived therefrom, are a part of the private property of the city, as much so as the lands and houses belonging to it, situated

within its corporate limits. The argument of defendant's counsel confounds the powers, in question, with those belonging to defendant in their character as a municipal or public body, such as are granted exclusively for public purposes of counties, cities, towns and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers, in question, have been conferred upon one of those public corporations, thus blending, in a measure, those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind and properly distinguishing the one class from the other so as to distribute the responsibilities attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred as to the object and purposes of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quo ad hoc, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom a like special privilege had been conferred."

It is clear that the appellee, in building and operating said works, acted in its capacity of a private corporation, and as it was not required to render public service, in consideration of the exemption of said works from the State taxation, the exemption is unconstitutional and void.

In Barbour v. The Board of Trade, 82 Ky., 645, Judge Hines announces the correct doctrine on this subject in the following strong and comprehensive language: "The power of taxation grows out of the necessity to preserve the government by laying the common burden upon every citizen enjoying its protection of life, liberty and property, and is limited in its nature to objects that are public, as distinguished from those that are personal or private in their character. Taxation immediatley for the benefit of an individual is a contradiction in terms, and which is prohibited by the fundamental law, unless it is granted as a 'public privilege in consideration of public service.'" If the legislature were to authorize the payment of a person's expenses in the performance of any enterprise, not a public service, there can be no doubt that such an act would be unhesitatingly declared unconstitutional, and to exempt a person's property from taxation, in consideration of the same service, would be equally unconstitutional. To exempt a person's property from taxation is to increase the burden of taxation upon all other taxpayers. The true test in such case is, has the legislature the constitutional power to authorize the direct payment for the services? If not, she can not exempt the person's property from taxation. There is no brief on file for the appellee.

The judgment of the circuit court is reversed and the case is remanded, with directions to grant the mandamus to compel the judge of the Campbell County Court to list said property for taxation, etc.

COMMONWEALTH v. MANN.

(Filed October 14, 1890—Not to be reported.)

Criminal law—Indictment—Larceny from the person—This appeal questions the sufficiency of an indictment under section 4, article 11, chapter 29, General Statutes. It charges that the appellee, James Mann, "did feloniously take, steal and carry away from the possession of Penn & Floyd, alias Edward Penn and William Floyd, money, currency of the realm, to the amount of over $10." Held—That under the common law, and under our former Code of Practice, such indictment does not describe the property stolen sufficiently, but under section 135 of the present Criminal Code of Practice, said description of the money stolen is sufficient.

P. W. Hardin for appellant.

Appeal from Taylor Circuit Court.

Opinion of the court by Chief Justice Holt.

This indictment is under section 4, article 11, chapter 29 of the General Statutes, which provides: "If any person shall steal money, goods or chattels, of the value of $4 or upwards, either from the person or possession of any one, or from his house, without violence or putting in fear, he shall be confined in the penitentiary not less than two nor more than five years."

It charges that the appellee, James M. Mann, did "feloniously take, steal and carry away from the possession of Penn & Floyd, alias Edward Penn and William Floyd, money, currency of the realm, to the amount of over $10." It contains no description of the money charged to have been stolen, and a demurrer to it having been sustained and the case dismissed, the Commonwealth has appealed.

Section 122 of the Criminal Code provides, that an indictment shall contain "a statement of the acts constituting the offense, in ordinay and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case."

The general rule is, that an indictment must, admitting what it charges to be true, show that the court has jurisdiction and that the imputed crime has been committed by the accused. Second. It must inform him of the precise charge, so as to enable him, without surprise, to prepare his defense and to make the verdict and judgment certainly available as a bar to another prosecution for the same offense. This is the general rule under our Code which looks to substance and not to form, and, under the old Code, this indictment would clearly have been insufficient.

In Rhodus v. The Commonwealth, 2 Duvall, 159, decided under it in 1865, where the indictment was so far descriptive as to charge the defendants with taking "one lot of treasury notes, called greenbacks, the issue of the treasury of the United States of America, and one lot of Kentucky bank notes and $15 in gold coin," it was held insufficent, because it did not sufficiently notify them what the State would attempt to prove, or sufficiently describe what had been stolen.

Section 135 of the present Criminal Code, adopted in 1877, however provides: "In an indictment for the larceny or embezzlement of money, or United States currency or bank notes, it is

sufficient to allege the larceny or embezzlement of the same, without specifying the coin, number, denomination or kind thereof."

This provision was not in the former Code. The ruling in the Rhodus case probably led to its enactment. It was seen that it would often be impossible to particularly describe the money that might be stolen, and, probably, sometimes impossible to do so at all.

This statutory rule was announced in the case of Jones v. The Commonwealth, 13 Bush, 356, where it was held, that in an indictment for the larceny of money, or United States currency or bank notes, it is sufficient to aver the larceny of the same, without specifying the coin, number, denominaiton or kind thereof.

While this indictment would not have been good either at common law or under the former Code, yet the present one declares, in express terms, that where one is indicted for stealing money, it shall be sufficient to merely aver the larceny of the same, and that its kind need not be stated.

The statute is certainly a broad one, but the policy or impolicy of it is not for our consideration. It has, as to the larceny of United States currency, or bank notes or money, dispensed with the descriptive averment usually necessary in indictments for larceny.

This appears to be not only the express declaration of the statute, but its necessary construction, when we consider the decisions above cited and the period of its enactment in reference to them.

The judgment is reversed, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

DEHART v. LEWIS.

(Filed October 16, 1890—Not to be reported.)

Fraudulent conveyance—In 1870 D. executed a promissory note, and in 1881 judgment having been rendered on the note, a tract of land, the legal title to which was in D. when the note was executed, was sold to satisfy the judgment, the legal title at the time of sale being in D., but which he, about a year afterward, conveyed to his brother, receiving no consideration therefor, and giving no other reason for making said conveyance than that his father put the brother in possession of the land, and directed D. to convey it to him. Held—That D was not legally bound to make said conveyance, and said deed can constitute no obstacle to the claim of the purchaser under the execution.

M. M. Redwine for appellant.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Lewis.

As the legal title of the land in dispute was in H. G. Dehart in 1878, when he gave his note to Spradling, and continued in him until after judgment in favor of appellee on that note had been rendered, and the land had been sold and purchased, in 1881, by appellee, under execution issued on that judgment, the deed made in 1882 by D. G. Dehart to appellant, his brother, presents no obstacle to recovery of the possession by appellee. For no other reason or consideration for execution of that deed is stated by appellant in his answer than that his father gave and put him in possession of the land, and requested H. G. Dehart to convey it to him when called on. But the latter never

was legally bound to convey, and it is not alleged he received valuable consideration for the deed of 1882, and even if he had then the right to convey, that deed would have to be regarded as fraudulent.

It seems to us the demurrer to the answer of appellant was properly sustained; and, therefore, judgment is affirmed.

TAYLOR, &c. v. MINOR AND WIFE, &c.

(Filed October 16, 1890.)

1. Will—Contest—Curatrix—Attorney's fees—Witness fees—In 1876 T. died, leaving a paper, purporting to be his last will, executed in 1884, by which, after devising his estate to his wife, the appellant, during life or until her remarriage, he disinherited his daughter, the appellant, who had married M., and devised his estate, after the death or marriage of his wife, to the remaining children From the order of probate M and wife prosecuted an appeal to the circuit court, where, after four unsuccessful trials, a finding against the will was had, which was affirmed, on appeal to this court.

Pending the litigation the appellant was appointed curatrix of the estate, and when it ended, she qualified as administratrix. She settled her accounts as curatrix in the county court, in which she was credited with extraordinary expenses or costs incurred by her in the will litigation, such as moneys paid to an expert witness and lawyer's fees. M and wife had obtained a judgment in the will litigation for their ordinary cost, and collected it, and afterwards brought this action to surcharge the settlement made by the curatrix, and made the other heirs parties, and sought a division of the estate and a re-imbursement for extraordinary expenses incurrd in the previous litigation. This included the fees of their attorneys; moneys paid to a distinguished physician as an expert witness; the cost of a continuance by them in that suit; the fees of a person for taking down testimony in the various trials; also the amount of their personal expenses in attending to the litigation, such as hotel bills. Appellant made similar claims against the estate. Held—The expenses claimed herein, as incurred in the will litigation, are not such as are embraced in section 15, chapter 23, General Statutes, where some have borne the expenses of litigation for others jointly interested and benefitted, and are entitled to be reimbursed; but the expenses incurred by M. and wife and by appellant tended to reduce the portions of the other devisees. Under chapter 39, article 1, section 21, General Statutes, appellant, as curatrix, was only directed to collect and preserve the estate, and all expenses incurred by her in the will litigation must be borne by her as devisee. She did not occupy the position of executrix; if she did, a part of such extraordinary expenses would be properly allowed; but M. and wife are entitled to an attorney's fee in this action for surcharging the accounts of the curatrix, as all the distributees are benefited thereby. The curatrix was properly credited with insolvent debts owing to the estate; also with debts owing by obligors, generally regarded as solvent, until their failure.

2. Interest—A curatrix of an estate, holding money to abide the result of pending litigation, should not be charged with interest on it, except to the extent that she collected interest on it.

W. B. Harrison for appellants.

Samuel Avritt and Rives & Spalding for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Holt.

Bannister Taylor died in 1876, leaving a paper, purporting to

be his will, executed in 1844. It devised his estate to his widow, the appellant, E. W. Taylor, for life, or during her widowhood; disinherited his daughter, the appellee, Martha Minor, who had married J. C. Minor; provided that his widow, as his other children married on arrival at age, should give to each of them $1,000 as an advancement; but if any one of them married against her will, such child should have no part of his estate; and that upon the death of his widow or her remarriage, his estate should, save in the event above named, pass to his children, save Martha; but if they died without children, it was to pass to a certain educational institution, which was named in the will. It nominated two persons as executors, but they never qualified. He had but two children, beside Martha, one of whom died before he did, and the other after, both leaving children.

Whether, therefore, the paper, purporting to be his will, was upheld or not, his estate passed to the same persons, saving a difference in the rights of the widow; and also, if the writing were maintained as his will, the portions of the devisees under it were increased by Martha being disinherited.

After being probated in the county court, Minor and wife assailed it, taking an appeal to the circuit court, where, after four mistrials, a finding was, upon a fifth trial, had against it. Upon an appeal to this court, the judgment was affirmed.

During the pendency of the litigation, E. W. Taylor, was appointed curatrix of the estate, and when it ended, she qualified as administratrix. As such representative she made a settlement in the county court of her accounts as curatrix, and while that settlement does not appear as part of this record, yet she appears to have been credited in it with extraordinary costs or expenses, incurred by her in the will litigation, such as moneys paid to an expert witness and lawyer's fees.

Minor and wife obtained a judgment in the will litigation for their ordinary cost, and collected it.

Shortly after the ending of that litigation Minor and wife brought this action against the widow and other heirs, seeking to surcharge and correct the settlement made by Mrs. Taylor in the county court, and for a settlement and division of the estate. In it they also claimed re-imbursement out of the estate for the extraordinary expenses they had incurred in the previous litigation. This included the fees of their attorneys; money paid to a distinguished physician as an expert witness; the cost of a continuance by them in that suit, and for which a judgment had been rendered therein; the charge of a person for taking down the evidence upon the various trials; also the amount of their personal expenses in attending to the litigation, such as hotel bills, etc.

Upon the other hand the appellant, Mrs. Taylor, while she denied the right of Minor and wife to recover these claims out of the general estate, claimed that she was entitled out of it to the extraordinary costs she had incurred in the will litigation, such as her attorney's fees and money paid by her to another expert witness. The case was referred to a commissioner, who reported in favor of allowing all these claims; and the court, by the judgments now complained of, allowed them all out of the estate, and both sides are now complaining, the one by an appeal, and the other by a cross-appeal.

The court also allowed an attorney's fee to each side in this case, to be paid out of the estate.

Various other grounds of complaint are presented by each side,

but those above named are the ones mainly urged; and the most of the others will go unnoticed as unnecessary for our consideration.

It is claimed, upon the side of the appellees, that section 15, chapter 23 of the General Statutes, page 311, authorizes the allowance to them of their extraordinary expenses incurred in the will litigation.

It provides: "In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, if it shall be made to appear that one or more of the legatees, devisees, distributees, or parties in interest, have prosecuted for the benefit of others interested with themselves, and have been at trouble and expense in conducting the same, it shall be the duty of the court to allow such person or persons reasonable compensation for such trouble, and for necessary expenses, in addition to the fees and costs, said allowance to be paid out of the funds recovered, before distribution, the persons interested having notice of the application for such allowance."

In our opinion, however, this provision does not embrace a case like this one. Where, however, one person has prosecuted an action at extra expense and trouble, and the recovery enures equally to the benefit of others, the chancellor may, in the exercise of his power to compel parties to do equity, require them, as a condition of sharing in it, to contribute their proper proportion of the expense, and may order it paid out of the common fund.

It is manifest, however, that such a case is not now presented. The will litigation was for the benefit of Mrs. Minor. Her success diminished the portions of the devisees named in the will, and their portions, as heirs, should not, therefore, be diminished by the payment of these extra expenses out of the estate, which were incurred for the benefit of Mrs. Minor alone. Upon the other hand the appellant, Ms. Taylor, was merely a devisee, and the curatrix. In the latter capacity it was her duty to collect and preserve the estate merely. She had no power, as such, to employ counsel in the attempt to set up a will, and charge the estate with the expense. (General Statutes, chapter 39, article 1, section 21.)

If she did so as a devisee, then, equally, she has no right to charge the estate, and this is true of any extraordinary expense or trouble incurred by her in that litigation, and it was error to make any allowance therefor out of the estate.

If she had been nominated as executrix by the will and in good faith, and upon reasonable grounds had endeavored to probate it, thus complying with what the testator may be regarded as having asked, she would have been entitled to any extraordinary expense, such as her attorney's fees and other incidental costs attending such an effort; but only to this extent has this court gone, and it is far enough, in our opinion. (Phillip's Ex'or v. Phillip's Adm'r., 5 Ky. Law Rep., 270.)

The allowance of a fee to the attorney of the appellees, Minor and wife, in this suit was proper. Mrs. Minor, by the breaking of the so-called will, had become a distributee of the estate. She, therefore, had a right to sue for its settlement; and in doing so, to surcharge and correct the settlement, which the administratrix had made of her accounts as curatrix. As it credited her by the extraordinary expenses incurred by her in the will litigation it was erroneous; and this being so, we fail to see upon what ground an allowance should be made to Mrs. Taylor out of the estate to pay the fee of her attorney in this action.

The distributee was not in fault in seeking to correct the settlement, and this expense, upon the part of Mrs. Taylor, has been incurred in endeavoring to uphold it, and protect her own individual interest.

While we doubt not she has acted throughout in good faith, yet this does not permit us to stretch the rule in her favor to such an extent as would generally prove unjust, and, indeed, be so in this instance.

This appeal is not so taken as to parties, that we can consider any question of overpayment to any of the heirs.

Mrs. Taylor was given a credit in her county court settlement for insolvent debts of the estate; and in making up the accounts in this suit she appears to have been charged only with the balance found owing upon that settlement. She was properly credited as to the Purdem debt owing to the estate, as the testimony shows that the obligors were, until the time of their failure, generally regarded as solvent.

It does not clearly appear, from this record, whether Mrs. Taylor has or has not been credited by all the taxes paid by her for the estate.

The chancellor will, upon the return of the cause, re-examine the case, and in the future judgment allow any not heretofore credited.

As curatrix she could not tell when the will litigation would end. She could not know when she would be called upon to settle her accounts. She should, of course, be made to account, however, for any and all interest upon the funds of the estate, which she, in fact, collected. She has been charged interest upon the money from two years after her qualification as curatrix. It appears that for a time a portion of the estate was in bank to her credit, and ready for distribution, if the litigation had come to an end, and it had been ordered.

If, during this period, she received no interest upon this portion of the estate—and she does not appear to have done so—it would not be equitable to charge her with it, and in the computation of interest against her, she should have credit to this extent.

We perceive no errors which we can consider as between the parties to this appeal, save as above indicated.

Upon a return of the cause the lower court will correct its proceedings, as herein indicated, calling to its aid its commissioner, if it sees proper to do so; and the judgments appealed from are reversed, upon both the main and cross appeals, and cause remanded for further proceedings consistent with this opinion.

KENTUCKY CENTRAL RAILROAD CO. v. McGINTY.

(Filed October 23, 1890—Not to be reported.)

Willful negligence—Parties to actions—The father is not an heir to his son, who left neither child nor widow, within the meaning of the statute, and who is authorized to maintain an action against a railroad company for damages resulting in the death of the son, from the willful neglect of said company.

Breckinridge & Shelby for appellant.

J. F. Winn for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Pryor.

The representative of one whose life is lost by the willful neglect of a railroad company, and who leaves at his death neither child or widow, can not maintain an action under the statute. The father sues in this case as the heir of his son, whose life is said to have been lost by the neglect of the appellant.

The judgment below is reversed and remanded, with directions to dismiss the petition.

HOOPER v. SNEAD IRON WORKS.

(Filed October 23, 1890—Not to be reported.)

Pleadings—Negligence—The petition in this action for damages for negligence, resulting in the death of H., fails to allege that it resulted from the neglect of appellee. An amended petition was filed, alleging that the deceased was employed to operate a circular sawmill, and that the materials consisted of uneven and knotty timber, the defects of which were not known to deceased or discoverable by him by ordinary observation. Held—Conceding that the allegations that the timber was furnished by it and was knotty and uneven, and so known to appellee to have been properly made, no neglect is shown on the part of the appellee.

Lane & Burnett for appellant.

Simrall & Bodley for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The pleading in this case is evasive, and while it appears that the death of appellant's intestate originated from a wound received by the latter while in the employ of the defendant, there is no allegation that it resulted from its neglect. It is alleged that the husband was running a circular saw for the defendant, and that the latter furnished him with materials full of blemishes with which to operate the machinery, and, in consequence of these defects, he was injured. In his amended petition, he says the defects in the material consisted of wood that was knotty and of irregular density, and the defects were not discoverable to the deceased; that it was the duty of the appellee to have examined and rejected it; and not having done so, he was guilty of negligence. It seems to us to follow, that if the intestate had voluntarily placed himself in the position of sawing the timber, he must have known, or could have known, by ordinary observation, that the timber was defective; or if not, we see no neglect, although such defects exists, on the part of the defendants, unless it knew, or should have known, by the exercise of ordinary care, that it was dangerous to be used; that it was the duty of the defendant to have smooth, even timber may be, and must be taken as true; but that some was uneven or knotty is not neglect; nor does the entire petition show, except by reference, that the appellant ever furnished the defective material; but if the averment had been distinctly made, there would have been no cause of action stated.

Judgment affirmed.

COMMONWEALTH v. SAPP.

(Filed October 25, 1890.)

1. Evidence—Testimony of wife against husband—Upon the trial of an indictment against the husband for attempting to poison the wife, the prosecution offered the divorced wife as a witness to prove that she had seen her husband sprinkle a substance upon a piece of watermelon intended for her, and that a portion of it produced on the trial and proven to contain arsenic was a part of the piece prepared for her. The court refused to permit her to testify. On appeal, Held—That she was a competent witness to testify against her husband for two reasons. First—Under section 606 of the Civil Code of Practice, the word "communication" should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or vice versa, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of one or the other; therefore, the rule should not be applied in such a case Second—The wife is a competent witness against the husband where the husband commits or attempts to commit a crime against the person of the wife. The section of the Code forbidding the husband or wife to testify against each other is but declaratory of the common law, and as the common law admitted an exception to the rule on the higher policy of punishing crime, and admitting the testimony from necessity, so our statute admits the same exception.

2. Same—Impeaching testimony of wife by showing her unchaste—The lower court erred in admitting evidence showing that the wife was unchaste when she had not testified, the evidence was incompetent. Overruling in part, Turnbull v. Commonwealth, 79 Ky., 495.

P. W. Hardin and F. Shuck for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Holt.

Upon the trial of William Sapp, upon the charge of attempting to poison his wife, the State offered her as a witness against him, avowing, by its attorney, that it would prove by her she had seen the accused sprinkle a substance upon a piece of watermelon intended for her, and that the portion of it produced at the examining trial, and then shown to contain arsenic, was a part of the piece prepared for her, and was, when so produced, in the same condition as when she got it from him.

It is claimed the attempt was made in August, 1888. Afterward, and before his trial, they were absolutely divorced. The court refused to permit her to testify, holding that she could not be a witness for any purpose; and whether this is so, is the main question now presented.

It is a general rule of the common law, based, both upon public policy and because of identity of interest, that neither a husband or wife can testfy for or against the other; and some authorities hold that where this relation has once existed, the one is admissible for or against the other, even after the relation has ceased as to any and all matters that occurred during its existence. They follow Lord Alvanley, who said, in the early case of Monroe v. Twisleton, Peake's Add. Cas., 219, that the divorced wife is a competent witness to prove any fact arising after the

divorce, but not to prove any thing which happened during coverture.

Thus Mr. Wharton says: "If a woman be divorced; a vinculo matrimonii, she can not prove a contract, or any thing else which happened during the coverture. Any fact, arising after the divorce, she may prove." (1 Wharton's Criminal Law, section 774.)

It is, perhaps, questionable whether some of the writers, to this effect, do not mean that the divorced wife can not testify as to any matter occurring during coverture, if her knowledge as to it arose by reason of the marital relation.

It was held, in the State v. Phelps, 2 Tyler's Reports, 374, that a woman, although divorced absolutely, is not a competent witness upon an indictment against her former husband for a crime committed during the coverture; but the court so announced, without any argument, in the opinion of the question. Cases may, however, be found where courts of high authority have held that a widow may testify against the administrator of her husband as to any facts, which she did not learn from the latter, or which did not come to her knowledge by reason of the marital relation, although relating to the transactions of her husband. (1 Greenleaf on Evidence, section 338; Babcock v. Booth, 2 Hill, 181.)

In the case just cited, the court said: "The policy of the law only excludes her, when her answer will be a violation of the confidence which existed between the husband and wife while the marriage relation continued;" and in Ratcliff v. Wales, 1 Hill, 63, which was an action for crim. con. with the plaintiff's wife, it was held that while a divorced wife is generally incompetent to testify against the husband as to facts occurring during the marriage, yet she was competent to prove the charge for him, although the act occurred during the existence of the marriage. We fail to see any reason for a distinction, whether she be called as a witness for or against him.

It was held by this court, in Storms, &c. v. Storms, &c., 3 Bush, 77, that the testimony of a husband, after his wife had been divorced from him, is competent against her, if it divulges no communication between them during coverture.

In English's Adm'r. v. Cropper, 8 Bush, 292, the testimony of the widow of the intestate was offered by his administrator to prove facts which came to her knowledge during the coverture, but not by reason of her confidential relation as wife.

It was urged that our then existing law (1871) provided that husband and wife should not testify against each other; and that construing it by the reasons of public policy which, before its adoption disqualified them from so testifying, it should be held to exclude them, after the dissolution of the marriage by divorce or the death of one of them; but this court said: "Neither the literal import of the language of the code cited, nor any principle of policy or propriety, will exclude a surviving wife or husband from testifying to facts known by the witness from other means of information, than such as result from the marriage relation, where, as in this case, the witness is not otherwise incompetent, although the testimony may relate to transactions of the deceased husband or wife."

Our statute, adopted in 1872, and which, in substance, so far as it bears upon the question we are now considering, is again found in section 606 of the Civil Code, appears to be declaratory of these decisions of this court. It says: "Neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while that relation subsisted, or afterwards, pro-

vided, however, that in actions where the wife, were she a feme sole, would be plaintiff or defendant, the wife may testify, or her husband may testify, but both shall not be permitted to testify." (General Statutes, edition 1883, page 414.)

This provision was considered, in the case of Elswick v. The Commonwealth, 13 Bush, 155, where the husband was indicted for a felony, but not one against the wife, who had been divorced before the trial; and it was decided that, inasmuch as she had been divorced, she was a competent witness for him to prove facts which came to her knowledge while the marriage relation existed, but not confidentially, or by means of her situation as wife.

Unquestionably information obtained by the husband or wife during the marital relation, by reason of its existence, should not be disclosed, even after the relation has been dissolved. Whether this rule may be relaxed, so as to permit the wife to testify against the husband by his consent, has been, to some extent, a mooted point; but in this country it has generally been denied.

Its importance to the interests of society, protecting, as it does, the peace and harmony so vital to the most intimate of all relations, can not be overestimated.

Its disregard would throw open to the public gaze all that privacy of married life, which tends to cement the relation, and destroy, in great degree, if not altogether, that mutual confidence and dependence, the one upon the other, so necessary to its existence. Discord and misery would reign where peace and concord are so necessary.

In the language of an eminent legal writer: "The great object of the rule is to secure domestic happiness, by placing the protecting seal of the law upon all confidential communications between husband and wife, and whatever has come to the knowledge of either, by means of the hallowed confidence, which that relation inspires, can not be afterwards divulged in testimony, even though the other party be no longer living." (1 Greenleaf on Evidence, section 337.)

If the proposed testimony violates marital confidence in the slightest degree, or tends, however slightly, to impair the rule for its protection, the highest considerations forbid its introduction.

The word "communication," therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife, or vice versa; but should be constructed to embrace all knowledge upon the part of the one or the other, obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party.

The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case.

What the State proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused.

If she had not then been his wife, ordinary observation would have enabled her to know all that it was proposed to prove by her.

But we think it was competent upon another ground. It was evidence, relating to an alleged attempt at felony, upon the

wife. The rule that husband and wife can not testify for or against each other is subject, necessarily, to some exceptions, one of which is, where the husband commits or attempts to commit a crime against the person of the wife. (Stein v. Bowman, &c., 13 Peters, 221.)

It was never doubted that she could exhibit articles of the peace against him.

Roscoe says, "It is quite clear that a wife is a competent witness against her husband, in respect of any charge which affects her liberty or person." (Roscoe's Crim. Evi. page 150.)

In an English case, where the husband attempted to poison the wife with a cake into which arsenic had been introduced, and the wife was admitted to prove that her husband gave her the cake, it was held by the twelve judges that the evidence was rightly admitted. (3 Russ., 632.)

In 1 Wharton's Crim. Law, section 769, it is said: "Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence;" and in the case of the State v. Hussey, 1 Busbee, 123, the judge, in delivering the opinion, said: "The rule, as we gather it from authority and reason is, that a wife may be a witness against her husband for felonies perpetrated or attempted to be perpetrated on her, and we would say for an assault and battery which inflicted, or threatened a lasting injury, or great bodily harm."

In the case of The People v. Northup, 50 Barb., 147, the husband was on trial for administering poison to the wife, and she was admitted as a competent witness.

The policy upon which the rule that the husband and wife can not testify for or against each other is based, is so far overcome as to create the exception by that superior policy which dictates the punishment of crime, and which, without the exception to the rule, would very likely go unpunished. It is of necessity.

If it be said that our statute forbids the introduction of the husband or wife as a witness against the other, we reply, and so did the common law; and yet the exception named existed; and so it should, in our opinion, under our statute. The necessity of the case requires such a construction; and, as already said, the statute forbidding husband or wife to testify against each other is but declaratory of the common law.

As the divorced wife would have been a competent witness, if she had still been the wife of the accused at the time of the trial, as to the alleged attempt at felony upon her, it follows, a fortiori, that being divorced did not disqualify her.

The accused was allowed to introduce testimony tending to show that the wife was unchaste. She had not testified as a witness, and it is difficult to see upon what ground this was permitted. It is not supposable that a court acted upon the idea that unfaithfulness upon her part to her marital vows authorized her husband to poison her. The evidence was incompetent.

The case of Turnball v. The Commonwealth, 79 Ky., 495, is overruled, in so far as it conflicts with this opinion.

This opinion is ordered to be certified to the lower court as the law of the case.

LEAVISON &c. v. HARRIS.

(Filed September 16, 890—Not to be reported.)

Appeals—Improvements—Appellee brought this action for the possession of a slip of ground in the city of Paducah, and after judgment was rendered in his favor the question as to compensation for improvements erected by appellant was continued. The court finally adjudged that a stone wall erected on the lot by the appellant belonged to him, and that he should remove it, and refuse to allow him any compensation for erecting same. Held —That the court properly refused appellant compensation for said wall, as it was erected after he had notice of appellant's claim to the land, and erected it at his peril, nor is he entitled to any compensation on the theory that it enhanced the value of the property, because the evidence shows that the wall was not constructed on the line of the lot, but was so constructed as to throw the lot into a wedge shape, thereby damaging it.

The question as to the correctness of the judgment as to appellee's right of possession of the lot can not be considered on this appeal, as that judgment is not appealed from: but conceding that this appeal brings up that judgment for review, this court would not disturb the finding of the lower court, as that finding will be presumed to have been authorized by the evidence heard, in the absence of such evidence from the record.

Bullitt & Reeves for appellants.

Chas. G. Wheeler for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellee sued the appellant for the possession of a slip of ground, situated in the city of Paducah, Ky. In 1886 the lower court decided that the appellee was entitled to the slip, and awarded him a writ of possession and gave him a judgment for his costs. The appellants did not except to the judgment nor appeal therefrom. But upon the appellants amended answer the court continued the case as to the question of the value of the improvements put upon the strip of ground by the appellants.

In 1888 the court approved of its former judgment and adjudged that the wall which the appellants built on said strip of ground was theirs, and that they were entitled to remove the same and should remove it; that they were not entitled to recover any compensation for said wall.

It is only from this latter judgment that the appellants appeal.

The appeal from this judgment does not authorize a review of the former judgment settling the appellees right to the slip of ground.

Even if the appeal embraced said judgment, we can not consider the same, for the reason that the evidence used upon the trial of that branch of the case is not copied in the record, and we must presume, in the absence of it, that it was sufficient to sustain the judgment. Therefore, the only question here is the refusal of the court to allow the appellants compensation for the wall. Upon that question the court had direct and positive proof that before the appellants built said wall, they had notice that the appellee claimed the ground upon which it was thereafter built. The court's judgment thereon we can not disturb.

The appellants having had notice of the appellee's claim to the land, they thereafter built the wall upon it at their peril. And the court having found the appellee's contention to be true, the appellants will not be heard to say that, as they did not

believe the appellee's contention to be true, they are entitled to recover under the occupying claimant's law. The only remaining question to be considered is, are the appellants entitled to recover upon the equitable ground that, as the labor and material have enhanced the value of the appellee's land, he ought to pay for such enhanced value? Upon that subject the proof is clear that the wall was not built on a straight line, the course that the appellee's line runs, but it was built so as to throw the appellee's lot into a wedge shape, which damaged his property, instead of enhancing the value of it.

The judgment is affirmed.

RUDD, &c. v. ANDERSON.

(Filed September 6, 1890—Not to be reported.)

1. Mortgage—Usury—Fixtures—A tract of 100 acres of land and a lot in Owensboro were devised for the use and benefit of R., his wife and children, but to be in no wise liable for his debts. In December, 1870, R. and wife executed a mortgage on twenty three acres of said land and the lot to secure the payment of a note executed to A. for $3,080, payable January 1, 1874, and interest thereon, payable January 1 of each year succeeding date of the note In 1879, H., a creditor who had an unsatisfied judgment against R., instituted an action to subject said property to the payment of his debt, to which action A. was made a party, and a finding by the court was had to the effect that his mortgage debt had been overpaid by $156 77. After the disposition of the action by H., the creditor, the children sought to recover of A. the amount overpaid. Held—That the basis of calculation adopted by the commissioner, under the direction of the court for ascertaining the amount of money due on the mortgage debt, was erroneous in the particulars indicated in the opinion, and the commissioner erred in failing to charge A. with the rental of a house occupied by him for five or six years. He should have also been charged with the value of a bank vault removed from premises belonging to the children, and he should have been charged with usury collected on the note.

2. Limitation—Usury—The plea of limitation against the claim of the children will not be sustained, as their claim is the result of a calculation of partial payments on the debt, and it is a well settled rule that in such cases limitation does not apply, no matter how long such debt may have continued, as the last payment may be purged of usury.

G. W. Williams & Son for appellants.

R. S. Todd for appellee.

Appeal form Daviess Circuit Court.

Opinion of the court by Judge Lewis.

There was devised to James C. Rudd by his father 100 acres of land in Daviess county, and a lot on Ann street in the city of Owensboro, the language of the will in relation thereto being in substance as follows: "Said property and product thereof to be for my son James C. Rudd's use and benefit for the support and maintenance of himself, wife and children during his life, and in no way or extent to be liable for his debts, and at his death to become the property equally of the children," etc.

In December, 1870, James C. Rudd borrowed of T. S. and W. K. Anderson $3,080, and executed his note for $3,500, the principal,

payable January 1, 1874, and interest thereon, payable January 1st of each year succeeding date of the note.

There was executed at the same time by James C. Rudd and wife a mortgage on twenty-three acres of the land devised by the will of Jas. Rudd and on the Ann street lot to secure payment of the debt, it being in terms agreed that all rents thereafter arising from two houses, erected on the lot with the money so borrowed, should, as collected, be applied to pay, first, the annual interest on the note at the agreed rate, and the surplus, if any, towards paying off the principal.

In 1879 W. V. Hagan, having, as alleged, an unsatisfied judgment against James C. Rudd, instituted an equitable action against him, T. S. Anderson, who had become sole owner of the note mentioned, and the wife and children of Rudd, for the purpose of subjecting the twenty-three acres to pay his debt. And one of the issues involved, upon the decision of which the lower court seemed to be of opinion the relief sought depended, was whether the note given to Anderson, in 1870, had been satisfied. To determine that fact, an order of reference was made to the master commissioner, who, January 5, 1885, reported that on September 1, 1883, the note had, according to a calculation filed with the report, been overpaid by the sum of $156.77. And January 17, 1885, a judgment was rendered in effect that T. S. Anderson had no lien on the twenty-three acre tract, his debt having been satisfied, and for a sale of it to satisfy the judgment of the plaintiff, Hagan.

But upon an appeal by the children of James C. Rudd that judgment was reversed by this court, it being decided that the property was devised to James C. for life, with the rents and issues in trust for the support of himself and his wife and children, to be apportioned between members of the family as they may increase or diminish, by reason of birth or death of a child, and that the property could not be sold absolutely; nor any more than his share of the rents and profits applied to pay his debts. (Rudd v. Hagan, &c., 9 Ky. Law Rep., 465.)

Though appellee, Anderson, in 1880, filed an answer to the petition of Hagan, in which he alleged there was a balance of about $2,900 of the mortgage debt then due and unpaid, and the infant children of James C. Rudd, by their guardian ad litem, filed in 1882 an answer to the cross-petition of Anderson, there was not, until April, 1885, any issue presented between the parties to this appeal. For in their answer of 1882 the infant children, by guardian ad litem, simply asked protection of the court and investigation of the matter set out in Anderson's cross-peittion. Consequently the question now before us are not controlled by the judgment rendered in favor of Hagan, further than it was thereby determined the mortgage debt had previously been satisfied. Nor does appellee now claim any part of it is unpaid, for he does not pray a cross-appeal, though the judgment of which appellants complain is against him for an amount assumed to have been overpaid to him. But the simple inquiry before us is whether the judgment is for enough.

It appears the principal sum of the original note, $3,600, was obtained by adding to the amount actually loaned, $3,080, interest in advance for one year, at the rate of about twelve per cent. per annum, and thereafter interest at the same rate was counted at the beginning of each of the six succeeding years, and then at the rate of ten per cent. until July, 1883, when by a settlement between T. S. Anderson and James C. Rudd, a balance of $1,257.30 was fixed on and a note therefor was given to the former by the latter.

At the time the original note and mortgage were executed, in 1870, it was in writing agreed that Anderson was to pay quarterly for five years, beginning January 1, 1871, $350 per year rent for one of the houses on the Ann street lot, occupied by him for banking, and the evidence tends to show he occupied it also during the year 1876 at the same rent. But thereafter, until 1882, when Anderson ceased to occupy the building, he was to pay $300 per year. He also received from the beginning of the year 1875 rent of another building on the lot used as a postoffice, amounting to $200 per year.

The commissioner who reported, in January, 1885, the amount overpaid to Anderson as of September 1, 1883, to be $156.77, arrived at that result by a calculation made under direction of the court in the following manner: He counted interest on the note at the rate of ten per cent. from September 1, 1871, to September 1, 1876, and at eight per cent. from the latter date to April 1, 1878; and thereafter at six per cent.

Though it is not clearly shown the evidence tends to show that at the beginning of each year Rudd exected a new note for the balance left, after deducting the accrued rents. Consequently it may be properly said James C. Rudd agreed to pay the two rates of ten and eight per cent. which the respective statutes authorizing those rates were in force, and that he and his wife and children are bound by that agreement. But it was not proper to add in the first instance more than the amount of six per cent. for one year on the sum actually loaned in December, 1870, and there was, consequently, due to Anderson January 1, 1872, $3,080, and interest thereon for one year at six per cent., making $3,264.80 instead of $3,305.86, the amount found by the commissioner. Another error of calculation was made by the commissioner in failing to give credie by rents due for the first six years quarterly.

It appears that the rent of the banking building was not sufficient to pay the yearly interest, at the rate charged, by almost $70, and that James C. Rudd paid that amount at the beginning of each year to make up the deficiency. But although he states the amount, $70, was obtained by him from rents, we do not think appellee, Anderson, should be charged therewith in the calculation made for the purpose of ascertaining how much is due on the mortgage note, or has been overpaid up to a certain date, as the case may be, by crediting Anderson with the debt and legal interest, and applying as partial payment in a legal mode rents arising from the mortgage property. For if the $70 was paid with rents arising from any other source, no account can be properly taken of it in ascertaining how much Anderson now owes appellants.

It appears that at the time Anderson vacated the bank building he removed a safe and vault therefrom with which it is contended he should be charged.

It seems to us there is no room for question as to the safe, because the evidence makes it plain Anderson purchased and paid for it, and had right to remove it. But the vault was erected at the expense of James C. Rudd, trustee, and with the money for which the mortgage note was given, and was removed with the consent of Rudd, and under an agreement by Anderson to credit the note by the price fixed on it, which he states was $372.43. We think that sum should be added to the amount of $156.77 found by the commissioner to have been overpaid as of September, 1883.

The judgment appealed from was for $187.50, aggregate amount

of rents received by Anderson subsequent to September, 1883, together with interest from the date each installment was received.

The evidence does not make it clear enough to justify this court in deciding that finding of fact is incorrect, for it is not satisfactorily shown any greater amount was actually received after that date. But we think the court erred in failing to adjudge to appellant the amount found by the commissioner to have been overpaid on September 30, 1883, supplemented by whatever additional sum may result from change of the mode of calculation and application of payment before mentioned, and by the sum of $372.43 price, of the vault and interest thereon.

It seems to us appellants are not barred by limitation to recover what may be actually found due them on account of over payments as of September, 1883, much less as to what was received by Anderson subsequent to that date.

They do not seek to recover back usury actually paid in the meaning of the statute prescribing one year limitation. For it is well settled that no matter how long previously usury may have been counted, nor how many renewals of an original note there may have been, when payment is finally demanded the debtor may have the outstanding note purged of usury. And where there has been, from time to time, partial payments made, he may likewise, upon a calculation and determination of what is legally due, have the debt decreased to the full extent of such usury as may at any time have been counted and included.

It was satifactorily shown by the report of the commissioner that in 1883, less than two years before the answer and set-off of appellant was filed, that appellee had been overpaid by $156.77.

And the sale of the vault was made and rents for which the judgment appealed from was rendered accrued within five years.

Therefore, the judgment is reversed and cause remanded, for further proceedings consistent with this opinion.

MARION NAT. BANK v. FIDELITY TRUST & SAFETY VAULT CO., &c.

(Filed September 18, 1890—Not to be reported.)

1. Interest—Agency—Pleadings—In 1868 Given, Jones & Co. made an assignment for the benefit of creditors, and by consent of parties the assignee appointed R., who had been a member of the insolvent firm, as his agent to attend to the business. It seems that R. was also cashier of a bank at which an account was opened and deposits of the trust fund made, the appellee succeeded to the name and business of that bank, and the account was continued. The bank paid six per cent. interest semi-annually on the fund by crediting the same to the account from the opening of the account until August, 1878, when R. directed the clerk not to credit further interest on the fund. When this direction was given the amount of the fund was $6,815.19, and during the same month the bank paid out what purported to be the balance of the fund. In 1885 R. and the assignee died, and in 1887 this action was brought to recover of the bank the interest on $6,815.19 from August 1, 1878, up to October, 1886. The petition avers an agreement to pay interest, which is admitted by the answer, but the bank seeks to avoid its liability for interest after August, 1878, by alleging that said agreement was to continue so long as was agreeable to both parties, and that it had terminated said agreement after notice to the assignee. Afterwards this defense was abandoned and an amended answer, alleged as a defense, that R. as cashier and agent of the assignee, had directed the payment of interest

until July 1, 1878, and not thereafter. Held—That the liability of the bank for interest is admitted by the answer and sustained by proof of the conduct of the parties, and the subsequent contract to suspend payment of interest is not proven.

2. Limitation—Evidence—The entry on the books of the bank, in 1878, without the knowledge of the assignee of the fact of suspension of payment of interest on the trust funds on deposit does not start the statute of limitations so as to bar a recovery.

Goodloe & Barr for appellant.

Wilson & Thum for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

Given, Jones & Co. made an assignment, in 1868, to Isaac Caldwell for the benefit of their creditors.

The trustee, by consent of all interested parties, had the right to and did select N. S. Ray, who had been a member of the insolvent firm, as his agent to attend to the trust business, and it is apparent that he, and not the trustee, mainly did so.

An account by way of general deposit of the trust funds in the name of the trustee was opened with the Commercial Bank at Lebanon, Ky., prior to 1874, but during the last named year it was merged into the appellant, the Marion National Bank, with the same officers, and the trust deposit, then amounting to over $11,000, was continued in it. They may, therefore, be regarded as the same bank as to the main question in this case.

The bank paid six per cent. interest semi-annually on the fund, crediting it up to it on the first of July and first of January, in each year, from the opening of the account with it until August, 1878. Ray was not only the agent of Caldwell as trustee, but he was also the cashier of the bank. At the time last named he ordered the clerk of the bank not to credit the fund in future with interest. It is not shown that the trustee knew of this direction, nor indeed that he knew the fund in bank had been bearing interest, further than this may be presumed from the length of time that it had been doing so, and the probability that the trustee would have made the fund profitable.

When this direction was given the fund on hand, including interest credits to that time, amounted to $6,815.19. Ray died in March, 1885, and Caldwell in the November following.

The bank at different times, after it ceased to credit the fund with interest, paid out upon the trustee's order a sum equal to the amount on deposit in August, 1878. The last payment was a remittance from the bank to the appellee of a certain sum as being the balance of the funds in its hands, and the appellee does not appear at that time to have been to any extent informed relative to the interest matter or its history.

It brought this action on February 12, 1887, for the interest on the $6,815.19, from August 1, 1878, up to October, 1886, allowance to be made in its calculation for the payments, which had been made by the bank.

The principal question is as to the liability of the bank for interest.

The petition avers that it was agreed between the trustee and the bank that the latter would pay six per cent. interest on the fund.

The answer admits this, and that the interest was payable semi-annually and to be credited to the trustee at the end of

each six months; but then avers affirmativley that this was to continue only so long as was agreeable to both parties, and that prior to July, 1878, the bank did notify the trustee that it would not pay interest after said time, and that it and the trustee thereupon agreed it was then to cease. This statement is altogether unsupported by evidence.

By an amended answer the appellant appears to have virtually abandoned this ground, and avers that Ray was its cashier and also the agent of the trustee, and that he directed interest to be paid to July 1, 1878, and not thereafter.

The answer admitted an express contract to pay the interest, but pleaded the making of a subsequent one in avoidance. Were it needful, the admission is sustained by the conduct of the parties. The bank paid interest on the fund for years, and after it failed to credit it to the appellee it still, and all time, had the use of the money, which is a fact suggestive for equitable consideration.

The claim that the admitted contract to pay interest was terminated is not proven, and the burden of so showing rested upon the bank.

Not only upon the pleadings, but looking also to the proven circumstances, it is liable for interest upon the fund. It certainly did not for years credit up the interest as a mere gratuity. It is not reasonable to so suppose, and it can not escape liability by a plea of limitation because the interest was to be credited by it to the fund, thus becoming a part of the deposit, the bank being the holder of it subject to the depositor's call, and it does not appear that the trustee had any notice that credit was not being given for it. The bank was to hold the fund, the interest as it accrued becoming a part of it, for the trustee. The interest was left in the bank's possession in the same way as if it had been drawn and then deposited with it, and its failure to credit it to the trustee, without knowledge on his part, did not start the statute to running. A bank can not thus profit by an entry on its own books or an omission to make one. As well might it enter upon its books that a deposit had been paid, and then when the owner demanded his money, say that when it did so a cause of action was created and that it is now protected by the statute.

The lower court gave judgment for $2,831.15, with interest from October 31, 1887. It is difficult to see how, from the record, it arrived at this particular sum. The case was not in condition for the want of sufficient data to render a judgment for any certain sum.

It is contended for the trustee that as its petition avers the appellant had in its hands on August 1, 1878, the sum of $6,815.19, interest should be allowed upon this sum up to the time of judgment, unless the bank shows the amounts and dates of the payments out of the fund, and that thus calculated the interest would amount to more than the court has allowed. The petition itself, however, admits payments were made, but does not give their dates or amounts.

It says: "Said Marion National Bank, by reason of the promises, became and is now indebted to the assignee and trustee of Given, Jones & Co., and to this plaintiff for interest on the sum of $6,815.19 from the 1st day of August, 1878, up to the 1st day of October, 1886, subject to such credits as may appear for moneys properly paid out by said bank.

The payments were made to the party or upon the order of the party who now seeks relief. It should be held to know of them. Moreover, it is an admitted fact upon the pleadings that the bank had rendered to the trustee a statement of them.

After the lower court had, by an opinion, held that the bank was liable for interest, but before it determined the amount, the bank offered to file an account purporting to show the amount of each payment and when made, and moved a reference to a commissioner to report the correct state of the amount and ascertain correctly the amount of the interest. The motion was overruled.

The court correctly refused to let the account be filed as it had not been referred to in the record by pleading or otherwise, but by way of preventing a probable injustice being done, it should even sua sponte, in case the parties failed to agree as to the amounts and dates of the payments, have ascertained them and the interest due through its commissioner, with orders to hear evidence relative thereto. We have looked to the account presented by the bank to see whether upon its own proposed showing the judgment can be upheld, but find that it can not, and any judgment upon the record in its present condition must be largely the result of mere conjecture.

The judgment is reversed, with directions to the lower court, in case the parties fail to agree by pleading or otherwise as to the dates and amounts of the payments, to ascertain the same and the interest due by its commissioner. Upon the appellee's pleadings, which are to be construed most strongly against it, it is only entitled to plain interest from August 1, 1878, to October 1, 1886, without any compounding, subject to deduction on account of any payments made out of the fund; and the cause is remanded for further proceedings consistent with this opinion.

MEADOWS v. GOFF.

(Filed October 16, 1890.)

1. Ejectment—Husband and wife—Pleading—An action of ejectment was prosecuted against H. M., husband of appellant, and judgment, by default, was rendered, and a writ of possession was awarded, but before the writ was completely served appellant filed her petition to be made a party defendant, alleging that the land belonged to her, and that her husband had no possession of same, except in her right, and asking that the judgment be set aside. Held—That the court had rendered judgment on the pleadings as made up before she filed her petition, and her petition could not be considered unless the former pleadings were vitalized by a new trial being granted.

2. Judgment—Res adjudicata—The judgment can bind none but parties and privies to it, and as the wife was not a party her property is not bound by it, nor can she be considered a privy of her husband, and bound by the judgment against him in any way. He had no title upon which the judgment could operate, and he held the possession in right of his wife in trust for her benefit equally with himself. His absolute right to possession does not begin until after the death of the wife, and upon condition that there was issue born alive unto them.

S. F. J. Trabue for appellant.

W. M. Becker and W. H. & G. E. Lilly for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Bennett.

The appellee brought an action of ejectment against the appellant, Henry Meadows, and recovered judgment, by default, against him for five-eights of about five hundred acres of land,

and a writ of possession was awarded the appellee against said appellant for said quantity of land. The appellant, Nancy Meadows, was not made a defendant to said action, nor did she appear therein as a party to the same. After the rendition of said judgment, but before the writ of possession was fully executed, the appellant, Nancy Meadows, filed her petition to be made a party defendant to said action, and she be permitted to defend the same, upon the ground that the land belonged to her, and that her husband's possession thereof was in right of her title and right of possession, and that he did not defend the claim of the appellant to be the owner of said land, because he was ignorant of his legal rights in that regard. The lower court sustained a demurrer to said petition, and the appellants have appealed to this court.

The office of pleadings is to make known to the court the cause of complaint, or the cause of defense, and the court is to look to the pleadings alone to determine what the cause of complaint or defense is. This is why written pleadings are required. When the issue made by these pleadings has been passed upon by the court, and gone into judgment, their office is at an end. They are no longer in court for any purpose whatever, except as containing the evidence of the authority of the court to render the judgment, which is alone looked to as containing the rights of the parties upon the issues that they had theretofore made. Accordingly, we have held, in the case of Brown v. Vancleave, 86 Ky., 381, that, safter a final judgment has been rendered in case, the parties thereto had no right to file amended pleadings. The judgment rendered in this case against Henry Meadows, now one of the plaintiffs, by his default, terminated the office of the pleadings, and precluded any right of either party to thereafter plead, unless he should acquire the right by obtaining a new trial, and thereby vitalizing the pleadings as to allow amendments, etc.

The appellant, Nancy, was not before the court in the action against her husband, but she had the right, by petition, to have herself made a party to the action, and set up her right to the land at any time before judgment was rendered; but after judgment was rendered her right to appear in the action was cut off, because there was then no action pending for the purpose of allowing any further pleading whatever by either party to the action, or by a stranger to it. Besides, it is a well settled rule that a judgment binds no one except the parties to the action or their privies; also, the appellant, Nancy, is not a privy of her husband in a matter of this kind, and the judgment against her husband, deciding that the land belonged to the appellee and that the appellee was entitled to the possession of it, does not bind her. That judgment only establishes the fact, so far as others are concerned, that, as between the appellee and Henry Meadows and his privies, the land and possession thereof belonged to the appellee; but the appellant, Nancy, was not a privy of the appellant, Henry; hence she was not bound by the judgment, either as to the right of title or of possession, because, as to the former, he had no right, and as to the latter, his right was in virtue of his wife's right of possession, and in trust for her benefit equally with himself, which he is entitled to by reason of her right, and which he can not be deprived of by an adverse claim of right like this one. His absolute right to possession does not begin until after the death of the wife, and upon condition that there was issue born alive unto them.

The judgment is affirmed.

McDANIEL, &c. v. EVANS, &c.

(Filed October 21, 1890.)

1. Contract—Consideration—Dismissal of injunction—This suit was instituted by appellees against appellants to recover purchase money for land evidenced by title bond, in which they also obtained an injunction restraining appellants from cutting timber and committing waste on said land. Afterwards appellants and appellees entered into a written agreement, to the effect that, in consideration of the dissolution of the injunction, appellants agreed that at the next term of the court judgment may be taken for confessed, unless, within the first ten days of the term, the debt be paid, and when the purchase money is paid the appellants to receive a deed. Held—That the agreement to confess judgment was based upon a valuable consideration, and appellants will not be permitted to question the title of the land to be conveyed. To do so would alter the contract expressed in the writing, when neither fraud nor mistake is shown as a basis for offering such evidence. It is well settled that, in case of a written contract, which is apparently on its face complete, the presumption is that it expresses the full agreement of the parties thereto. This contract does not admit of such a defense to its enforcement as executory contracts for the sale of land usually do. In that class of contracts the vendee can question the title to the land involved.

2. Confession of judgment—The agreement to confess judgment did not mean that judgment should go against appellants for more than was due, and the case is reversed, with directions to give such credits as were due appellants.

J. B. White for appellants.

Irving Halsey for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

This action was instituted by the apppellees against the appellants on a contract, evidenced by title bond, for the sale of land, and to enforce their lien on said land for the payment of the purchase money. The appellees also obtained an injunction against the appellants, preventing them from committing waste by cutting and removing the timber from said land. Afterwards the appellants and appellees entered into the following agreement: In consideration of the plaintiffs consenting to the dissolution of the injunction, etc., the defendants agree that the plaintiff's attorney may confess judgment against them for the full amount then due on note, upon which said suit is brought, at the next term of said Breathitt Circuit Court, in the event that said McDaniel and Spicer fail to pay same within the first ten days of the next term of said court. When purchase money is paid, said Spicer and McDaniel to receive a deed. Signed, etc.

The consideration of the agreement to confess judgment for the amount of the note then due, at the next term of court, provided the appellants failed to pay the same "within the first ten days of said term," was the dissolution of said injunction by the appellees. This agreement had the same effect, so far as presumptions are concerned, as other written agreements have. In case of written contracts, which are apparently on their faces complete, the presumption is that they express the full agreement of the parties theeto, and nothing that restricts, enlarges or modifies the agreement thus expressed will be heard, because of the pre-

sumption that the full agreement was expressed in the writing, unless it is alleged and proven that something else was agreed on which restricted, enlarged or modified the agreement as written, and which was to be a part of it, but which was left out of it by mistake or fraud. It is also to be presumed that, when the parties contract involves the transfer from one to the other of property, the transferee is satisfied with the title as it is, and the burden is upon him to show that he has been overreached by fraud or mistake. Of course this rule does not apply to ordinary executory contracts for the sale of land, for the reason that in such sales only the equitable title is sold, and the agreement to thereafter convey the legal title the vendee may, consistently with the agreement, put in issue the vendor's ability to comply with his agreement in this respect without alleging fraud or mistake; but where, as in this case, the vendor releases a valuable right in consideration of the vendee's agreement to let judgment go against him for the price of the land which he had already bought, and for the price of which he had been sued, such agreement is based upon a sufficient consideration, and the rights of the parties stand upon the same footing as do the rights of the parties to any other written agreement, and the party wishing to be released from a compliance with the agreement must allege fraud or mistake. Here the vendees said, in substance, to the vendors, if the latter would dismiss their action of injunction against the former, they would suffer judgment to be rendered against them for the balance of the purchase price of the land. This proposition was accepted, and the vendors dismissed their action. Now, by the agreement, the vendors part with a valuable right for the benefit of the vendees, and in consideration thereof the vendees agree to compensate the vendors by confessing judgment for the price of the land. It seems that a simple statement of the proposition would suggest that the appellants should comply with this agreement unless they have been overreached by fraud or mistake. As the appellants agreed in said consideration to let judgment go against them for the price of the land, the presumption is that they knew the condition of the title, and were well enough satisfied with it to agree to let judgment go against them for the price. This, as said, is not an ordinary executory contract of sale, where the vendor may be required to manifest his ability to convey the legal title by simply putting in issue his ability to do so, but it is an agreement, upon a valuable consideration, moving from the vendors to the vendees, for the latter's agreement to let judgment go against them for the price of land already sold to them, and it must be presumed that they were satisfied with the vendors' title which they were to receive as it then was, and agreed to receive it in its present condition, and unless they are able to allege and prove fraud or mistake as to condition of the title, they must submit to the execution of their agreement. But by the terms of the agreement they were only bound to let judgment go against them for the amount that was due at the time it was proposed to take the judgment. Therefore, it was entirely consistent with the agreement for them to plead the payments of $25 and $10 and $5. For the error in rejecting the plea, the judgment is reversed; otherwise, it is correct, and the case is remanded, with directions to proceed consistently with this opinion.

WOOD, &c. v. PITMAN COAL CO.

(Filed October 25, 1890.)

Trusts—Conveyances—Judicial Sales—In 1848 J. became purchaser at a judicial sale of two tracts of 291 and 652 acres belonging to John Ward at his death, and received a conveyance of same in 1850. Prior to 1867 J. had sold all of said land except 350 acres, which he then conveyed to A. M. W. by deed, in which it is recited substantially that the two tracts of land were purchased in 1848, J. bidding therefor on claims of O.'s administrator, and that all he desired was to secure the claims against said land and certain unsettled claims he held against John Wood, deceased, and also against A. M. W., and other charges, fees and costs growing out of said suit also against the said A. M. W. It is then recited that he had sold the 291 acre tract and 300 acres of the other tract, and there was still due him of said claims about $800, the precise amount, however, being unknown, and then this language occurs: "And whereas, it has always been understood and agreed between the parties hereto that when said J. was secured in all said sums he was to convey said land to said A. M. W., or so much of same as had not been previously disposed of and whereas, said A. M. W. claims said conveyance of that part of said land undisposed of, * * * allowing said Jackson to retain a lien thereon for the purpose of securing him in the payment of the different amounts referred to, but as they are unknown, it is agreed the lien shall be for $800." After said property had passed to the appellees by conveyances for a valuable consideration, appellants, as heirs of John Wood, deceased, set up claim to said land, alleging that A. M. W. held the same in trust for them. Held—That at the time J. made the conveyance to A. M. W. he had been in possession seventeen years, and was under no legal or moral obligation to convey the same to A. M. W., and that as the title passed from A. M. W. to his vendee for a valuable consideration without notice of any equitable claim on the part of appellants, the appellees will be protected in their title thus derived. Appellants can not claim the property by reason of the fact that A. M. W. was administrator of the estate of John Wood, deceased, on the theory that he held the estate for distribution among them, because he had made a settlement of his accounts as administrator and owed the estate nothing.

W. O. Bradley, H. C. Eversole and W. L. Brown for appellants.

Alcorn & Craft for appellee.

Appeal from Laurel Court of Common Pleas

Opinion of the court by Judge Lewis.

In virtue of his purchase at the judicial sale in 1848, in an action of Oldham's Adm'r v. Administrator and Heirs of John Wood, and commissioner's deed to him in 1850, Jarvis Jackson acquired absolute title to the two tracts of 291 and 652 acres, belonging to John Wood at his death, and exercised unquestioned acts of ownership over both, having sold previous to 1867 all of the first named tract, and all of the other but 350 acres, which he then conveyed to Allison M. Wood. It thus results that whatever equitable right either A. M. Wood, or appellants, the other children and heirs-at-law of John Wood, acquired to the 350 acres, now in dispute, was voluntarily conveyed by Jarvis Jackson, and the only evidence the land was conveyed to A. M. Wood or was held by him in trust for appellants is afforded by the deed of 1867. For though John Wood, jr., erected a building on the 350 acres and resided there for some time, he voluntarily abandoned the possession previous to May, 1877, when A. M.

Wood conveyed the land to G. M. Givens, under whom appellees hold and claim.

As Givens was purchaser for a valuable consideration, the only question in this case necessary to consider is, whether recitals in the deed from Jackson to A. M. Wood are of such a character as to afford to him notice of the claim to the land now set up by appellants. It is recited in that deed, substantially, that the two tracts of land were, as before mentioned, purchased by Jackson in 1848; that he, Jackson, bid therefor on claims of Oldham's Adm'r and others, and that all he desired by the purchase was to secure the claims against said land and certain unsettled claims he held against John Wood, deceased, and also against said A. M. Wood and other charges, fees and costs growing out of said suit; also against the said A. M. Wood. It is then recited that he had sold the 291 acre tract and 300 acres of the other tract, and there was still due him of said claim about $800, the precise amount, however, being unknown. And then this language occurs: "And, whereas, it has always been understood and agreed between the parties hereto, that when said Jackson was secured in all said sums, he was to convey said land to said A. M. Wood, or so much of same as had not been previously disposed of. And, whereas, said A. M. Wood claims said conveyance of that part of said land undisposed of, * * * allowing said Jackson to retain a lien thereon for the purpose of securing him payment of the different amounts referred to, but as they are unknown it is agreed the lien shall be for $800."

It becomes manifest upon examining the deed that at its date Jackson was not legally bound to convey the land to A. M. Wood, or any other person, but might then, which was seventeen years after date of commissioner's deed, and nineteen years after his purchase, have held or sold it to a stranger without any question of his right to do either. It further appears that he was never under either a legal or moral obligation to make the conveyance to any other person than A. M. Wood, nor for any other purpose than his individual use.

It seems to us that as there was nothing in that deed to give notice to or even put Givens on inquiry as to the equitable claim of appellants, he must be treated as a purchaser for a valuable consideration without notice, and, therefore, unaffected by the equity of appellants, even if it had existed as against A. M. Wood. It is true he was administrator of John Wood, his father, but the settlement of his accounts shows he owed the estate nothing. It further appears the deed from Jackson to him, though made in 1867, was not recorded until 1877, just before the deed from him to Givens. But that fact does not show, as suggested by counsel, any fraud, nor invalidate the title of Givens, and much less does it strengthen the claim of appellants, for then twenty-seven years had elapsed without any assertion of right by them which was prolonged to thirty-six years before they commenced this action.

There are other reasons which might be given for sustaining the judgment of the lower court, dismissing the action, but what has been said is enough to authorize this court to do so, and, therefore, the judgment is affirmed.

PERKINS, &c. v. COLEMAN, &c.

(Filed October 30, 1890.)

Conveyance—Warranty—Estoppel—The owner of an undivided one-half interest in a tract of land sold and transferred by deed of general warranty the whole tract; afterwards the vendor inherited the interest in the land that he did not previously own, and his heirs instituted this action of ejectment to recover this interest. Appellee resists the right of appellant to recover upon the ground that the title inherited was transferred to the vendee by estoppel. Held—That the defendants in ejectment may show that the plaintiff has parted with his title by his covenant of warranty, which runs with the land, and which repeats itself daily and operates upon all the interest the warrantor may have or acquire in the land, no matter how nor when the title may be acquired, and estops all those claiming title under or through the warrantor. This species of estoppel differs from an estoppel which merely affects the consciences of parties, and which does not pass to or affect strangers to the transaction.

John Young Brown and Montgomery Merritt for appellants.

S. B. & R. D. Vance for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Bennett.

N. G. Terry owned an undivided interest in the land in controversy, and conveyed the whole of it to Horace Dunham, by deed of general warranty. Thereafter, Terry inherited that part of the land that he did not own, and this action of ejectment is brought by Terry's heir to recover the possession of that part of the land thus inherited from the appellee. He resists the right of the appellants to recover the said land, upon the ground that the title that Terry inherited was transferred to his vendee by estoppel. The appellants contend that the doctrine of estoppel does not protect strangers to the transaction, but only the parties and privies are bound thereby; and, as the appellee is neither party nor privy, he can not avail himself of the estoppel that would bar appellants' right as against Dunham or his privies.

It is true that where the estoppel merely affects the conscience of the parties, and not the title, it does not operate on strangers to the transaction; but where it "works an interest in the land" conveyed, "it runs with it, and is a title." Where it clearly appears, from the writing, that the vendor has conveyed, or agrees to convey, a good and sufficient title, and not merely his present interest in the land, the agreement runs with the land, and repeats itself every day, and if the vendor, at the time of the conveyance, has not title to the land, but subsequently acquires title, it "eo instanti," enures to the benefit of the vendee and his privies. In other words, it is immediately transferred by the law of estoppel to the vendee and his privies, because, by the contract, which daily repeats itself, the vendor's title, whenever acquired, is transferred to the vendee and his privies. Consequently, a stranger to the transaction, in an action of ejectment by the vendor against him, where he must recover, upon the strength of his own title, and not upon the weakness of his adversary's, may show that he has thus parted with his title.

The judgment is affirmed.

CRIGLER & CRIGLER v. CONNER, &c.

(Filed November 1, 1890—Not to be reported.)

Surety—Assignment for benefit of creditors—Attachment—In 1878 R. sold and conveyed to C. a tract of land, reserving a lien on the same to secure the payment of purchase money. In 1880 C. and his wife conveyed the land to a third person, who in turn conveyed it to the wife of C. In 1885 a suit was brought against C. and the heirs of the wife, she being dead, to recover a personal judgment on the note against C., and to subject the land to pay same. Personal judgment was rendered against C., but the enforcement of the lien was postponed. In the meantime an execution had issued against C., which had been replevied and Cleek, the surety on the replevin bond, paid it off and took an assignment of all benefits of said judgments and note, and amended pleadings were filed, asking that the lien be enforced for the benefit of Cleek. In 1886 C. had made an assignment for the benefit of creditors, and appellants, as creditors, had filed suit and levied an attachment upon the life estate of C. in the land to satisfy their claim. Appellants were made parties to the first-named action, and the claim of Cleek was sustained and the land sold to satisfy it and the attachment was discharged. Held—That as appellants have not appealed from the judgment discharging the attachment they are not before the court; and as the children of the deceased wife, who were the owners of the remainder interest in the land and the assignee of C., have not appealed the judgment below is affirmed.

H. P. Whitaker for appellants.

Collins & Fenley for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

In 1878 Riggs sold and conveyed to John L. Conner a lot of land, which, in 1880, he, his wife, Elizabeth, uniting, conveyed to H. S. Conner, who, on the same day, conveyed it to her.

This action was brought in 1885 by Walton, assignee of the note given to Riggs, for the last installment of purchase money, to which the children and heirs at law of Elizabeth Conner, then dead, were made defendants, and judgment for amount of the note against John L. Conner, as well as for enforcement of vendor's lien retained in the deed, was prayed for in the petition.

In November, 1885, personal judgment was rendered on the note against John L. Conner, but, as recited by the court, the infants, by their guardian ad litem, denying the lien, and the deed referred to not being then filed, the action as to the question of lien was continued.

Execution was issued on the judgment, and at the maturity of the replevin bond the debt was paid by appellee, Cleek, who was Conner's surety, and in February, 1886, Walton assigned and transferred to Cleek benefit of the judgment, also the note, with all equities, attaching to the same. He also, by amended petition filed in October, 1886, stated he had made the transfer and authorized Cleek to collect the debt and prosecute the action in his own name. And thereupon the latter filed an amended petition, in which he set out the foregoing facts, and asked judgment enforcing the lien on the lot for payment to him of the amount of the debt he had been compelled to pay as surety of John L. Conner.

It appears that Conner, in 1886, made a deed of assignment for benefit of his creditors, and to settle his estate appellants.

Crigler & Crigler, had instituted an action. They were also, upon their petition, made parties to the action of Walton v. Conner, &c., and filed an answer, in which they state John L. Conner has a life estate in the lot, upon which an attachment in their favor had been levied, and deny the right of appellee, Cleek, to enforce his alleged lien upon the land.

The two actions having been consolidated and heard together, it was adjudged appellee has a lien for amount of the judgment, previously rendered in favor of Walton, and costs incurred, and that the lot of land be sold to pay him and that the attachment of appellant be discharged, because it was levied after the deed of assignment was made by John L. Conner.

The infant defendants who, as heirs at law of Elizabeth Conner, own the remainder interest in the land have not appealed from the judgment, and, consequently, the only subject of controversy there could be between the parties to this appeal is the life estate of John L. Conner, which was attached by appellants. But the title to that was adjudged to be in his assignee, and the attachment of appellants thereon was, consequently, discharged. So that to give them any standing in this court they must first appeal from the judgment discharging that attachment, which they have not done. And as the assignee has not appealed from the judgment in favor of appellee, it results that there is now, in fact, no controversy before us in regard to the validity of that judgment, because no party authorized to do so has appealed from it.

Wherefore, the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

STAFFORD v. CAIN.

(Filed October 29, 1890.)

1. Appellate practice—Where several defendants are appealing upon the same record from a joint judgment against them this court will not take up the case and decide it as to some of the appellants when the appeal does not stand for trial as to another appellant, as, for instance, where an appellant has died pending the appeal and a continuance for revivor is necessary.

2. Same—Supersedeas—Where a joint judgment is rendered against several, and an appeal is granted to the defendants jointly, any one or all may prosecute the appeal. Or if the appeal is granted to each of the several defendants, they may all appeal upon the same record and be treated as joint appellants, and all or a part of them may execute jointly a supersedeas bond.

3. Right to issue execution against one of several defendants in joint judgment—Quære—Where there is a joint judgment against several defendants, and all except one execute a supersedeas bond, can the plaintiff issue execution against the defendant not superseding, it being provided by statute that "on a joint judgment against several, the execution must be joint."

B. F. Buckner, E. S. Watts and A. E. Willson for appellant.

C. S. Grubbs and C. B. Seymour for appellee.

Appeal from Louisivlle Law and Equity Court.

Opinion of the court by Presiding Judge Barbour.

While a judgment against several defendants may, upon their appeal be reversed as to one or more and affirmed as to the others, this court will not, where the defendants are appealing upon the same record, take up the case and decide it as to some of the appellants, where the appeal does not stand for trial as to another appellant, as, for instance, where an appellant has died pending the appeal, and a continuance for revivor is necessary.

Where a joint judgment is rendered against several, either or all may prosecute an appeal. The form of the order granting the appeal is immaterial. Though it may be granted to the defendants jointly, either or all may appeal. Or, if the appeal is granted to each of the several defendants, we see no reason why they can not all appeal upon the same record, and be treated as joint appellants. And as they may appeal jointly or severally, it follows that they may execute jointly a supersedeas bond, or one or two may execute a separate bond, while the others may not choose to do so.

Though the appeal was, by the lower court, granted to all the defendants, and afterwards the court set aside so much of that order as affected Stafford, and granted him an appeal. As all those of the defendants appealed, the supersedeas bond executed by Stafford & Lyman is as valid as if the appeal had been granted to them jointly.

Whether where there is a joint judgment against these defendants, all of whom appeal, and two only supersede the judgment, the plaintiff can (in view of the statute, General Statutes, chapter 38, article 1, section 3, which provides, that "on a joint judgment against several the execution must be joint") issue execution against the defendant not superseding, it is not necessary for us to decide.

If the execution can be issued, it is because the supersedeas by the others is no obstacle. On the other hand, if the execution can not be issued, it is because of the supersedeas by the others, and in that event it would seem that the bond should cover any loss the plaintiff may sustain by reason of not being able to issue the execution.

The motion of appellee to discharge the supersedeas is overruled.

SUPERIOR COURT ABSTRACTS.

HIGGINSON, GD'N, &c. v. JENKINS.

Filed October 22, 1890. Appeal from Union Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Debtor and creditor—Trusts—A father conveyed land to the wife and children of an insolvent son, the deed providing that the produce of the land should be used for the support and maintenance of the wife and children free from the debts and liabilities of the husband. At the death of the grantor, he left a will devising a certain portion of his estate to the children of his son, providing in his will that his son should have the right to live with and control said children, and should have, so long as he lived with them, his board and nothing more out of the property. He also provided that his son should not take possession of the property without first giving bond and security. The son qualified as guardian of his children and assumed the management of the property conveyed and devised, for their benefit, and by his labor and attention increased its value. Held—That creditors of the son have no right to subject the property or its increase, or other property into which it may have been converted.

2. One who was nominally guardian treated as trustee—The fact that the son as guardian charged himself with what he estimated as the value of the property, instead of reporting the kind of property, can not alter the rights of the children to the property itself. While nominally a guardian, he was in fact a trustee, and the fact he qualified as guardian instead of trustee will not be allowed to prejudice the interests of his children.

Yeaman & Locket and H. X Morton for appellants; Cromwell Adair and H. D. Allen for appellee.

WOODRING, GD'N v. WHITE, ASS'EE.

Filed October 22, 1890. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Conversion by trustee of trust property—Assignment for creditors—When a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the beneficiary may elect to hold the substituted property subject to the trust or to hold the trustee personally liable to him for a breach of the trust. The former he can do, however, only when he can follow and identify the property either in its original or substituted form; and when he is forced to rely upon the personal liability of the trustee he occupies a position toward the estate of the trustee which is no better than that of a simple contract creditor. Therefore, when a trustee, after disposing of the trust property, makes an assignment for the benefit of creditors, and it does not appear that the proceeds of the trust property came to the hands of the assignee, or they can not be identified in his hands, the beneficiary of the trust is remitted to the rights which belong to general creditors of the estate.

James Montgomery for appellant; J. C. Poston and J. P. Hobson for appellee.

COMMONWEALTH v. LOUISVILLE & NASHVILLE RAILROAD CO.

Filed October 22, 1890. Appeal from Taylor Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Indictment—Running trains on Sabbath—Judicial notice—Courts will take judicial notice of the fact that the running of trains on the Sabbath is "a work of necessity;" and while it is possible that a railroad company might engage in such a running of train and transportation of passengers

or freight on the Sabbath as to constitute its act a violation of the statute, yet in such a case the indictment should so aver the facts that the court could as matter of law say, admitting the allegations to be true, that there has been a violation of the statute. The mere averment in an indictment that the railroad company employed certain persons in running its trains on the Sabbath, and that said work was not a work of necessity, is as to the latter part of the averment but a conclusion of the pleader, and not such a statement of the particular circumstances constituting the offense charged, as is essential to a good indictment.

P. W. Hardin for appellant; John McChord for appellee.

C. & N. RAILROAD CO. v. HARLAN.

Filed October 22, 1890. Appeal from Harlan Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Grounds for a new trial should point out specifically the errors relied on. It is not sufficient to assign as a ground for a new trial "that the verdict was contrary to law," or "errors of law occurring at the trial."

2. Railroads—Running switch—The servants of a railroad company in charge of a mixed passenger and freight train were guilty of negligence in making a running switch, and a passenger having been thrown from his seat in the passenger coach and severely injured by the collision of the cars, the company is liable.

3. Excessive verdict—As the plaintiff endured great physical and mental suffering and is probably permanently injured, a verdict for $1,900 is not so excessive as to indicate that the jury was influenced by passion or prejudice.

M. A. Alexander for appellant; Lewis McQuown for appellee.

RATCLIFF, &c. v. BELLFONT IRON WORKS CO.

Filed October 22, 1890. Appeal from Carter Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Landlord and tenant—Forcible detainer—Upon the trial of a writ of forcible detainer the court properly refused to instruct the jury that they must find for the defendant if they believed that he had surrendered up his lease and ceased to be the tenant of plaintiff before the bringing of the action. The lease could not be canceled and the possession of the land surrendered without the consent of the landlord, and there was no evidence in this case to show that such consent was ever given.

2. Same—A tenant can under no circumstances after lease and entry under his landlord attorn to another without the landlord's consent or deny the title under which he entered. Nor can he after a pretended surrender of his lease, without the consent of his landlord, re enter during the term of his lease, and thus gain such an adverse possession of the land as would entitle him to deny his landlord's title on the trial of a writ of a forcible detainer.

T. D. Theobald for appellants; R. D. Davis for appellee.

VOLZ v. TUTT, &c.

Filed October 22, 1890. Appeal from Wolfe Circuit Court. Opinion of the court by Judge Yost, affirming.

1. The service of process on Sunday is valid if the officer believed that it could not be executed after that day.

2. Inducing one to come into county in order to serve process on him—Where the defendant resides in another county, but is served with process in the county in which the action is pending, the fact that the officer sent him a message to come to see him on important business does not invalidate the service if he came into the county on business of his own and not in response to the officer's message.

Ira Julian for appellant; J. B. White for appellees.

HEFFLIN v. KIMMAL.

1. Jurisdiction—The circuit court has no jurisdiction where the amount in controversy, exclusive of interest and cost, does not exceed $50, except in the case provided by the act of March 10, 1880, which applies only to non-residents. The mere fact that the defendant, a resident of the State, owns no property except real estate, which the plaintiff seeks to subject by an attachment, does not confer jurisdiction on the circuit court.

2. Appeal from void judgment—The judgment of the circuit court being void for want of jurisdiction, and a motion to set it aside having been made and overruled, the judgment is reversed, with directions to dismiss plaintiff's action.

S. E. Hill for appellant; E. D. Walker for appellee.

COMMONWEALTH v. FORD.

Filed October 22, 1890. Appeal from Pike Circuit Court. Opinion of the court by Judge Young, affirming.

1. Indictment for keeping bawdy house—It is not sufficient to allege in an indictment for keeping a bawdy house that defendant suffered persons of different sexes, not married to each other, to assemble in a house under his control, and there have carnal sexual intercourse with each other, and to indulge in lewd and lascivious conduct. A bawdy house is a house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes.

2. Failure to give defendant's full name—The failure of an indictment to state the surname, Christian name or the name in full of the defendant will not vitiate the indictment, and is not a ground for demurrer.

The indictment in this case charged "Mose" of the offense of keeping a bawdy house. A bench warrant issued against "Mose Ford." Ford demurred to the indictment. Held—That the failure of the indictment to state defendant's full name is not ground for demurrer.

P. W. Hardin for appellant.

FORD v. PRICE.

Filed October 29, 1890. Appeal from Nelson Circuit Court. Opinion of the court by Judge Young, affirming.

Burden of proof—On the plea of non est factum the burden of proof is upon the plaintiff.

W. W. Halstead for appellant; John A. Fulton for appellee.

MOORE, COMMITTEE v. BRYANT.

Filed October 29, 1890. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Young, reversing.

Void judgment against lunatic—As there was in this action against a lunatic no service of process, either upon the lunatic or her committee, and no defense made by the committee, the judgment was void, and a motion to set it aside having been made and overruled, the judgment is reversed.

Crawford & Mason for appellant.

TOWN OF IRVINE v. WAGERS.

Filed October 29, 1890. Appeal from Estill Circuit Court. Opinion of the court by Judge Young, affirming.

1. Failure of town to repair bridge—As plaintiff was injured by reason of defendant's negligence in failing to repair a bridge, which it was its duty to repair, the defendant is liable.

2. Instructions to jury—It was not error to refuse an instruction, the substance of which had already been given in another instruction.

H. C. Lilly and Robert Riddell & Son for appellant; John Bennett and J. B. White for appellee.

TICHNOR v. HAGAN.

Filed October 29, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

Fraudulent sale—Bona fide purchaser—When a sale, procured by the fraud of the vendee, has been perfected by a delivery of the property, it can not be set aside by the vendor to the injury of a bona fide purchaser. And this is true in this case, whether the sale was absolute or conditional, as there was an unconditional delivery of the property to the vendee, who kept it in his possession until he sold it for a valuable consideration to one who had no notice of the original vendor's claim.

Sweeney, Ellis & Sweeney for appellant; W. Carrico for appellee.

CLARK v. PENDLETON COUNTY.

Filed October 29, 1890. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Yost, affirming.

The right to commissions does not attach, until there has been a complete performance of the service or duty upon which they depend.

A delinquent tax collector who, under his contract with the county court, was entitled to a certain commission on all sums collected by him, is not entitled to the agreed commission on taxes, for which he recovered a judgment, but which he was prevented from collecting by reason of a compromise, made by the county court with the taxpayer, pending an appeal from the judgment. He would be entitled to recover on a quantum meruit, but is not entitled to anything by way of commissions.

W. J. Perrin for appellant; John H. Barker for appellee.

ELLIS v. CASEY.

Filed October 29, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing, Judge Young, dissenting.

Cost of advertising sales—Liability of sheriff—Under a statute, which provides for the advertisement in a newspaper of sales of property to be made by the sheriff of Kenton county, under execution, the sheriff is not personally liable to the publisher for the cost of the advertisement, in the absence of any agreement to that effect. The publisher must look to the party for whose benefit the advertisement is made.

Tisdale & Gray for appellant; William Goebel for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. COODIN'S EX'ORS.

Filed October 2, 1890. Appeal from Bell Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, reversing.

Parol testimony to add to writing—Where a deed was executed conveying to a railroad company, for a recited money consideration, an unconditional right of way through the grantor's lands; and the company, by its writing, executed at the same time, obligated itself not to damage the grantor's spring nor render it inaccessible for use, and to move his smokehouse for him, these two writings must be construed as one contract, embracing the whole agreement between the parties; and in the absence of allegation and proof of fraud or mistake, parol testimony was incompetent to show that the company had agreed to do other things not recited in the writing.

J. W. Alcorn and Wilson & Rawlings for appellant; J. D. Black for appellees.

EAST TENNESSEE COAL CO. v. DOBSON.

Filed October 29, 1890. Appeal from Whitley Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, affirming.

Inconsistent defenses—Contributory negligence—Prejudicial errors—In an action for negligence a traverse and the plea of contributory negligence are

not inconsistent defenses, and the court erred in this case in rejecting an amended answer pleading contributory negligence. But as the defendant was allowed, upon the trial, without objection, to go into the whole case, just as if its rejected pleading had been filed, and the court, without objection or exception, gave an instruction as to contributory negligence, the defendant was not prejudiced by the rejection of its amended answer.

Hill & Denham and J. W. Alcorn for appellant; J. H. Tinsley and J. R. Sampson for appellee.

LANDSOWN v. LANDSOWN.

Filed October 29, 1890. Appeal from Carter Circuit Court. Opinion of the court by Judge Yost, dismissing.

1. Right of appeal—Contempt—Pending an action by the wife for a divorce the court awarded to the defendant the custody of certain children, the sons of the parties, and to the plaintiff the custody of their daughters, directing that the children, awarded to the plaintiff, be immediately given into her possession by the defendant. The defendant, in contempt of the order of court, concealed the children, so that the judgment could not be carried into effect. The court then awarded the custody of all the children to the plaintiff, and order an attachment against defendant for the contempt. From the order, awarding the custody of the children to the plaintiff, the defendant appeals. Held—That the defendant should purge himself of his contempt of the orders of the court below before he can have a hearing in an appellate tribunal.

2. A motion to dismiss can be heard at any time, upon five days' notice, served upon the appellant or upon his attorney of record.

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KENTUCKY COURT OF APPEALS.

GILL, &C. v. BUCKNER, &C.

(*Filed May* 24, 1890—*Not to be reported.*)

Conveyance—Limitation—Estoppel—In 1830 Thomas Buckner and Matilda Buckner, his wife, the father and mother of appellants and of the appellee, William Buckner, and Mrs. Ambrose, formerly Buckner, conveyed to John Hanson, sr., father of Matilda, the tract of land, a part of which is now in controversy. Shortly thereafter John Hanson, sr., died testate, devising said land to his son, G. G. Hanson. In an action instituted, attacking the conveyance to John Hanson, sr., as voluntary and fraudulent as to debtors; also attacking the devise to G. G. Hanson as voluntary and fraudulent, it was decided that said conveyance was valid as against creditors, and the devise was based on the obligation that G. G. Hanson would convey said land to Matilda Buckner and her children, which conveyance he shortly thereafter executed, giving to Mrs. Buckner a dower interest of one-third for life, remainder to her children. Buckner having died, Mrs. Buckner intermarried with one Jett, who obtained from the county court a division of the land, setting apart one-third for life to Mrs. Jett, and the remaining land was divided between the children in equal parts.

Said life interest, excepting a small portion, which had been sold under execution, was, by conveyance, sold to John Buckner, and the remainder interests of William Buckner and Mrs. Ambrose were sold to Henry Wyatt. Wyatt also bought all the interests that had been allotted to the Buckner heirs in the division. John Buckner sold his interests to Wyatt, and Blades purchased some of the purchase money notes. John Buckner and Blades brought separate actions on purchase money notes against Wyatt, and a sale of the land was adjudged to satisfy said debts. As a part of said judgment, the court ordered that "so much of the undivided interest in the dower, formerly allotted to Matilda Jett, as was sold by the complainant, Buckner, to the defendant, Wyatt, as is sufficient to satisfy the complainant's debt be sold." John Buckner objects to the judgment, claiming that only his life interest in the dower interest passed under the decretal sale, and not his remainder in said dower interest. Mrs. Gill claims her remain-

der in the dower interest. *Held*—That the language of the judgment of sale, accompanied by the possession of the land by the purchaser for over thirty years, and the failure of John Buckner to complain of the judgment for that period, deprives him of any right to relief.

Mrs. Gill is entitled to one-fourth of the remainder in the dower interest, as she never united with her husband in the conveyance; nor is her claim barred by limitation, as the life tenant died in 1884.

R. K. Smith for appellants.

H. P. Willis for appellees.

Appeal from Bracken Chancery Court.

Opinion of the court by Judge Bennett.

In 1830 Thomas Buckner and Matilda Buckner, his wife, the father and mother of the appellants, and of the appellee, William Buckner, and Mrs. Ambrose, formerly Buckner, conveyed to John Hanson, sr., father of said Matilda, the tract of land, a part of which is now in controversy. Not long afterwards the said Hanson died testate. He devised said tract of land to his son, G. G. Hanson.

In the case of Hanson v. Power, 8 Dana, 91, in which the conveyveyance to John Hanson, sr., was attacked as being voluntary, consequently fraudulent as to creditors, &c., it was sought to set said conveyance aside; also the devise to G. G. Hanson. It was decided in that case that the conveyance was not voluntary, and was valid, even as against creditors, and that the devisor required the devisee to execute bond that he would convey said land to Mrs. Buckner and her children. This finding of fact by the court is authoritative, and binds G. G. Hanson and those claiming under him. According to this finding of fact said land was devised to G G. Hanson in trust for the benefit of Mrs. Buckner, and the children above named.

He, thereafter, pursuant to said trust duty, conveyed said land to Mrs. Buckner and said four children; one-third thereof to Mrs. Buckner for life, and the "residue to said children in equal portions." Thereafter, said Buckner having died and his widow having married Jett, the latter procured, in the county court, the allotment of dower to Mrs. Jett, and the division of the balance of the land, in equal parts, among the Buckner children.

While the power of the county court to make this allotment and division is exceedingly questionable, yet Mrs. Jett and said children had the right to the allotment and division, in the manner of one-third to the widow for life, and the residue to the children in fee, in equal portions, and the action of the county court, in making the allotment and division, though under its power to allot dower, &c., was not void, and may be regarded, at this late day, as binding. The land having been devised to G. G. Hanson in trust for said parties, he had no implied reversionary right in the life interest; therefore, there is no ground for the contention that he holds the reversionary right in the said life interest. This sale conveys the fee to said parties to the entire land; one-third theroof to Mrs. Jett for life, the residue to the children, which includes the remainder interest in the life estate. Said Jett and wife sold the said life estate, except a portion thereof that had been previously sold under execution, to John Wheeler. Said Wheeler thereafter sold the same to the appellant, John Buckner. The appellant, Mrs. Gill, did not sell her one-fourth remainder right in said life interest

to said Buckner. She never signed the deed of conveyance. Consequently, she is entitled to said remainder interest.

But William Buckner and Mrs. Ambrose, having sold their respective remainder interests in said life estate to Henry Wyatt, they are not entitled to recover in this action.

It appears that Henry Wyatt bought all the interest in said estate allotted to the Buckner heirs in the county court division. Mr. Blades bought some of the purchase money notes, and separate suits were instituted by John Buckner, he having sold his interest to said Wyatt, and Blades against said Wyatt to enforce their liens on the parcels of land so sold, for the payment of the purchase money, and the said parcels were sold to satisfy said purchase money, and Blades became the purchaser of all of said parcels. Now the question is, was the said remainder interest of the appellant, John Buckner, included in said sale? If it was included, he can not recover; if it was not included, he can recover. If the appellant, John Buckner, conveyed his interest to said Wyatt by deed or bond for a title, the same is not copied in this record. His petition alleges that eighty-five acres were sold to said Wyatt. But the decree directs that said eighty-five-acre and ten-acre tracts be sold. They were sold, and Blades was the purchaser. Thereafter, the decree was amended, so as to set aside the sale of the ten acres, and to sell in its stead "so much of the undivided interest in the dower, formerly allotted to Matilda Jett, as was sold by the complainant, Buckner, to the defendant, Wyatt, as is sufficient to satisfy the complainant's debt," &c.

It is contended that the expression, "the undivided interest in the dower," &c., refers to the life estate that the appellant owned, and not to the remainder interest therein. But the language used, aided by the attendant circumstances, does not admit of this interpretation. The dower estate had been set apart by metes and bounds. It was a separate and distinct estate from the other portion of the tract. The appellant, Buckner, owned all of it; not an undivided part of it, but he did own one undivided remainder interest therein. The expression, "undivided interest in the dower," &c., as explained by the surrounding circumstances, means the remainder interest in the dower property. The amended decree says that appellant, Buckner, sold this interest to Wyatt. Blades became the purchaser of it, and paid said appellant for it. The sale was confirmed, and Blades took possession of the said interest. And although the pleadings, as far as is shown by this record, do not set up this interest as having been sold to Wyatt, and there are no title papers filed showing a sale of any of appellant's interest to Wyatt, the amended decree says that he sold his undivided interest in the dower, &c., to Wyatt. The said appellant was a party to this action, and he never took any steps to correct the amended decree, if the same was erroneous, but received pay for said interest, and let Blades take possession of this interest, and hold it as his own for over thirty years. Under these circumstances the appellant must be conclusively presumed to have authorized the filing of amended decree and the sale thereunder; and having done so, he can not now question the purchaser's right to said interest. Blades bought all the other interests at the sale, made in the action of himself against Henry Wyatt, except Mrs. Gill's remainder. She did not join with her husband in the conveyance of said remainder interest; and the life tenant having died in 1884 the statute of limitation does not bar her right.

The judgment is affirmed as to all of the appellants except Mrs.

Gill and her husband; as to the two latter, it is reversed, and the cause is remanded, with directions for further proceedings consistent with this opinion.

SLOCUM, &C. v. CALDWELL & CO., &C.

(*Filed June* 25, 1890—*Not to be reported.*)

1. *Mechanics' liens—Mortgages—Fixtures*—H. sold S. a lot of land in Louisville, reserving a lien for unpaid purchase money. Subsequently, S.. having erected a flour mill on the lot, executed to H. a mortgage to secure the payment of $2,000 borrowed money. After the execution of this mortgage S. leased the property to P., giving him also an option to purchase same. P. changed the mill into a roller mill, removing the machinery, found in the mill when he took possession, out on the lot, and supplied in its place roller mill machinery, obtained from appellees, upon which they asserted their lien, under the provisions of sections 1 and 6 of an act, entitled "an act to provide a mechanics' lien law for the city of Louisville and county of Jefferson," approved March 2, 1869, which provides, "that all persons who shall perform labor or furnish materials, fixtures or machinery for constructing, finishing, altering, adding to, or repairing any house, building, mill, manufactory or other structure, within the city of Louisville, * * * may have a joint lien * * upon any machinery or fixtures, alterations, additions or repairs to a previous building, *which are capable of being severed or removed from such previous building, without material injury thereto*," and providing that, although the person with whom the contract of furnishing said machinery was made, had no authority to bind the land, the court could order said machinery sold to satisfy the mechanics' lien, provided the same could be removed, without material injury to the building.

In an action to enforce satisfaciion of all the liens on said property, *Held*—That the general rule, which entitles the holder of a mortgage to the benefit of all improvements erected on the mortgaged property, has been altered by this statute, and the mortgagor is entitled to a prior lien on only the mill property and machinery on the lot before the roller mill machinery was placed thereon by appellees, and appellees are entitled to have their lien enforced by a sale and removal of the roller mill property from the mill.

The decision of the question as to the practicability of removing said machinery from the building, without material injury thereto, having been made in the affirmative by the chancellor, its correctness is presumed.

2. *Appeals—Parties*—Although a part of the old machinery may have been used by appellees the mortgagee alone could complain, and he has not appealed.

Stone & Sudduth and Jas. A. Beattie for appellants.

Walter Evans and A. E. Willson for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In 1882 Hornsby sold to Slocum a lot of land, retaining in the deed therefor a lien for purchase money. Slocum erected on the lot a flour mill, and in 1886 gave to Hornsby a mortgage on the property to secure $2,000 borrowed money.

In March, 1887, Pollock leased the lot and mill reserving, by terms of the contract, right to purchase at a price fixed.

After Pollock got possession; under the lease, he changed the character of the mill, which had been operated by stones, to what is

called a roller mill, and to that end detached and removed from the building, though not off the lot, all the machinery not necessary or adapted to making flour by the roller process.

It appears that by contract with Pollock, W. E. Caldwell & Co. and The Nordyke & Marmon Company, each furnished new machinery, which was placed in the building and used for operating the mill. And not being paid therefor, each company instituted an action to enforce its alleged lien, in pursuance of a statute, entitled "an act to provide a mechanics' lien law for the city of Louisville and county of Jefferson," approved March 2, 1869. And thereafter, September 28, 1887, Pollock, without exercising his right to purchase the property, abandoned the lease.

The two actions having been consolidated and tried together, Hornsby and Slocum, now appellants, being parties to each, judgment was rendered in substance, that Hornsby had a superior lien upon the lot of land, together with the flour mill and all the improvements and machinery thereon, except the machinery and implements furnished by Caldwell & Co., and by The Nordyke & Marmon Co., respectively, and put up and used for operating said roller mill; that the property to which Hornsby had the superior lien be sold to satisfy his debts mentioned against Slocum; and the other property be sold to satisfy the debts of the two companies just mentioned. Whether that judgment is correct depends upon construction of sections 1 and 6, of the statute referred to, which are as follows:

SEC. 1. "That all persons who shall perform labor, or furnish materials, fixtures, or machinery for constructing, finishing, altering, adding to, or repairing any house, building, mill, manufactory or other structure, within the city of Louisville, or county of Jefferson, by or under any employment or contract, express or implied, shall, and may have, a joint lien upon such house, building, mill, manufactory or other structure, and upon the interest of the employer in the parcel of land upon which such structure may be situated; and in the previous structure, added to, altered or repaired, to secure the payment of their several demands, which lien shall be prior and superior to all other liens or incumbrances on such house, building, mill, manufactory, or other structure, and the fixtures and machinery so constructed when the structure is wholly new; and upon any machinery or fixtures, alterations, additions, or repairs to a previous building, *which are capable of being severed or removed from such previous building without material injury thereto;* and shall be prior and superior to all other liens or incumbrances upon the interest of the employer in the lot or parcel of land built upon, and upon any previous structure so altered, repaired, or added to, created after the commencement of constructing the house, building, mill, manufactory or other structure, or adding to, altering or repairing a previous structure; provided that no lien shall so attach for any sum amounting to less than $10."

SEC. 6. "The liens, herein provided, shall be enforced by appropriate orders, judgments or decrees for the sale of the property on which the lien exists, according to equity usage; and if it shall appear that the employer did not own, or had no right to bind the land for a sufficient estate to satisfy the liens, then the court may provide for the sale and removal of the house, building, mill, machinery, or other structure, when it is wholly a new structure, or of the fixtures, machinery, alterations, additions or repairs upon which the lien exists, *so far as the same may or can be removed without material injury to the former structure not owned by the employer,*

TICHNOR v. HAGAN.

Filed October 29, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

Fraudulent sale—Bona fide purchaser—When a sale, procured by the fraud of the vendee, has been perfected by a delivery of the property, it can not be set aside by the vendor to the injury of a bona fide purchaser. And this is true in this case, whether the sale was absolute or conditional, as there was an unconditional delivery of the property to the vendee, who kept it in his possession until he sold it for a valuable consideration to one who had no notice of the original vendor's claim.

Sweeney, Ellis & Sweeney for appellant; W. Carrico for appellee.

CLARK v. PENDLETON COUNTY.

Filed October 29, 1890. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Yost, affirming.

The right to commissions does not attach, until there has been a complete performance of the service or duty upon which they depend.

A delinquent tax collector who, under his contract with the county court, was entitled to a certain commission on all sums collected by him, is not entitled to the agreed commission on taxes, for which he recovered a judgment, but which he was prevented from collecting by reason of a compromise, made by the county court with the taxpayer, pending an appeal from the judgment. He would be entitled to recover on a quantum meruit, but is not entitled to anything by way of commissions.

W. J. Perrin for appellant; John H. Barker for appellee.

ELLIS v. CASEY.

Filed October 29, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing, Judge Young, dissenting.

Cost of advertising sales—Liability of sheriff—Under a statute, which provides for the advertisement in a newspaper of sales of property to be made by the sheriff of Kenton county, under execution, the sheriff is not personally liable to the publisher for the cost of the advertisement, in the absence of any agreement to that effect. The publisher must look to the party for whose benefit the advertisement is made.

Tisdale & Gray for appellant; William Goebel for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. COODIN'S EX'ORS.

Filed October 2, 1890. Appeal from Bell Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, reversing.

Parol testimony to add to writing—Where a deed was executed conveying to a railroad company, for a recited money consideration, an unconditional right of way through the grantor's lands; and the company, by its writing, executed at the same time, obligated itself not to damage the grantor's spring nor render it inaccessible for use, and to move his smokehouse for him, these two writings must be construed as one contract, embracing the whole agreement between the parties; and in the absence of allegation and proof of fraud or mistake, parol testimony was incompetent to show that the company had agreed to do other things not recited in the writing.

J. W. Alcorn and Wilson & Rawlings for appellant; J. D. Black for appellees.

EAST TENNESSEE COAL CO. v. DOBSON.

Filed October 29, 1890. Appeal from Whitley Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, affirming.

Inconsistent defenses—Contributory negligence—Prejudicial errors—In an action for negligence a traverse and the plea of contributory negligence are

not inconsistent defenses, and the court erred in this case in rejecting an amended answer pleading contributory negligence. But as the defendant was allowed, upon the trial, without objection, to go into the whole case, just as if its rejected pleading had been filed, and the court, without objection or exception, gave an instruction as to contributory negligence, the defendant was not prejudiced by the rejection of its amended answer.

Hill & Denham and J. W. Alcorn for appellant; J. H. Tinsley and J. R. Sampson for appellee.

LANDSOWN v. LANDSOWN.

Filed October 29, 1890. Appeal from Carter Circuit Court. Opinion of the court by Judge Yost, dismissing.

1. Right of appeal—Contempt—Pending an action by the wife for a divorce the court awarded to the defendant the custody of certain children, the sons of the parties, and to the plaintiff the custody of their daughters, directing that the children, awarded to the plaintiff, be immediately given into her possession by the defendant. The defendant, in contempt of the order of court, concealed the children, so that the judgment could not be carried into effect. The court then awarded the custody of all the children to the plaintiff, and order an attachment against defendant for the contempt. From the order, awarding the custody of the children to the plaintiff, the defendant appeals. Held—That the defendant should purge himself of his contempt of the orders of the court below before he can have a hearing in an appellate tribunal.

2. A motion to dismiss can be heard at any time, upon five days' notice, served upon the appellant or upon his attorney of record.

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KENTUCKY COURT OF APPEALS.

GILL, &C. V. BUCKNER, &C.

(*Filed May* 24, 1890—*Not to be reported.*)

Conveyance—Limitation—Estoppel—In 1830 Thomas Buckner and Matilda Buckner, his wife, the father and mother of appellants and of the appellee, William Buckner, and Mrs. Ambrose, formerly Buckner, conveyed to John Hanson, sr., father of Matilda, the tract of land, a part of which is now in controversy. Shortly thereafter John Hanson, sr., died testate, devising said land to his son, G. G. Hanson. In an action instituted, attacking the conveyance to John Hanson, sr., as voluntary and fraudulent as to debtors; also attacking the devise to G. G. Hanson as voluntary and fraudulent, it was decided that said conveyance was valid as against creditors, and the devise was based on the obligation that G. G. Hanson would convey said land to Matilda Buckner and her children, which conveyance he shortly thereafter executed, giving to Mrs. Buckner a dower interest of one-third for life, remainder to her children. Buckner having died, Mrs. Buckner intermarried with one Jett, who obtained from the county court a division of the land, setting apart one-third for life to Mrs. Jett, and the remaining land was divided between the children in equal parts.

Said life interest, excepting a small portion, which had been sold under execution, was, by conveyance, sold to John Buckner, and the remainder interests of William Buckner and Mrs. Ambrose were sold to Henry Wyatt. Wyatt also bought all the interests that had been allotted to the Buckner heirs in the division. John Buckner sold his interests to Wyatt, and Blades purchased some of the purchase money notes. John Buckner and Blades brought separate actions on purchase money notes against Wyatt, and a sale of the land was adjudged to satisfy said debts. As a part of said judgment, the court ordered that "so much of the undivided interest in the dower, formerly allotted to Matilda Jett, as was sold by the complainant, Buckner, to the defendant, Wyatt, as is sufficient to satisfy the complainant's debt be sold." John Buckner objects to the judgment, claiming that only his life interest in the dower interest passed under the decretal sale, and not his remainder in said dower interest. Mrs. Gill claims her remain-

der in the dower interest. *Held*—That the language of the judgment of sale, accompanied by the possession of the land by the purchaser for over thirty years, and the failure of John Buckner to complain of the judgment for that period, deprives him of any right to relief.

Mrs. Gill is entitled to one-fourth of the remainder in the dower interest, as she never united with her husband in the conveyance; nor is her claim barred by limitation, as the life tenant died in 1884.

R. K. Smith for appellants.

H. P. Willis for appellees.

Appeal from Bracken Chancery Court.

Opinion of the court by Judge Bennett.

In 1830 Thomas Buckner and Matilda Buckner, his wife, the father and mother of the appellants, and of the appellee, William Buckner, and Mrs. Ambrose, formerly Buckner, conveyed to John Hanson, sr., father of said Matilda, the tract of land, a part of which is now in controversy. Not long afterwards the said Hanson died testate. He devised said tract of land to his son, G. G. Hanson.

In the case of Hanson v. Power, 8 Dana, 91, in which the conveyveyance to John Hanson, sr., was attacked as being voluntary, consequently fraudulent as to creditors, &c., it was sought to set said conveyance aside; also the devise to G. G. Hanson. It was decided in that case that the conveyance was not voluntary, and was valid, even as against creditors, and that the devisor required the devisee to execute bond that he would convey said land to Mrs. Buckner and her children. This finding of fact by the court is authoritative, and binds G. G. Hanson and those claiming under him. According to this finding of fact said land was devised to G. G. Hanson in trust for the benefit of Mrs. Buckner, and the children above named.

He, thereafter, pursuant to said trust duty, conveyed said land to Mrs. Buckner and said four children; one-third thereof to Mrs. Buckner for life, and the "residue to said children in equal portions." Thereafter, said Buckner having died and his widow having married Jett, the latter procured, in the county court, the allotment of dower to Mrs. Jett, and the division of the balance of the land, in equal parts, among the Buckner children.

While the power of the county court to make this allotment and division is exceedingly questionable, yet Mrs. Jett and said children had the right to the allotment and division, in the manner of one-third to the widow for life, and the residue to the children in fee, in equal portions, and the action of the county court, in making the allotment and division, though under its power to allot dower, &c., was not void, and may be regarded, at this late day, as binding. The land having been devised to G. G. Hanson in trust for said parties, he had no implied reversionary right in the life interest; therefore, there is no ground for the contention that he holds the reversionary right in the said life interest. This sale conveys the fee to said parties to the entire land; one-third theroof to Mrs. Jett for life, the residue to the children, which includes the remainder interest in the life estate. Said Jett and wife sold the said life estate, except a portion thereof that had been previously sold under execution, to John Wheeler. Said Wheeler thereafter sold the same to the appellant, John Buckner. The appellant, Mrs. Gill, did not sell her one-fourth remainder right in said life interest

to said Buckner. She never signed the deed of conveyance. Consequently, she is entitled to said remainder interest.

But William Buckner and Mrs. Ambrose, having sold their respective remainder interests in said life estate to Henry Wyatt, they are not entitled to recover in this action.

It appears that Henry Wyatt bought all the interest in said estate allotted to the Buckner heirs in the county court division. Mr. Blades bought some of the purchase money notes, and separate suits were instituted by John Buckner, he having sold his interest to said Wyatt, and Blades against said Wyatt to enforce their liens on the parcels of land so sold, for the payment of the purchase money, and the said parcels were sold to satisfy said purchase money, and Blades became the purchaser of all of said parcels. Now the question is, was the said remainder interest of the appellant, John Buckner, included in said sale? If it was included, he can not recover; if it was not included, he can recover. If the appellant, John Buckner, conveyed his interest to said Wyatt by deed or bond for a title, the same is not copied in this record. His petition alleges that eighty-five acres were sold to said Wyatt. But the decree directs that said eighty-five-acre and ten-acre tracts be sold. They were sold, and Blades was the purchaser. Thereafter, the decree was amended, so as to set aside the sale of the ten acres, and to sell in its stead "so much of the undivided interest in the dower, formerly allotted to Matilda Jett, as was sold by the complainant, Buckner, to the defendant, Wyatt, as is sufficient to satisfy the complainant's debt," &c.

It is contended that the expression, "the undivided interest in the dower," &c., refers to the life estate that the appellant owned, and not to the remainder interest therein. But the language used, aided by the attendant circumstances, does not admit of this interpretation. The dower estate had been set apart by metes and bounds. It was a separate and distinct estate from the other portion of the tract. The appellant, Buckner, owned all of it; not an undivided part of it, but he did own one undivided remainder interest therein. The expression, "undivided interest in the dower," &c., as explained by the surrounding circumstances, means the remainder interest in the dower property. The amended decree says that appellant, Buckner, sold this interest to Wyatt. Blades became the purchaser of it, and paid said appellant for it. The sale was confirmed, and Blades took possession of the said interest. And although the pleadings, as far as is shown by this record, do not set up this interest as having been sold to Wyatt, and there are no title papers filed showing a sale of any of appellant's interest to Wyatt, the amended decree says that he sold his undivided interest in the dower, &c., to Wyatt. The said appellant was a party to this action, and he never took any steps to correct the amended decree, if the same was erroneous, but received pay for said interest, and let Blades take possession of this interest, and hold it as his own for over thirty years. Under these circumstances the appellant must be conclusively presumed to have authorized the filing of amended decree and the sale thereunder; and having done so, he can not now question the purchaser's right to said interest. Blades bought all the other interests at the sale, made in the action of himself against Henry Wyatt, except Mrs. Gill's remainder. She did not join with her husband in the conveyance of said remainder interest; and the life tenant having died in 1884 the statute of limitation does not bar her right.

The judgment is affirmed as to all of the appellants except Mrs.

Gill and her husband; as to the two latter, it is reversed, and the cause is remanded, with directions for further proceedings consistent with this opinion.

SLOCUM, &C. v. CALDWELL & CO., &C.

(*Filed June* 25, 1890—*Not to be reported.*)

1. *Mechanics' liens—Mortgages—Fixtures*—H. sold S. a lot of land in Louisville, reserving a lien for unpaid purchase money. Subsequently, S., having erected a flour mill on the lot, executed to H. a mortgage to secure the payment of $2,000 borrowed money. After the execution of this mortgage S. leased the property to P., giving him also an option to purchase same. P. changed the mill into a roller mill, removing the machinery, found in the mill when he took possession, out on the lot, and supplied in its place roller mill machinery, obtained from appellees, upon which they asserted their lien, under the provisions of sections 1 and 6 of an act, entitled "an act to provide a mechanics' lien law for the city of Louisville and county of Jefferson," approved March 2, 1869, which provides, "that all persons who shall perform labor or furnish materials, fixtures or machinery for constructing, finishing, altering, adding to, or repairing any house, building, mill, manufactory or other structure, within the city of Louisville, * * * may have a joint lien * * upon any machinery or fixtures, alterations, additions or repairs to a previous building, *which are capable of being severed or removed from such previous building, without material injury thereto*," and providing that, although the person with whom the contract of furnishing said machinery was made, had no authority to bind the land, the court could order said machinery sold to satisfy the mechanics' lien, provided the same could be removed, without material injury to the building.

In an action to enforce satisfaciion of all the liens on said property, *Held*—That the general rule, which entitles the holder of a mortgage to the benefit of all improvements erected on the mortgaged property, has been altered by this statute, and the mortgagor is entitled to a prior lien on only the mill property and machinery on the lot before the roller mill machinery was placed thereon by appellees, and appellees are entitled to have their lien enforced by a sale and removal of the roller mill property from the mill.

The decision of the question as to the practicability of removing said machinery from the building, without material injury thereto, having been made in the affirmative by the chancellor, its correctness is presumed.

2. *Appeals—Parties*—Although a part of the old machinery may have been used by appellees the mortgagee alone could complain, and he has not appealed.

Stone & Sudduth and Jas. A. Beattie for appellants.

Walter Evans and A. E. Willson for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In 1882 Hornsby sold to Slocum a lot of land, retaining in the deed therefor a lien for purchase money. Slocum erected on the lot a flour mill, and in 1886 gave to Hornsby a mortgage on the property to secure $2,000 borrowed money.

In March, 1887, Pollock leased the lot and mill reserving, by terms of the contract, right to purchase at a price fixed.

After Pollock got possession; under the lease, he changed the character of the mill, which had been operated by stones, to what is

called a roller mill, and to that end detached and removed from the building, though not off the lot, all the machinery not necessary or adapted to making flour by the roller process.

It appears that by contract with Pollock, W. E. Caldwell & Co. and The Nordyke & Marmon Company, each furnished new machinery, which was placed in the building and used for operating the mill. And not being paid therefor, each company instituted an action to enforce its alleged lien, in pursuance of a statute, entitled "an act to provide a mechanics' lien law for the city of Louisville and county of Jefferson," approved March 2, 1869. And thereafter, September 28, 1887, Pollock, without exercising his right to purchase the property, abandoned the lease.

The two actions having been consolidated and tried together, Hornsby and Slocum, now appellants, being parties to each, judgment was rendered in substance, that Hornsby had a superior lien upon the lot of land, together with the flour mill and all the improvements and machinery thereon, except the machinery and implements furnished by Caldwell & Co., and by The Nordyke & Marmon Co., respectively, and put up and used for operating said roller mill; that the property to which Hornsby had the superior lien be sold to satisfy his debts mentioned against Slocum; and the other property be sold to satisfy the debts of the two companies just mentioned. Whether that judgment is correct depends upon construction of sections 1 and 6, of the statute referred to, which are as follows:

SEC. 1. "That all persons who shall perform labor, or furnish materials, fixtures, or machinery for constructing, finishing, altering, adding to, or repairing any house, building, mill, manufactory or other structure, within the city of Louisville, or county of Jefferson, by or under any employment or contract, express or implied, shall, and may have, a joint lien upon such house, building, mill, manufactory or other structure, and upon the interest of the employer in the parcel of land upon which such structure may be situated; and in the previous structure, added to, altered or repaired, to secure the payment of their several demands, which lien shall be prior and superior to all other liens or incumbrances on such house, building, mill, manufactory, or other structure, and the fixtures and machinery so constructed when the structure is wholly new; and upon any machinery or fixtures, alterations, additions, or repairs to a previous building, *which are capable of being severed or removed from such previous building without material injury thereto;* and shall be prior and superior to all other liens or incumbrances upon the interest of the employer in the lot or parcel of land built upon, and upon any previous structure so altered, repaired, or added to, created after the commencement of constructing the house, building, mill, manufactory or other structure, or adding to, altering or repairing a previous structure; provided that no lien shall so attach for any sum amounting to less than $10."

SEC. 6. "The liens, herein provided, shall be enforced by appropriate orders, judgments or decrees for the sale of the property on which the lien exists, according to equity usage; and if it shall appear that the employer did not own, or had no right to bind the land for a sufficient estate to satisfy the liens, then the court may provide for the sale and removal of the house, building, mill, machinery, or other structure, when it is wholly a new structure, or of the fixtures, machinery, alterations, additions or repairs upon which the lien exists, *so far as the same may or can be removed without material injury to the former structure not owned by the employer,*

or to rent the same for the benefit of lien claimants, if it shall appear the rents will pay the lien claims in a reasonable time, in cases where the owner of the land or former structures consents to the renting on election given."

It is manifest operation of that statute was not intended to be regulated or limited by the general rule, giving to a mortgagee benefit of improvements made by or for a mortgagor; nor is it material whether the machinery, furnished and attached to the mill building by appellees, are to be regarded as such fixtures as may not generally be removed by a tenant, or as may not be incumbered with liens to secure payment to those furnishing them. For the statute, in express terms, provides, that any person, who shall furnish any machinery or fixtures, alterations, additions or repairs to a previous building, which are capable of being severed or removed from such previous building, without material injury thereto, shall have a lien thereon prior and superior to all other liens, which may be enforced by a sale and removal thereof, even when it appears the employer did not own nor have a right to bind the land, whereon the building is situated, for a sufficient estate to satisfy such liens.

It is not, therefore, a question of law, but one of fact, depending upon the evidence, whether the machinery furnished by appellees could be severed and removed from the previous building, without material injury thereto; and as the chancellor determined that question affirmatively, and was, we think, authorized by the evidence to do so, there was no other alternative, under the statute, but to direct a sale of the machinery to satisfy the respective liens of appellees.

But it is argued for appellants that the phrase, "previous building," applies not merely to the actual structure in the condition it was when the machinery, furnished by appellees was put into it, but also to the machinery and appliances used when flour was made by use of burr stones; and, consequently, the right to remove the rollers and other machinery, used in connection with them, could not be exercised by or for benefit of appellees, except by putting the former machinery back in the condition it was before being attached. But it seems to us the position can not be maintained. The statute expressly provides for a lien in favor of a person who may furnish machinery, for not merely constructing, finishing, adding to or repairing, but as well for *altering* a mill or manufactory which generally, and in such case as this, necessarily requires previous removal of the old, in order that the new and entirely different machinery may be put into the building or structure. Consequently, while the lien of a vendor or mortgagor may still exist upon materials or machinery, which was in the mill or manufactory when it was created, it would not be consistent with the language of the statute, nor with reason, to require the person furnishing new and improved machinery in place of the old, and, perhaps, obsolete to deduct any account from the value of his services or materials, in good faith rendered or furnished.

By the judgment the old machinery and materials, though detached, were directed sold towards satisfying the debts of appellant, Hornsby, and that is all he can claim, under the statute, the theory of which is, that machinery and materials, furnished for the purposes mentioned, add to value of the realty, benefitting creditors as well as owners, and, therefore, those who furnish them should be paid therefor.

Moreover, whatever cause of complaint Hornsby may have is against Slocum, with whose knowledge and consent Pollock caused

the old machinery moved, and he can not prevent appellees, who, afterwards and in good faith, furnished the new machinery, recovering compensation therefor.

It appears Pollock, in part payment of machinery furnished, sold a pair of burr stones to appellee, The Nordyke & Marmon Co., and Slocum seeks to deduct the value thereof from the claim of the company. But as Hornsby, who alone, if any party, would have a right to complain, asks no relief on that account, we think the counter-claim of Slocum was properly dismissed.

Judgment affirmed.

RANDOLPH, &C. V. LAMPKIN, &C.

(*Filed Oct.* 18, 1890.)

1. *Wills—Undue influence—Parties to actions—Evidence*—Lewis W. Lampkin, sr., died in 1882, about eighty-six years of age, leaving a will by which he devised to Catherine W. Gordon and her children all his real and personal estate, except thirty acres of land given to Lewis Washington, and one and one-half acres to Jefferson Blackwell.

In a contest as to the validity of the will a verdict and judgment was rendered, finding that said instrument was not the last will and testament of Lampkin as to the devise to Mrs. Gordon and her children.

This appeal questions the correctness of the finding against the will as to the devise to Mrs. Gordon and her children.

The testator had been twice married, but had no children, both wives being dead.

His last wife was the sister of Mrs. Gordon, and she died about five years before the testator. From the time of her death he lived on his farm, until his death, with negroes as his companions, except the last six months of his life, a son of Mrs. Gordon leased the farm for five years, and resided with the testator until his death.

In 1811 the father of Lewis W. Lampkin, sr., devised his real estate to his two sons, the testator and his brother. Upon the death of the brother his son, Lewis W. Lampkin, jr., succeeded to the interest of his father, and he, shortly thereafter, executed a voluntary conveyance of the interest, so acquired, to his uncle. Later, he brought a suit against his uncle to set aside the voluntary conveyance he had made, which was compromised by the uncle paying him a large sum of money. The father of the testator left eleven children, who have numerous descendants living in different States and localities, and the court ordered that a few of the heirs could prosecute the action for the benefit of all, as provided in section 25, Civil Code of Practice. The court admitted evidence, showing that testator admitted he had encouraged his nephew, Lewis W. Lampkin, jr., to drink liquor. The court also admitted testimony, showing in whose name the land was assessed, prior to the death of testator's brother. *Held*—That appellants were not prejudiced by the order, permitting a few of the heirs to sue for the benefit of all, but the admission of the evidence concerning the testator encouraging his nephew to drink liquor, and the evidence as to whose name the land was assessed in, was improper and misleading.

The record of the litigation between the testator and his nephew was competent, only for the purpose of showing the feelings that existed between them.

Section 35, chapter 113, General Statutes, construed.

2. *Misconduct of the court*—After the jury had retired and considered of their verdict for some time, the court, learning from the foreman that they could not agree, had the jury return into the court-room, who reported that they were unable to agree, and thereupon the judge arose from his seat and

said to them: "Gentlemen, *how do you expect this case to be decided, unless you do it? This is, as you know, the third trial of this case, and it has become an incubus upon the business of the court.* You were examined in your selection as members of this jury, and none of you disclosed any thing to cause me to doubt your capacity to try the case and decide it. *You must decide it.* * * * *It is no credit to a man, merely because he has an opinion, to stubbonly stick to it*," &c., after which the jury retired, and soon returned a verdict. *Held*—That such misconduct of the court was prejudicial, and the verdict rendered, under such circumstances, should be set aside.

E l. M. Wallace and C. J. Bronston for appellants.

D. L. Thornton, O'Neal, Jackson & Phelps and Samuel B. Kirby for appellees.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Lewis.

Lewis W. Lampkin, sr., died March 27, 1882, about eighty-six years old, leaving a paper, purporting to be his last will, by which was devised to Catherine M. Gordon and her children, all his real and personal estate, except thirty acres of land, given to Lewis Washington, and one and one-half acres to Jefferson Blackwell; and this is an appeal by the first mentioned devisees and propounders from a judgment, rendered in pursuance of verdict of the jury, finding, in substance, the paper, in question, to be his last will, so far as it makes provision for Lewis Washington and Jefferson Blackwell; and not his last will, so far as it makes provision for Catherine M. Gordon and her children.

As under section 35, chapter 113, General Statutes, the proper issue for the jury in a will contest is, "whether or how much of any testamentary paper produced is or is not the last will of a testator?" it was competent for the jury to find the verdict rendered. And although the devisees, Washington and Blackwell, as well as the contestants, are before this court as appellees; still, as there was not in the lower court, nor, by reason of the relative attitude they occupy, can be any real contest between them and appellants, the judgment must, in the absence of a cross-appeal, be treated as to them, final and conclusive.

In order to determine the questions made in behalf of appellants, it is necessary to refer in some measure to the family history of the testator, and the manner in which he became owner of the estate devised.

It appears that about the year 1811 James Lampkin died, leaving a will, by which he devised his estate to his children, eleven in number, his land being divided and given to his sons. Two of the sons, Presley T. and Lewis W. Lampkin, whose will is in contest, became partners, and jointly occupied and used the land devised by their father, and other tracts purchased, until 1834, when the former died, leaving three children.

By his will the control and management of his estate and custody of his children were given to Lewis W. Lampkin, who was made executor. Two of the children, however, died in infancy, leaving Lewis W. Lampkin, jr., sole devisee, who resided with his uncle until, and for some time, after his marriage. But in the year 1857, he separated from his wife, and made a voluntary conveyance of his estate to his uncle for the purpose, it seems, of defeating his wife's claim to alimony, from whom he was divorced.

About 1858, having again married, he instituted suit against his

uncle to recover back the estate he had conveyed, which was settled by payment of a large sum to him. He afterwards brought another action to recover more on that account, which was compromised by the payment of another large sum to him. And soon after he went away, and, so far as this record shows, was never thereafter seen or heard from by his uncle, the testator.

Lewis W. Lampkin, jr., had, by his first, one, and by his second wife two children, on whose motion appeal in this case from the county to the circuit court was taken. And one of the reasons for reversal now urged is an order permitting them to contest the probate of the will for the other heirs-at-law of the testator. It seems to us section 25 of the Civil Code is peculiarly applicable in a case like this, for while the testator is shown by the record to have had ten brothers and sisters, the number and names of their children do not appear, and, consequently, here is clearly a case contemplated by that section, where the parties are numerous, and it is impracticable to bring them all before the court. Besides, we do not perceive how appellants were prejudiced by that order, but they were rather benefited in thus saving expense of multiplicity of suits.

Any evidence of his conduct or conversation, tending to show the feelings of a testator towards those who are the natural objects of his bounty, or his previous intention in respect to disposition of his estate, is competent. But the evidence introduced on trial of this case for the purpose of showing that the testator admitted he had encouraged Lewis W. Lampkin to drink liquor, and was, therefore, responsible for his subsequent dissipated and drunken habits, was improperly admitted. For while his purpose was not to injure, but, as he said, to prevent him dying of consumption, as his brother and sister had done; still the inference was attempted to be drawn, and to operate improperly on the minds of the jury, that he owed a recompense to the children of Lewis W. Lampkin, to be discharged only by devising his estate to them. It was also improper, as was done, to show in whose name the land was listed for taxation previous to the death of Presley T. Lampkin. For even if the mode adopted to show the fact had been a proper one, the ownership of the property left by the testator was not in issue, but his title to it was clear and conceded, and evidence on that subject was necessarily misleading, and calculated to divert the minds of the jury from the true issue.

The record of litigation between the testator and Lewis W. Lampkin was competent, if at all, only for the purpose of showing the feelings that existed between them.

The testator never had any children, though twice married. Precisely when he first married does not appear. His last wife, who was a sister of Catherine M. Gordon, died under very distressing circumstances, about five years before he did, having been burned to death, and he thereafter resided upon his farm, with no other companions but negroes, his former slaves, until about six months before, when a son of Catherine M. Gordon leased his land for five years. A brother of his last wife, named Hugh Smith, seemed, according to the evidence, to have at one time had influence over him, and a previous will was made, by which the testator gave to him all his estate. But Smith seemed to have betrayed his confidence, and left the State about a year before the last will was made. It is not affirmatively shown that Mrs. Gordon, or any of her children, had or exercised influence upon the testator to cause him to make the will, now in contest, nor that it was so made under any other influence or incentive than his own feelings and wishes. But

as there were facts proved, from which the jury might reasonably have inferred undue influence was used for the purpose, and did cause execution of the will, we do not feel authorized to disturb the verdict, upon the ground it is palpably or flagrantly against the evidence.

It appears, from the bill of exceptions, that after the jury had retired, and for some time considered of their verdict, the foreman came to the judge of the court and had a private conversation with him, and some time after his return to the jury-room the jury came in a body into the court-room and reported they were unable to agree, and there was no possibility of their agreeing, and thereupon the judge arose from his seat and said to them: "Gentlemen, *how do you expect this case to be decided unless you do it? This is, as you know, the third trial of this case, and it has become an incubus upon the business of the court.* You were examined in your selection as members of this jury, and none of you disclosed any thing to cause me to doubt your capacity to try the case and decide it. *You must decide it.* You have given the case a close and patient hearing. You must be patient and considerate of one another in your deliberations, and give the case full consideration. You were hearing the case three or four days, and you must take more time in your deliberation. You say you can't agree. *It is no credit to a man, merely because he has an opinion, to stubbornly stick to it,* but he should be open to argument and reason and conviction. You ought to go into the jury-room with a spirit of conciliation and disposition to agree. You gentlemen should kindly and in good temper listen to each other and charitably listen to those with whom you don't agree. The judge has to decide cases often when he is doubtful as to the right. Even in our families, by listening to our wives and members of our family, we change opinion. I trust you will retire, and giving to each other a patient consideration, and reach a conclusion in this case. Gentlemen, you will retire to your room for further consideration."

It does not appear, nor is it contended the judge of the court intentionally abused the discretion which he had, and might reasonably exercise as to length of time the jury ought to have been kept together, with a view to agreement upon a verdict. But it seems to us when the fact the jury had come into court and announced it impossible for them to agree, and the length, tone and manner of the address by the court are considered, the conclusion is almost inevitable that the jury brought in a verdict which they would not have rendered but for the interposition of the court. And as the actual finding shows evidence of a compromise of opinion, and yielding by some of the jury of their previously announced unalterable convictions, we think the verdict can not be regarded as the result of deliberate judgment, but was brought about by the supposed paramount duty of the jury to agree upon a verdict, rather than by free and unbiased conviction of what their verdict ought to be. And whenever the interference of the court appears to have had such effect upon the jury, their verdict ought to be set aside.

Wherefore, for the errers indicated, the judgment is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion.

AVERY'S TRUSTEES V. AVERY.

(*Filed Nov.* 1, 1890.)

Surrender of trusts—Prior to 1882 B. F. Avery gave to his son, W. S. Avery, 100 shares of stock in a corporation, which the son conveyed by deed in trust to his mother, with power of renunciation on her part, to be held by her for his use, subject to the rights of his then creditors. His father died in 1885, and under his will W. S. Avery received enough more of the stock to make him the owner, in all, of four hundred and thirteen and two-seventh shares. The will provides: "The portion of said stock which shall, under the third item, fall to my son, Sidney, shall be held by my sons, Samuel L. Avery and George C. Avery, in trust, for the benefit of said Sidney, until he shall arrive at the age of twenty-seven years, when the trust, as to him, shall cease, *provided that, in the judgment of my wife and my sons, Samuel and George, the habits of said Sidney are such as to render it prudent that said trust shall cease, and until that time said Sidney shall have the use only of the dividends arising upon such stock.* If I should die during the minority of said Sidney, then he shall have, during his minority, only such portion of said dividends as may be necessary, in the judgment of said trustees, for his education and support, the excess over that of said dividends being safely invested for his benefit."

In February, 1887, the appellee, being then twenty-nine years old, conveyed all the stock in trust to the appellants; they, as his trustees, being already in control of it. Another person was joined with them as a co-trustee. The deed recites the existing trusts, and then enumerates the powers and rights of the trustees and the *cestui que trust.*

Appellee brought this action, asking that the deed of 1887 be annulled as fraudulent; that the testamentary trust, and that under the deed of 1882 be held to have been surrendered, and that he be adjudged the absolute possession of the stock, alleging that the deed of 1887 is forbiden by law as against public policy, and, therefore, void; but that it operated as a renunciation of the previously existing trusts, and as an exercise by the trustees, under the will, of the discretion therein confided to them as to the stock given to the appellee. Appellants, in their answer, alleged that it was but a consolidation of the testamentary trust, and that created by the deed of 1882 to the mother. A demurrer to the answer was sustained, and the stock adjudged to be delivered to appellee, from which this appeal is prosecuted. *Held*—That W. S. Avery received no consideration for the transfer, by deed of 1887, by which the estate, in remainder of the trustees, was considerably increased, thus greatly benefitting the trustees. Trustees in equity will not be permitted to reap a profit from a transaction with the beneficiary. But whether or not the trustees have released control over the trust fund, or exercised their discretion in favor of the beneficiary will not be determined, from the mere fact that they have dealt with him as competent to dispose of and control his stock. The cour should not have sustained the demurrer to the answer, as it alleged that the habits of W. S. Avery had not improved, but that he is still improvident, and that a prudent regard for his interest forbids that any of the trusts should cease, the truthfulness of which should have been determined by the court after a consideration of all the facts and circumstances attending the case. The only effect of setting aside the deed of 1887 was to restore the parties to the positions they occupied before that deed was executed.

Muir & Hayman and Dodd & Dodd for appellants.

Hargis & Eastin for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

Prior to November 10, 1882, B. F. Avery gave to his son, the

appellee, W. S. Avery, one hundred shares of stock in the incorporated company, known as "B. F Avery & Sons;" and at the date named, the donee conveyed it in trust to his mother, the appellant, Susan H. Avery, with power of renunciation upon her part, to be held by her for his use, subject to the rights of his then creditors. He retained the entire equitable ownership; and it may fairly be presumed that a desire upon his part to secure the estate to himself from his then improvidence, together with his confidence in his mother, led to the execution of the deed.

His father died in 1885, and under his will, and subject to its conditions, the appellant acquired enough more of the stock to make him the owner, in all, of 413 2-7 shares. The will provides: "The portion of said stock which shall, under the third item, fall to my son, Sidney, shall be held by my sons, Samuel L. Avery and George C. Avery, in trust for the benefit of said Sidney, until he shall arrive at the age of twenty-seven years, when the trust as to him shall cease, *provided that, in the judgment of my wife and my sons, Samuel and George, the habits of said Sidney are such as to render it prudent that said trust shall cease, and until that time said Sidney shall have the use only of the dividends arising upon such stock.* If I should die during the minority of said Sidney, then he shall have, during his minority, only such portion of said dividends as may be necessary, in the judgment of said trustees, for his education and support, the excess over that of said dividends being safely invested for his benefit."

In February, 1887, the appellee, being then twenty-nine years old, conveyed all the stock in trust to the appellants; they, as his trustees, being already in control of it.

Another person was joined with them as a co-trustee. The instrument is quite lenghty. It recites the already existing trusts, and then enumerates the powers and rights of the trustees and the *cestui que trust.*

It is claimed, upon the side of the appellants, that it was but a consolidation of the testamentary trust, and that created by the deed of 1882 to the mother; while the appellee contends, not only that it is forbidden by law as against public policy, and, therefore, void, but that it operated as a renunciation of the previously existing trusts, and as an exercise by the trustees, under the will, of the discretion therein confided to them as to the stock given to the appellee.

Acting upon this belief he brought this action, asking that the deed of 1887 be annulled as fraudulent; that the testamentary trust, and that under the deed of 1882, be held to have been surrendered and that he be adjudged the absolute possession of the stock.

The answer traverses, in the main, the averments of the petition; gives a history of the transactions relating to the stock; avers that the habits of the appellee have not improved, but that he is still improvident, and that a prudent regard for his interests forbids that any of the trusts should cease.

The lower court sustained a demurrer to the answer, and gave the appellee the absolute control of the stock. It did this, as its opinion shows, upon the ground that the deed of 1887 was void, but yet was an exercise of the discretion given by the will to the trustees, and operated as a renunciation of both the testamentary trust and that created by the deed to Mrs. Avery, of 1882.

Unquestionably, the deed of 1887 lessened the rights and interests of the *cestui que trust*, as they existed under the trust deed of 1882 and the will of his father. The absolute equitable right to the stock

was practically reduced to a life estate. Indeed to less, because, instead of being entitled to the income arising from the stock, as he formerly was, it was provided that he should only have such portion of it as the appellants might see proper to give him. He was also divested of the power to dispose of the stock by will, unless he should marry and have children. This was likely to work to the pecuniary advantage of the appellants. It created for them in certain contingencies an estate in remainder, and there was no consideration moving to the *cestui que trust* to support a contract for the benefit of the trustee. Moreover, their powers as trustees were increased. The deed authorized them to dispose of the stock in any manner they saw fit, and exempted them from any accounting for their acts in the management of the trust.

These matters are all shown by the answer; and in view of the fact that this was a contract between those who already occupied the position of trustee and *cestui que trust*, we concur with the lower court in holding the deed of 1887 to be void.

If a trustee contracts to his own advantage as to the trust property with the *cestui que trust*, while the trust relation exists, he can not be allowed to profit thereby. The law will not permit him to thus place his individual interest in conflict with that of the *cestui que trust*. Perry on Trusts, section 197.

He can not be permitted to thus tempt his own virtue. Ordinarily, he has the confidence of the *cestui que trust* and influence over him, and occupies such a position that contracts between them as to the trust estate, whereby he profits, should be regarded as contrary to a proper and just policy, and, therefore, not enforceable against the will of the party, who, from his dependent situation, is the weaker one.

The policy of the law is against such transactions, and they are, therefore, regarded as constructively fraudulent. They may not originate from any actual evil design, and, doubtless did not, in this instance, but as they tend to mislead and violate confidence, they are forbidden by law equally with positive frauds, or those originating *malo animo*.

It is urged that the appellants, in the deed of 1887, expressly renounced the two trusts theretofore existing; and if this be not so, yet the fact that the trustees, under the will, by the deed of 1887, contracted with him, should be held to be a concession upon their part of his fitness to manage his estate, and should be held to operate as an exercise in his favor of the discretionary power under the will.

It is true that the twelfth clause of the deed of 1887 provides: "Susan H. Avery, of the second part, expressly renounces, for the benefit of the successors named herein, the trusts and the conditions named in the deed of November 10, 1882, and the said Susan H. Avery, Samuel L. Avery and George C. Avery, in exercise of the discretion and trust named in the will of B. F. Avery, for the use of W. S. Avery, now renounce the same for the benefit of the successors named "herein;" but it is evident that it was the purpose of this writing to continue the previous existing trusts, and that it was so understood by all the parties to it. It strengthened them as against the *cestui que trust*, and to the advantage of the trustees, and herein lies the fault of the instrument.

A renunciation in this way, the writing containing it being void, should not operate to destroy the previous trusts.

The trustee, under the deed of 1882, renounces merely to enable the trustees, under the new deed, to act, and so of the trustees, under the will. It is expressly stated as to both trusts, that the renuncia-

tion is "for the benefit of the successors named herein." It was not made for the benefit of W. S. Avery, but to enable the new trustees to act.

In fact, the deed expressly provides against the termination of the testamentary trust, because, it says: "Whereas, said parties (the trustees under the will), in the exercise of the discretion given them, do not deem that the time has yet arrived when said trust should cease, although said W. S. Avery has now attained the age of twenty-seven years."

Suppose the trustees under the former trusts, looking to their own advantage, had renounced them improperly, would the law allow them to fail? Certainly not. The chancellor, exercising his inherent power, would interfere, and uphold them by providing a trustee. Here, however, it is claimed that this was done by a deed, in which the former trustees evidently intended not to do it.

The deed of 1882 was executed by parties who were *sui juris*, and it was unquestionably valid. It, however, was for the benefit of the appellee only, and a court of equity has the power, therefore, to give him the control of the property embraced by it, if the reason, which evidently led to its execution, no longer exists. If the habits and circumstances of the *cestui que trust* no longer require the continuation of the trust, in order to secure to him the estate conveyed, then, as he is the sole beneficiary, the chancellor should restore to him the control of it.

As to the testamentary trust the trustees were not invested with an arbitrary discretion, but they were invested with a discretionary power, to be reasonably exercised, for the benefit of the appellee. They had no right to exercise it in their own favor, but it was their duty to exercise it for the benefit of the *cestui que trust*.

Whether they have done so may be inquired into by the chancellor.

The fact that the trustees have contracted with the *cestui que trust*, or that he has capacity to contract, should not be the test, whether the testamentary trust should be removed and the property restored absolutely to the appellee. The one provided by the testator must determine the question, and that is, whether "the habits of said Sidney are such as to render it *prudent* that said trust shall cease."

The deed of 1887 being invalid, all the parties were remitted to the trusts previously existing, and the lower court should have overruled the demurrer to the answer, and heard the case upon the merits. If, upon such hearing, the chancellor should be of the opinion that the necessity, as indicated in B. F. Avery's will, for the continuation of the testamentary trust no longer exists, and that the need, as herein indicated, for that created by the deed of 1882, also no longer exists, then he should, by a proper judgment, give to the appellee the control of the property; but if the showing be otherwise, then the trusts should be continued.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

WILLIAMS v. COMMONWEALTH.

(*Filed October* 28, 1890.)

Criminal law—Evidence—Opinion of accused as to imminent danger—Self-defense—The appellant, as deputy sheriff of Bell county, shot and killed one Dickinson, while attempting to arrest him, and by this appeal seeks to reverse a judgment of conviction. Dickinson being an employe of a meat shop, came to the shop drunk and drove off the person in charge, who applied to appellant, as an officer, to arrest Dickinson. Appellant, in company with a person supposed to have some influence or control over Dickinson, went to the shop where Dickinson, who, having refused to surrender to his friend, was ordered by appellant to throw up his hands and surrender to him. Dickinson had in his hands a pistol, which he was flourishing, and the main question to be decided was, in what position did the deceased have his pistol when appellant fired and killed him? The appellant was asked the question as to his belief as to whether he was in danger, at the hands of the deceased, at the time he fired the shot. It was avowed, in writing, that his answer would be in the affirmative. The court refused to permit appellant to answer the question. After the prosecution announced that its testimony in chief was closed, and several witnesses for appellant had been examined, the attorney for the prosecution announced that a witness, whose name was on the indictment, was present, and moved that he be sworn and put under rule to testify in chief, but the court sustained appellant's objection to same, and after the close of the testimony for the defendant he was permitted to testify as to the position in which the deceased had his pistol at the time he was shot. *Held*—That the court erred to the prejudice of appellant, in refusing to permit appellant to state that he believed he was in imminent danger when he fired the fatal shot. It was also prejudicial error to permit the witness to testify in chief for the prosecution after the court had declined to put him under rule and had permitted him to be present and hear all the testimony in the case.

J. R. Sampson and E. W. Hines for appellant.

P. W. Hardin for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Lewis.

The homicide in this case occurred under the following circumstances: William Dickinson, deceased, was in some way connected with a butcher shop belonging to his brother, and came back to the shop, from a trip made to purchase cattle, drunk, and with a pistol in his hand drove another employe away. An agent of the shop owner, who was absent, upon being informed of his conduct, went to the place, and he was also compelled to leave. Thereupon the accused, Roger Williams, a deputy sheriff, was sought and applied to by the agent to go and arrest him. A man named Hall, who, it seems, had some influence with the deceased, went into the shop, leaving the accused at the door, and tried to persuade deceased to give up his pistol, but instead of doing so the pistol, according to the testimony of Hall, was presented towards him, and threatening or defiant language used by the deceased. The accused then told the deceased to consider himself under arrest, and to throw up his hands, and very soon fired his pistol with fatal result, and the material and decisive question of fact in the case is, what position the deceased had his pistol in, and what he said and did just before he was shot.

A witness named Brooks, who had been off on the trip with

deceased, and drank liquor with him, testified he was in the shop at the time of the killing, and that the deceased, when told by accused, he was his prisoner, and directed to throw up his hands, arose and stood in a stooping position, his head hanging down, and pistol in his hand hanging down in front of him, and was in that position when the accused, from his position at the door, shot him. Another witness testified he was passing by the door, and saw deceased, when told by accused to do so, throw up his hands, but the pistol he had was pointed considerably above accused when he fired.

On the contrary, the accused testified that when he went to the shop door he spoke to deceased, and, after being recognized, told him he was his prisoner, and to throw up his hands, whereupon the deceased used the words "no you don't," and turned his pistol and pointed it at accused, and he then drew his own pistol from his pocket and fired, and his statement is corroborated by that of Hall.

During examination of the accused as a witness he was asked whether, at the time he shot, he believed he was in danger at the hands of the deceased, but objection to the question made by attorney for the Commonwealth, was sustained by the court, although it was avowed in writing the answer would be in the affirmative.

We think the court erred in refusing to permit answer to that question, for, while mere belief on part of the accused he is in danger does not avail, unless he has reasonable grounds for the belief, still an inference unfavorable to the defense may well be drawn by the jury from the failure of the accused, having chance to do so, to swear he did believe he was in danger when he fired upon the deceased.

After close of testimony in chief for the Commonwealth, and several witnesses for defense had been examined, the attorney for the Commonwealth stated to the court Goucher, a witness on the indictment for the Commonwealth, had answered and was in the court-house and asked that he be sworn and put under the rule and allowed, as an eye witness, to testify in chief, as the defendant's testimony had not closed; but objection then made to the motion was sustained. However, at conclusion of the defendant's evidence Goucher was introduced as a witness by the Commonwealth, and testified he was present when the killing occurred, and that Brooks, the witness, was, at the time, in the meat shop. That statement was, perhaps, competent in rebuttal of previous testimony for the defense that Brooks was not there; for if he was not present of course his version of the manner in which the killing took place was unworthy of belief. But the further question was asked the witness, how the deceased, Dickinson, had his hands when shot? and, over objection of the defendant, the witness was permitted to then testify that he, "Dickinson, had his hands up when shot."

That statement can not be regarded in any sense rebutting testimony, but was in chief and related to the main issue of fact, about which witnesses for the Commonwealth and for the defense had already testified, and in regard to which the evidence on both sides had, according to the rule of proceeding laid down in the Criminal Code, been closed.

It is well settled that the trial judge has a reasonable discretion in such case, but there should always be good cause for introduction of testimony out of the regular order, especially where injustice may likely result therefrom. Here the court had already decided, for reasons we must presume deemed sufficient, against the motion of the attorney for the Commonwealth to put the witness, Goucher,

under rules and permit him to testify in chief; yet after the defendant's testimony was closed that witness was permitted to be, the first time, sworn and to testify on the main issue of fact, after being present and hearing all the previous testimony on that issue. We think, in view of the time and manner in which that witness was permitted to testify, an undue advantage was given the Commonwealth, and the substantial rights of the accused were thereby prejudiced.

Wherefore, for the errors mentioned, the judgment is reversed and cause remanded for a new trial.

HARRISON V. ROWLEY.

(*Filed Sept.* 11, 1890—*Not to be reported.*)

Boundary—Division fences—Evidence—Presumption of chancellor's finding of facts—In 1865 appellant and appellee became owners of adjoining lots of land, situate between Second street and the Ohio river, in Vanceburg, the portion of the division fence extending from a point in the fence to Second street being kept up by appellant, while the portion extending from the point of division to the river was kept up by appellee. But in 1884 the portion kept up by appellee was washed away by a flood in the river, and appellee built another fence, extending from the point of division to the river, but which new fence is located, according to the contention of appellant, fifteen inches over on the land of appellant. To settle this question appellant sought, by a proceeding in equity, to establish this disputed boundary. *Held*—That the chancellor, having decided that the present fence is located on the true line, his decision will be presumed correct. The evidence introduced by appellant and appellee being conflicting, the testimony of the surveyor, to the effect that he established the location of the line by extending the line from the point of division to the river, by following the course of the fence built by appellant, is entitled to great weight.

Thomas & Pugh for appellant.

George T. Halbert for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Lewis.

It appears that about the year 1865 appellant and appellee became owners of adjoining lots of land in a square extending from Second street, in the town of Vanceburg, to Ohio river, and bounded by alleys on eastern and western sides. The division fence was then, or, perhaps, had been previously built, and was thereafter kept up by them jointly, appellant taking care of that portion extending from Second street to a half-way point, and appellee the end next to the river.

In 1884 the portion it was the duty of appellee to keep in repair was destroyed by flood in the river, and was then reset by a son of appellee, though, according to the evidence, not in a durable or proper manner, and, consequently, appellee, in 1886, made a new fence extending from the half-way point to the river, which appellant claims was put about fifteen inches further upon his lot than the original fence stood, that he contends was on the true and long-recognized line of division between them. Hence this litigation, commenced by an action ordinary to recover the disputed land, but

an amended petition was subsequently filed, in which it was alleged appellee had, by changing the location of the fence, confused the boundary of the lots, and judgment was prayed establishing the actual division line between the parties. Following that amendment the action was, on motion of appellant, transferred to equity, and, upon final hearing, the chancellor, without intervention of the jury, rendered judgment, finding and fixing the true division line where the fence now stands, which was followed necessarily by a dismissal of the action.

It will be thus perceived the issue involved is purely one of fact, unless, as contended in argument, it be questionable whether the chancellor had a right, in absence of prayer by appellee for affirmative relief, to determine by the judgment where the true line of division is. It seems to us it was his duty to do so, because appellant had himself asked such judgment, and certainly is not now in a position to complain that it was done. Besides, decision of the actual location of the division fence necessarily involved the ascertainment and fixing of the division line.

The evidence upon the issue of fact is very conflicting; various objects along the line are identified and described, which, according to the opinions of appellant himself and his witnesses, satisfactorily show the present fence is not where it was in 1884, and had been for more than fifteen years previously. But, on the other hand, appellee and his witnesses seem to be equally satisfied the fence is precisely where it was before 1884, and by statement of facts explanatory, or contradictory, render appellee's theory as plausible as that of appellant.

There being such conflict in the testimony, it seems to us the evidence of the surveyor should have a controlling influence, especially as there is not a decided preponderance of the evidence in favor of appellant, the plaintiff. The report and testimony of the surveyor is that, beginning the line at the point on Second street where the division fence, put up by appellant, intersects it, and continuing it the course of that part of the fence to the river, the new fence put up by appellee, in 1884, is on his, and not appellant's, side of the line. While a division fence, agreed to and acquiesced in for fifteen years by the parties themselves, is generally to be regarded as the true division line; still, in case of doubt as to the real location of such fence, the line should be established by the court where it ought to be, according to actual survey or demonstration by a competent surveyor.

Such being this case, we do not feel authorized to disturb the judgment of the chancellor, and it is affirmed.

BAKER, GINN & CO. V. FARMERS' TOBACCO WAREHOUSE CO.

(*Filed September* 25, 1890.)

Surety—Guaranty—Breach of contract—Appellants executed to appellee the following writing:

"CARROLLTON, KY., August 2, 1889.

"We agree to, and with the Farmers' Tobacco Warehouse Company, that Hanks & Co., of Carrollton, will well and truly carry out and fulfill their contract with said warehouse company, in the advance of supplies and money to farmers on growing crops, and that said Hanks & Co. will pay over and return to said warehouse all amounts so advanced on the present growing crops. BAKER, GINN & CO."

Appellees in this suit seek to recover of appellants, on said writing, money received by Hanks & Co. of appellants on this contract. It is urged as a defense that the money was furnished to Hanks & Co. by appellee, under a contract different from that mentioned in the writing. *Held*—That it is immaterial whether Hanks & Co. were to make advancements to the farmers out of money and goods from their store, which appellee were to re-imburse to them, or whether the money, with which said advancements were to be made, was to be furnished to Hanks & Co. before the advancements were made, as, in either event, the terms of the contract were complied with, and the object of appellee was accomplished by notes being executed by the farmers for such advancements, and their undertaking to ship the tobacco to appellee's warehouse. The rule which requires that the contract of a guarantor or surety must be construed strictly, does not apply in this case, as the contract of guaranty left the details of the contract between Hanks & Co. and appellee to the discretion of the principals, and as long as that discretion is not abused, so as to amount to a fraud upon the guarantor or surety, he is bound thereby. No abuse of such discretion being shown in this case, the answer presented no defense.

John Roberts, R. W. Masterson, Thomas J. McElrath and John K. Goodloe for appellants.

Gibson & Gibson for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellants executed to the appellee the following writing:

"CARROLLTON, KY., August 2, 1889.

"We agree to, and with the Farmers' Tobacco Warehouse Company, that Hanks & Co., of Carrollton, will well and faithfully carry out and fulfill their contract with said warehouse company, in the advance of supplies and money to farmers on growing crops, and that said Hanks & Co. will pay over and return to said warehouse all amounts so advanced on the present growing crops.

[Signed.] "BAKER, GINN & Co."

The appellee sued the appellants, as the sureties of Hanks & Co., to recover the amount of money that Hanks & Co. had received on this contract, and had not accounted for.

The appellants contend that the money was advanced to Hanks & Co. under a contract variant from that mentioned in the contract sued on; consequently, they were not bound for Hanks & Co's defalcation.

It is to be observed that Hanks & Co. and the appellee made the contract with the appellee after the writing quoted was signed by the appellants and delivered to Hanks & Co., and they and the appellee made their contract, in consideration of said obligation, to be responsible for its performance.

There is some difference in the recollection of the witnesses as to what were the terms of the contract made by Hanks & Co. and the appellee. The appellee's agent recollects that Hanks & Co. agreed with the appellee to buy the farmers' tobacco, and make advancements, on account of the tobacco, in money or goods, and take the farmers' notes for the advancements, payable to the appellee; the farmers also agreeing in said notes to deliver said tobacco to the appellee, and then the appellee was to let Hanks & Co. have the amount that they had advanced on said tobacco, &c., and Hanks & Co. were to be responsible to the appellee for these advancements.

On the other hand, Hanks and Little recollect the agreement to be that the amount of money that they needed, with which to buy tobacco, was to be advanced to them, and they were to take the notes of the farmers, payable to the appellee for the amounts advanced; the obligors were to bind themselves to deliver their tobacco to the appellee, and such of them as Hanks & Co. should not deem responsible, should give mortgages to secure the performance of their undertaking, and that Hanks & Co. were to be responsible to the appellee for said advances.

It is certain that one or the other of said agreements was made. Is either of them variant from the obligation sued on? Let us see. The obligation obliged the appellants, first, to be responsible for Hanks & Co's performance of their contract with the appellee, in the advance of supplies and money to the farmers on their growing crops; second, that said Hanks & Co. would pay to the appellee all amounts it advanced on the growing crops. It is to be observed that there is no particular contract to be made on the part of Hanks & Co. with the appellee, mentioned in the first part of the appellants' obligation. According to said obligation the only contract contemplated was that Hanks & Co. were to buy the farmers' growing crops of tobacco, and make the advancements on the tobacco, and the appellee was to furnish the means with which to make the advancements. It seems clear that the foregoing is the only rational interpretation to be given to the language used. The details of what said contract was to be were not given, and if its details did not make it variant from what is expressed above, the appellants are bound. Then, according to said contract, Hanks & Co. were to buy the farmers' growing crops of tobacco, and make advancements thereon, in either goods or money, and the appellee was to furnish the wherewith. Now, the appellee's object was to acquire a right to the farmers' growing crops of tobacco, and the usual way was to purchase them and make advancements thereon. To accomplish this arrangement it agreed with Hanks & Co. that they should make the purchases and the advancements, and the appellee was to furnish the amount of these advancements at some stage of the transactions, either to Hanks & Co., with which to pay to the farmers, or to Hanks & Co. to re-imburse them for their making the advancements. In either case the advancements on account of the purchase of the crops of tobacco were made by the appellee; in either case the advancements are made by Hanks & Co. as a go-between. Whether he advances on the tobacco purchase with his own money or that of the appellee, their purchase is for it. If they pay out of their right pocket with one hand, they put the same amount of the appellee's money in their other pocket with their left hand. In either case it is substantially the appellee's advancement, and is made on the purchase of tobacco for the appellee. Therefore, as the purchase of the crops of tobacco and the advancements thereon were for the benefit of the appellee, and as said purchase and advancements were the objects desired, and for the performance of which the appellants obligated themselves, we can see no difference, so far as the appellants are concerned, in the appellee's giving the money to Hanks & Co. with which to advance on the tobacco contracts, and the payment of the same amount to them on account of their advancements in their own goods or money. In either case the same end was accomplished; and for a failure of the appellee to get back their money, thus advanced on either of said contracts, the appellants are responsible.

It is clear, as a general rule, that where, as in the case of a guar-

antor or surety, the consideration does not move to the guarantor or surety; he is bound solely by the contract, and a close adherence to the letter of the contract is the only equitable rule. Although the alteration of the contract is only partial, and the principal is still under obligations to that contract, though varied in some particulars, the answer of the guarantor or surety that the contract to which he agreed no longer exists as a whole, and that he is not bound by the contract that has been put in its place, is quite sufficient. But in the nature of things this rule can not obtain in a case where the terms of the proposed contract are not agreed on in detail; but if the detail thereafter agreed on constitutes the contract, the performance of which was guaranteed, the guarantor or surety is bound on his obligation of guaranty, although the detail is variant from what he had hoped it might be; that is, one manner of performance less expeditious, or less practicable, or safe, might be agreed on, instead of another more expeditious, practicable, or safe. This, by the silence of the guarantor or surety, he agrees to leave to the discretion of the principals, and as long as that discretion is exercised in a manner not so abusive as to amount to a fraud upon the guarantor or surety, he is bound thereby. As said, the appellants bound themselves that Hanks & Co. should buy growing crops of tobacco and make advancements thereon, and that they should pay the appellee the amount of the advancements, the appellee having furnished the same. The manner of the performance of this contract having been left to the discretion of the principals, and the manner of the performance having been essentially within the scope of the contract, and complied with the terms thereof, the appellants are liable thereon. If said obligation be construed to be a guaranty, it is not such an one as requires notice to appellants as to the amount of the advancements, and if it was necessary to give the appellants notice of the acceptance, it clearly appears that they had such notice. It is unnecessary to notice in detail, in this opinion, the other grounds of defense; it suffices to say that they are not available.

The judgment is affirmed.

FARLEY V. CLORE, &C.

(*Filed Sept.* 18, 1890—*Not to be reported.*)

Judicial sales—The record in this case showing no error in rendering judgment for any of the lien debt not due, and the land having been properly advertised before sale, the judgment is affirmed.

Brown & Ward for appellant.

Sol. S. Sizemore for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

This case is brought here on exceptions to the commissioner's report of the sale of land to satisfy the vendor's lien. In the absence of a brief by the appellant, after an examination of the record, we find no error of which the appellant should complain. It is alleged that the land is susceptible of division, and there is nothing show-

ing that the land was sold for any part of the lien not due when the judgment was rendered. The land was properly advertised and the proceedings regular.

Judgment affirmed.

BLAND'S ADM'R V. BLAND, &C.

(Filed Sept. 20, 1890.)

Trusts—Conditional devise of rents and profits—Equitable interests in property subject to debts—After a return of *nulla bona* against the appellees, E. U. and J. H. Bland, an equitable action was instituted to subject to the payment of their debts, property, or the profits thereof, to which they were entitled under the will of their sister. By the provisions of her will their sister directed that her property, real, personal and mixed, be held in trust, and that the trustee should pay to her brothers one-half each of the rents and profits arising from said estate free from their creditors; but if any creditor of said brothers should attempt to subject their interest in the profits to the payment of their debts then such rents and profits should be held and invested by said trustee as a permanent fund, which her brothers, at their deaths, could dispose of one half each absolutely.

Held—That the principal of said estate belonged to the brothers, and was subject to their debts, although the testatrix had attempted to put the entire estate beyond the reach of creditors of her brothers. Such attempt being inconsistent with public policy and repugnant to the statute failed to accomplish her intentions, as the beneficial intersts of her brothers in the principal fund remained under their control. The conditional forfeiture attached only to the *rents* and *profits*. The personalty should first be applied to the payment of debts, and next the chancellor should rent out the property until the rents should pay the debts, but if the rents of the real estate should be insufficient to pay the debts in a reasonable time then a sale of so much of the realty should be made as will satisfy the same.

J. P. Hobson for appellant.

Bush & Robertson, E. D. Walker and Wm. Lindsay for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Holt.

The administrator of Henry Bland having obtained a judgment and a return of *nulla bona* against the appellees, E. U. and J. H. Bland, brought this action to subject to the payment of his debt property, or the profits thereof, which he claims is held in trust for them under the will of their sister, Maria Bland.

The question is, whether under its provisions they own any estate or interest which can be subjected by suit to the payment of the debt.

The will provides:

1. "I bequeath and devise to the trustee hereinafter named all the property not otherwise disposed of that I may possess and own at my death, real, personal and mixed, in trust and for the following purposes:

"It is my will, if it can be effectuated, that my brothers, Evarts and James, shall each annually (or at shorter periods in discretion of said trustee) receive from said trustee the rents, interest, dividends and profits of my estate, each one half thereof. It is also my desire that their interest and that of each alone in the rents, &c., of my

estate shall in no manner, directly or indirectly be subject to the debts of my said brothers, or either of them, which now exist, or which they may hereafter create, and being advised that if the right of my said brothers, or either of them, in and to said rents, &c., is made absolute, certain and indivisible that their creditors, contrary to my wish and will, may possibly subject the said rents, dividends, &c., to their claims. Now, therefore, to meet this state of case, I declare the right of my said brothers to receive said rents, profits, &c., shall only accrue annually, and that the same shall be paid one-half to each by my said trustee for their own, their present or future use, or for their voluntary disposition thereof, and if by any legal proceedings against said trustee, or my said brothers, or either, the said rents, &c., shall be *attempted* to be subjected to the debts of my said brothers, or either, then the rents, interest, dividends or profits, for that of both or of the one whose interest is sought to be subjected, shall be added to the fund referred to in the next item and my said brothers shall receive no part thereof, or at least the one for whose debt it is sought to be subjected.

2. "It is my wish that the principal of my estate shall be so invested and kept invested as that it may produce a fair and reasonable profit and dividend. It is also my wish that so much of the profit, &c., of my estate as shall not, under the preceding item, be paid to my said brothers shall be treated thereafter as principal of my estate to be invested in such way as to yield profit.

3. "If either of my said brothers, Evarts or James, shall die unmarried and childless, then the provisions of item one shall be for the benefit of the survivor during his life, but the one so dying first *may by will devise one-half the principal of my said estate to whom he soever desires*, but such devise not to take effect until the death of the surviving brother, who, meantime, shall receive the entire profits, &c., subject to conditions of item one if creditors attempt to intervene, and the survivor, Evarts or James, *may dispose of the other half of my estate then remaining by will as he desires*. But if either or both of my said brothers, Evarts or James, shall die intestate, then the one-half of my estate which he might have disposed of by will shall pass to his children, if any he has, or if none, then to the children of his surviving brother, jointly with my sister, Lavina, and brother, Strother, or their heirs or devisees."

By subsequent clauses it is provided that if Evarts and James, or either of them, at any time become free of debt, then one-half the estate is to be conveyed absolutely to the one so free; and in the event both become free or die, the trust is to terminate; also if the trusteeship should be vacant the county court may, upon their motion or that of the survivor, appoint a trustee; also that the trustee may, with their consent or that of the survivor, make investments or sell the property and re-invest the proceeds, but all to be held as principal of the estate; or instead of renting the real estate the trustee may permit them to occupy it or part thereof, a fair rent to be charged, and enforced as a lien upon the crop if their creditors attempt to subject it; also that the trustee may make all necessary improvements or repairs with their consent, or that of the survivor, and they may agree upon his compensation.

It is manifest the purpose of the testatrix was to give to these two brothers her estate without its being liable for their debts. The policy of our law, and in fact its express provision, forbids the creation of any trust by which this may be accomplished.

Section 21, article 1, chapter 63, of the General Statutes, says:

"Estates of every kind held or possessed in trust shall be subject

to the debts and charges of the persons to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned a like interest in the property held or possessed as they own or shall own in the use or trust thereof."

Accordingly, this court has always subjected property held in trust to the payment of the debts of the *cestui que trust*, unless a discretionary power was given to the trustee to withhold all payment or benefit from him. In such a case there exists no ownership by the *cestui que trust* in the use of the property. He has no beneficial interest. The ownership is in the trustee with the power to give or not, as he may please. There exists no claim which the *cestui que trust* can enforce against the trustee, and, therefore, no right exists in the debtor which the creditor may by substitution enforce.

The will of Maria Bland, however, creates no such trust; but one is created in the profits of the estate, which the will provides shall be forfeited in case the creditors of the *cestui que trusts* attempt to subject them to the payment of their debts.

This having been done by the institution of this suit, it is now claimed that, *ipso facto*, they have been divested of all interest in the estate.

It is contended that the testatrix had a right to annex a condition to the bounty; that she had a right to say it should be defeasible in a certain event, and that this cannot be said to be in fraud of any creditor of the *cestui que trust*.

Trusts created by will are to be regarded according to the intention of the testator, unless it be contrary to law or public policy. He can not so execute his will that a compliance with it will result in a violation of law. He can not override the statute. The power to make the will comes from it. The statute, *supra*, however, only subjects trust estates of every description to the debts of the *cestui que trust;* and it is said that here, by the happening of the contingency named in the will, which was to work a forfeiture, no trust exists.

Conceding this to be true, yet it will be noticed the intended forfeiture relates alone to the profits of the estate; and, in the event they do not go to the conditional *cestui que trusts*, they are to become a part of the principal of the estate.

The case is unlike that of Marshall's trustee v. Rash, &c., 87 Ky., 116, because there the portion of the *cestui que trust* was given to him absolutely, but with discretion in the trustee, in whom the control or title was vested, to pay him such portions of the profits and in such manner as he might think best. This was but giving him a reasonable discretion in the matter; one which he was bound to exercise in good faith, and the reasonable exercise of which a court would compel for the benefit of the beneficiary. In that case both the estate and the right to the profits belonged to the *cestui que trust*, the title and control being vested in the trustee. There was no question of forfeiture in the case, or of the existence or non-existence of an estate in the debtor, and it was properly subjected to the payment of his debts. The statute applied in that case.

It will not do to say that the intention of the testator must be executed without regard to the existing law. Suppose he were to give a fund in trust, and merely provide that it should not be liable for the debts of the *cestui que trust*. To subject it to them would violate the testator's intention, and yet no one will claim that it could not be done. The testator must, in making his will, conform to the existing law.

Upon the other hand, the case of White v. Thomas' trustee, &c.,

8, Bush 661, relied upon by the other side, is not like this one. There the *cestui que trust* had no power to dispose of the estate. The property was devised to an executor in trust for a person with permission to the executor of affording to another party the use, or the value of the use, of a part of it; and the creditor of the latter attempted to subject this use to the payment of his debt. The mere use was given it to terminate if any sale should be attempted by the donee or any creditor.

In this case, however, the provision of the will, relative to forfeiture, relates merely to the profits of the estate; and it is provided, that in the event of the happening of the condition of forfeiture they are to become a part of the principal of the estate.

Undoubtedly a testator is under no obligation to provide for the payment of the debts of the devisee. It is, of course, no fraud upon the creditors if he does not do so. He may condition his bounty as suits him, if he violates no rule of law. He may provide that it shall cease upon the bankruptcy of the donee and go to another; also that this shall take place upon the filing of a creditor's suit to subject the estate to the debt of the first donee. Bramhall v. Ferris, 4 Kernan, 41.

He can not, however, substantially give the estate to the debtor, and at the same time place it beyond the reach of his creditors.

Here the testatrix gives to her two brothers the absolute power of disposing by will of the estate.

It is not a mere power of disposition to some particular person, or for some particular purpose; but they may by will dispose of it in any way they desire. This unlimited power of disposal is utterly inconsistent with the idea that the party possessing it has no interest in the property.

It is only in cases where the happening of the event has divested the devisee of *all* interest in the property that the courts have said there was nothing that could be reached by his creditors. As careful an examination as we have been able to make shows this to be the fact.

In this instance by the happening of the event named in the will the profits, instead of being paid to the *cestui que trusts*, became a part of the principal of the estate, with the power in them to dispose of it all by will as they please.

It can hardly be said there was any forfeiture of the profits as to them, and while the case undoubtedly is of a character warranting discussion *pro et con*, yet, regarding all the provisions of the will, the property is substantially that of E. U. and J. H. Bland.

The testatrix desired to so provide that their creditors could not reach it. This she evidently attempted to do; but she also undoubtedly thought and intended that even after the happening of the event, which would add the profits to the principal of the estate and stop their payment by the trustee to her two brothers, they would still be the beneficiaries of the estate. This being her intention, and this being the real effect of the will, the property is liable to their debts. The law regards the substance rather than the form, and persons disposing of their property by will can not be permitted to really make a debtor the beneficiary of their bounty, and by evasion defeat the statute for the protection of the creditor. The judgment sustaining the demurrer to the petition and dismissing the action is reversed, with directions to the lower court, in the event no valid defense is presented to the appellant's debt, to apply to its payment the personalty of the estate, and if need be rent out the realty for this purpose; and if this will not satisfy it within a reasonable time then a sale of so much of the realty as may be necessary will be

ordered, and for all further necessary proceedings consistent with this opinion.

BULL, &C. V. KY. NATIONAL BANK.

(*Filed Sept.* 30, 1890.)

1. *Trusts—Construction of wills—Defeasible life estates*—The testator, after devising certain specified property to his two sons, to be held in trust by his executor, and to be controlled by him during the life-time of said sons, Robert and Edward, the executor to pay, in quarterly payments, the net proceeds of the rents and profits to the beneficiaries, provides, in his will, as follows: "*The said property shall not be in any manner encumbered by, nor shall it or its rents or profits be in any way subjected to, the debts of my son, Edward, either by process of law, or by any order, assignment or contract he may make, and should it at any time be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or encumbered by him, then, in that event, I direct that my executor shall thenceforth pay the rents and profits of the said property to the wife of said Edward for her separate use, free from the debts or control of her said husband.*"

In an equitable action by the appellee to subject the interest of Edward in the property to the payment of his debts, *Held*—That by the provision of the will cited a trust estate for life in the rents and profits of his estate vested, subject to be divested upon the judgment of this court, subjecting any portion of said rents and profits to the payment of the debts of said Edward; but the rents and profits accruing, up to the date of the delivery of this opinion, are subjected to the payment of said debts. The rents and profits accruing thereafter shall constitute the separate estate of the wife of Edward. Chapter 63, article 1, section 21, General Stautes, can have no application to this case, as here the beneficial interest in the *cestui que trust* ceases to exist upon the happening of the event annexed to the devise, and becomes vested in his wife, so there is no estate in Edward for either himself or his creditors, and as the devisor, his father, had the power to make such a limitation or create the defeasance, when disposing of his own estate, neither Edward or his creditor can complain.

Equitable life estates, or a beneficial interest in the debtor, can not escape subjection to the payment of his debts, but here he has no estate, because the debtor becomes divested by the very terms of the will that neither misleads or deceives the creditor, who is trusting the beneficiary in the business transaction.

Divesting one of his life estate in rents and profits is equivalent to divesting him of all interest whatever in such estate, he having no interest, except in such rents and profits.

2. *Novation—Presumptions as to findings of fact by chancellor*—The findings of a chancellor, upon the issue of releasing the trust estate from liability on a note by the execution of a new note by the trustee, as an indorser in his individual capacity, will not be disturbed where the evidence is conflicting, as it will be presumed correct.

Jno. C. Russell, Cary & Spindle and Richards & Harris for appellants.

H. L. Stone, Hargis & Eastin and P. B. Muir for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

These consolidated actions were heard together, and a judgment rendered for the bank.

The defense relied on by the appellant is, that the bank (appellee) agreed that new notes should be executed for the old notes then owing, and that William Cromey's name, as an individual indorser, should be substituted in lieu of his name as executor and trustee of Bull's estate, thereby releasing the estate of Bull from any and all responsibility upon the paper. This new paper was executed in January, of the year 1886, and was given, as defendants allege, for the purpose of releasing the liability of the trust property, and making Cromey individually liable, when, in fact, the defendants say the bank, in violation of its agreement, entered into an arrangement with the trustee, unknown to them, by which his liability as such was still continued, regardless of the arrangement under which the new notes were executed, the same now in controversy. They, therefore, deny the right of recovery.

The agreement or consideration for the renewal of these notes is established by Mrs. Bull and her sons, but denied by both Fetter, the president of the bank, and by Cromey, the trustee, who, in substance, say that the entire arrangement, including that fixing the liability of the trustee, was made at the instance of the appellants.

The appellants were the principal obligors in the greater part of this large indebtedness, and it is unreasonable to believe that the bank would release solvent parties to obtain as an indorser or security one who was insolvent. The evidence, however, is conflicting, and the chancellor, in our opinion, ruled properly on that branch of the case. The testimony shows that the notes, originally discounted by the bank, was for the benefit of one or the other of the parties to them. The bank parted with its money in good faith, and to those who are now parties to the renewal paper.

The loans may have been large and unusual, but in the absence of fraud or bad faith on the part of the appellee the liability of the parties to the paper can not be questioned, and the right of the appellee to come into a court of equity, after exhausting the remedy at law, for the purpose of obtaining relief, is equally plain.

The important question, and the only one necessary to be considered, arises from the will of John Bull, in that part of the devise to each of his sons, by which it is provided that the rents and profits of the estate devised shall not be subject to the claims of any creditor.

Under our statute, construed by repeated decisions of this court, it has been held, that where there is a beneficial interest in the property, that interest may be subjected to the payment of the debts of the beneficiary. In the recent case of Bland's adm'r v. Bland, decided at the present term, the interest of the devisee was held to be liable, upon the ground that the provisions of the will attempted to exempt the estate, or its rents and profits, from being subjected to the payment of the debts of the devisee, and at the same time vesting in the devisee the absolute power of disposing of the whole estate as he might deem proper. That was a case in which the benefits of the rents and issues were taken from the devisee and added to the principal, with the power given the devisee to dispose of it by will as he pleased.

It is said, in the opinion in that case, that the profits or income of the estate was not, in fact, forfeited, by reason of the attempt by the creditor to subject it, but only added to the principal, thus enlarging the estate, the disposition of which was left alone to the beneficiary, if he saw proper to devise it; that being invested with such

a title, to hold that the devisee had no interest, is contrary to the plain provision of the will.

In the case before us the testator devised certain specified property, to be held in trust by his executor, and to be controlled by him during the life-time of Edward and Robert (the sons), the executor to pay, in quarterly payments, the net proceeds of the rents and profits to the beneficiary. Following this devise to Edward, and a like devise to Robert, is this provision: "The said property shall not be, in any manner, encumbered by, nor shall it or its rents or profits be, in any way, anticipated by, or in any way subjected to the debts of my son, Edward, either by process of law, or by any order, assignment or contract he may make; and should it, at any time, be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or encumbered by him, then, in that event, I direct that my executor shall thenceforth pay the rents and profits of the said property to the wife of said Edward for separate use, free from the debts or control of her said husband." The feature distinguishing this case from that of Bland v. Bland is, that in the case of Bland the devisee was never divested of his interest or deprived of his title, but was, in fact, given such an absolute estate as to exclude the idea that he was not, in any sense, a beneficiary. Here the use and, we might say, the life estate ceases in Edward, and becomes vested in his wife, so there is no estate in Edward for either himself or his children, and as the devisor (his father) had the power to make such a limitation, or create the defeasance, when disposing of his own estate, neither Edward or his children can complain. Equitable life estates, or a beneficial interest in the debtor, can not escape subjection to the payment of his debts; but here he has no estate, because the debtor becomes divested by the very terms of the will, that neither misleads or deceives the creditor, who is trusting the beneficiary in the business transaction. It is said, however, the corpus of the estate is in Edward, and the rents or profits vested in his wife. The estate is in the trustee, with the right of Edward to the rents, to be paid him by the trustee as they become due, and upon the conditions expressed in the will of his father. When you take from the principal devisee the use or enjoyment of the income, and this is all he is entitled to, nothing remains of the estate for him. There is no estate left in Edward that a chancellor can reach, or to which Edward could assert any right to, after the happening of the event, by which he is divested of title, and his wife becomes entitled to the rents and profits. It is argued that this is a mere evasion of the statute, by which it is provided that "estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit they shall be respectively held or possessed," and that no such devise should receive the sanction of this court. That it was the purpose of the testator that his sons should use and enjoy the property devised to them, unmolested by any creditor, is apparent, but this affords no reason for disturbing the provisions of the will on this subject, if, by its terms, their equitable interest was passed to others. It is a mistaken idea to say that the devise gave to the sons an equitable life estate in the property, or in the rents and profits, as by the provisions of the will, under which this title is passed to the sons, they are to become divested of the title upon a certain contingency. The testator was not required to anticipate the extravagance of the beneficiaries of his bounty, so as to provide for those who might thereafter become their creditors; but, on the contrary, the property devised, belong-

ing to him, he had the right, and it was his duty to secure the sons, and, particularly, their families against such a reckless use of their property as might reduce them to want. There is nothing in such a provision as effects a sound public policy, or makes this devise of the testator superior to the law of the land. The testator might as readily have devised the estate, in the first place, to the wives of his two sons, or any they might thereafter have, in order to preserve it for their families, and the argument could then be used that this was done merely to enable the wives to hold the property that his sons might enjoy it, and still the devise would be upheld. Counsel seem to have overlooked the fact that this was the testator's own property he was disposing of, and not his sons, and argue as if the testator had no power to annex a condition to the devise that might terminate at once all interest the sons had in the property. It is said there is no authority or precedent to be followed in this case, but after a careful examination of a number of cases, we find the right of a testator to make such a disposition of his estate fully sustained, and have failed, by reference to the authorities referred to by counsel for the appellees to find any single case in which their view of this question is maintained. Some of the authorities go to the extent of holding that the interest and dividends of real or personal property held in trust may be enjoyed by the beneficiary, without liability for his debts. Nichols v. Eaton, 91 U. S., 716.

This court has held the contrary doctrine, but has never gone so far as to adjudge that the beneficiary might not lose his estate, upon the happening of a contingency provided by the terms of the trust. A testator can not vest the title in a trustee for the use of another, and permit its enjoyment by the *cestui que trust* without subjecting it to the debts of the latter. This is the rule in this State, and the doctrine recognized in this case is not inconsistent with it.

While the trustee holds the property for the use of the debtor he holds it subject to the claims of his creditors, but when the property or its profits is to be applied to the use of the beneficiary (the debtor) for a limited period, or until the happening of a certain event, when the title or the entire profits is to vest in another, then the rights of the creditor to subject it for the debt of the first taker is gone. The testator provides, "that if at any time it should be held by a court of last resort that said rents and profits are liable to be subjected to the debts of Edward, or liable to be anticipated or encumbered by him, then, and in that event, I direct my executor to pay the rents and profits of said property to the wife of Edward for her separate use, free from the debts or control of her husband." Why should the executor hold the rents and profits any longer than the event contemplated by the testator? The will provides that he shall not, and the credit given the devisee is based on the title acquired under the will of his father. If he had a life estate, or was entitled to the rents and profits for life, without any condition or limitation as to his right, the property could be subjected, and the claim of the creditor enforced; or, if any income was in the hands of the trustee that the beneficiary could demand paid over to him, as a matter of right; to that extent the creditor would obtain relief, as in this case the income and profits were due and payable to the appellant up to the time he was divested of title, and the chancellor could subject it. It may be proper to consider the authorities, English and American, on this subject. In Lewis v. Lewis, 6 Simms., —, the testator devised certain lands to trustees to recover rents, and to pay a certain sum for the benefit of his son's family,

and the residue for the use of his son, with no power on the part of his son to charge or alienate it, and that it should not be subject to the claims of creditors. The will also provided that if the son violated the provisions of the trust the residue should not be paid to him, but should be accumulated. The trustee conveyed the property for creditors, and it was held that his interest in the residue ceased.

In Brandon v. Robinson, 18 Vesey, 433, Lord Eldon said: "There is no doubt that property may be given to a man until he shall become bankrupt; it is equally clear, generally speaking, that if property is given to a man for his life, the donor can not take away the incidents of a life estate." If a condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited. This statement of the lord chancellor embraces the whole law in this class of cases.

In the case of Oldham v. Oldham, equity cases, volume 3, before the Master of the Rolls the question was, whether Oldham had been divested of his life interest in an annuity by entering into a composition with creditors, the annuity to pass to the wife in the event he should anticipate or dispose of the fund, or should have a flat in bankruptcy duly issued against him. He pledged this future income, and in a contest between the creditors of Oldham and the trustees it was adjudged that the stipulations of the trust should be executed, and that his life interest was gone.

The case of Shee v. Hale, 13 Vesey in Chancery, 404, John Wortham, by his will, bequeathed to his son, through trustees, an annuity of 200£ during his life, with the condition that it was to fall into the residium of the estate, in the event his son should sell, assign, or part with the same as a security for money to be advanced, or should anticipate the same by pledging, &c., except only as to the then next annual quarterly payment. The son took the benefit of the insolvent act, and his assignees, claiming the annuity, it was held that the assignees could not take the fund, but that it passed as directed by the will.

The doctrine of the English courts is well settled on the point involved, and the courts of this country have followed it; and in Nichols, assignee, v. Eatin, 1 Otto, 716, the Supreme Court was not disposed to accept the doctrine, in so far as restricted the powers of testamentary disposition, so as to prevent the beneficiary from using and enjoying the benefits of the devise against claims of creditors. In that case the bankruptcy of the devisee was, by the will, to terminate all his interest in the estate, and the creditors were denied the right to the estate, or its profits, after the act of bankruptcy. Where the debtor, who is the beneficiary, has any substantial right in the property that a chancellor can expose, then, so long as this right continues, his interest is liable for his debts, but no longer. The event happening, upon which the interest passes to another, the creditor is without remedy.

Nor are we without precedent, establishing the doctrine that the event upon which the beneficiary may be divested of title may be the decision of a chancellor, subjecting the interest or income to the payment of the debts of the *cestui que trust*.

Joshua Ferris died in 1848, leaving this codicil to his will: "I hereby declare, in making provision in my will, that the income of one-third of my estate, after payment of debts and legacies, should be paid to my son, Myron H. Ferris. It was my design to make provision for the support of *himself* and family, which could not be taken from them by his creditors, and for the purpose of making

myself more plainly understood on this point, and to carry out said design, it is my will that in case creditor's bill shall be filed, or any proceedings instituted against my son, Myron, for the purpose of reaching the interest or income so provided for him, and divesting it from the object intended by me, and a decree or judgment obtained for that purpose, that then, *from that period*, the said interest or income shall cease, and I direct my executors, from thenceforth, to expend the said interest or income for the support of the family of said Myron H. Ferris, either by paying the same to his wife, or in any other practicable way, in their discretion." Bramball v. Ferris, 14 N. Y., 41. The controversy was, in that case, between the creditors of the son and the devisees over or the executor.

The New York Court of Appeals was then presided over by Denio, as chief justice, with three associates, and the Supreme Court judges, four in number, ex-officio members of the Court of Appeals at the time that case was decided. Separate opinions were delivered from each court holding, without dissent, the provisions of the will of Lewis, that the interest of the devisee should cease on the recovery of a judgment by creditors, was valid.

In the case of White v. Thomas, trustee, 8 Bush, 661, the will provided that the right of another to use the property devised should not be subject to alienation or sale, and that the right to the use should terminate upon an attempt to do so by the beneficiary or her creditors. This provision was upheld, on the ground that Mrs. White had no interest in the property. These cases, it seems to us, should be conclusive of the question raised, and in no wise subverts the rule of law that one vested with an interest in property can not use or occupy it to the exclusion of creditors. Nor can the devisor, who has attempted to secure an estate for the benefit of those who are to take under him, be charged with fraud in endeavoring to anticipate the wants of his sons or their families, or liable to the charge of contriving, in violation of law, to place the estate devised beyond the reach of his son's creditors. It was his estate. He had the right to place the limitation upon its duration; and the creditor, dealing with the son, knew the nature of his title.

A judgment subjecting the income, due at the date this opinion was delivered, should be entered, and then all the interest of the sons ceases in the profits and income of the property.

Judgment below is reversed that such a judgment may be entered; in all other respects, it is affirmed.

FIRST NATIONAL BANK V. LANCASTER.

(*Filed Oct.* 16, 1890—*Not to be Reported.*)

Fraudulent conveyances—Two bachelor brothers, owning and operating a large distillery and farm, became involved financially and made an assignment for the benefit of their creditors. At the assignee's sale their brother, who was the owner of a distillery in Marion county, became the purchaser of the distillery and farm sold, and executed his notes for the purchase money. After the purchase, his two brothers remained on the farm and carried on the farming and distillery business for a number of years, as agents for their brother, the owner, and received as compensation for their services only a sum sufficient for their board and clothing, besides caring for their mother, who lived with them and who owned a dower interest in a part of the land. Shortly after the purchase a sudden rise in whisky enabled the brother to realize, from the product of his two distilleries, large

profits, with which he paid off his purchase-money notes, and purchased a distillery near Samuels' depot, which he placed under the control of his two bachelor brothers. Afterwards creditors of the two bachelor brothers, holding unsatisfied debts, filed their suits in equity, seeking to subject the property controlled by them to their debts, alleging that the purchaser was holding it in secret trust for them; or, if this could not be done, they prayed that the value of the skill and labor of the two brothers, which they alleged were of the reasonable value of $2,000 each per annum, be applied to the payment of their debts. *Held*—That the proof establishes the fact that the brother who purchased the property did not hold it in trust for his two insolvent bachelor brothers, they having no interest in it, nor the profits arising from it, being merely agents for the purchaser, and receiving only a support for themselves and mother as compensation for their services. Nor could the chancellor subject the value of their skill and labor for the benefit of their creditors, there being no contract for an amount beyond their support. Such contract is only a reasonable provision for his brothers, to whom he was under a natural and moral obligation to support. The chancellor will not compel an insolvent debtor to labor for the benefit of his creditors.

John A. Fulton, John S. Kelley, John D. Wickliffe, John W. Lewis and W. C. McChord for appellant.

Fairleigh & Straus, E. E. McKay, Charles Carroll and J. W. Thomas for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1879 two of the appellees, S. B. and I. M. Lancaster, being involved in debt and, in fact, insolvent, made an assignment of all their estate to Stephen E. Jones for the benefit of creditors. They were both bachelors, men of excellent business qualifications, and were at the time engaged in operating a large distillery, both being practical distillers. They owned a farm of about fourteen hundred acres that was well stocked, and upon it had many valuable thoroughbred race horses, or stock of that description. Their brother, R. G. Lancaster, lived in the county of Marion and operated a distillery, and was worth some $12,000 or $15,000. He purchased the most of the personal estate and all the real estate that was sold by the assignee, giving his notes for the purchase money, and, as the proof shows, with his two brothers as his sureties on the first installment notes for the land. The assigned estate failed to pay the debts of the assignors by $40,000, or approaching that sum. The bachelor brothers remained on the farm with their mother, who had a dower interest in part of it, and continued to operate the distillery and the farm, as was done prior to the sale to their brother, the decided preponderance of the testimony showing that they acted as his agents, under a power of attorney, and controlled and managed the farm and distillery in his interest, although enjoying the benefits resulting from their supervision, in the way of support and maintenance. Shortly after the assignment there was a sudden advance in the price of whisky, and their brother realized near $17,000 from the sale of whisky at his distillery, and the two brothers, who were managing the home property, met with a like success, so that in a short time Robert paid off the indebtedness to Jones and purchased an interest of two-thirds in a distillery, at Samuels' depot, for $4,000, and also purchased what is called the Withrow place, for $17,000, and erected

upon it a distillery costing about $10,000. This was all accomplished in a short space of time, and at the institution of these actions the two bachelor brothers were managing for their brother, Robert, as they say, and, as the chancellor below decided, an estate of the value of not less than $75,000.

The creditors of S. and I. M. Lancaster, whose debts were not satisfied in full out of the assigned estate, after exhausting their common-law remedy, instituted these several actions against the three brothers, alleging that all this property was paid for by S. and I. M. Lancaster, by reason of their own skill and industry, and that Robert is holding it for them in secret trust, so as to avoid the payment of the debts they owe to these appellants. They further insist that, should the property be adjudged to belong to Robert Lancaster, that he should be compelled to pay to the creditors of his two brothers the value of the latter's services, the testimony showing that the services of each were worth $2,000 per annum, and that they had received, under an arrangement with their brother, only a sum sufficient to board and clothe them, or to furnish them the ordinary expenses of living. The testimony conduces to show, and about which there is no controversy, that Sam and Mat, as they are familiarly called in this proceeding, superintended and, in fact, controlled this entire property, purchasing stock for the use of the farm and then selling it, purchasing corn and supplies for the distillery, making contracts for him, and acting in every way as if they were the real owners, with the exception that their contracts were made as the agents of Robert, who seems to have confided the entire management of the entire property to them. When making large investments it appears that the two consulted Robert, and that he often drew upon and used the proceeds of the distillery, as he claimed to be the real owner.

The three brothers all swear that when the purchase was made by Robert, of this large property from the assignee, it was made in good faith, and with no agreement or understanding that the property was to be held in trust for Sam and Mat; that the accumulations had been invested and the title made to Robert in the same good faith, and with no secret trust for their benefit, but for the reason that Robert, being the owner, was entitled to the profits. It is evident that Robert had made himself liable for all the purchase money to the assignee of his two brothers, and that both of them were then insolvent, with but little prospect of ever paying their debts. Under such circumstances had Robert the right to place them on, or permit them to remain on, this large estate, use and enjoy it for their own support, applying the products of the farm and distillery, beyond what was necessary for such a purpose, to his (Robert's) individual credit. It is plain that the rapid advance in the value of whisky enabled Robert to meet his pecuniary engagements, and while the skill, industry and attention of his two bachelor brothers contributed to aid him in making these payments, if at last it was the sale of the products of the farm and the distillery that belonged to him, is there any fraud upon creditors for Robert to agree with his insolvent brothers that they should receive no other compensation than such a reasonable expenditure as would enable them to live? They all swear that such was the agreement, and that this compensation they have received.

The two brothers had lived long on this large farm; it had been their home for many years. Their mother was then living on her dower interest, and Robert, knowing that any property acquired from the products of this large estate by his two brothers, Sam and

Mat, if given to them, would be seized by their creditors, saw proper to make such an arrangement as would place it in his power to provide for them, and at the same time secure to himself the profits resulting from what rightfully belonged to him. The creditors of his two brothers had no lien upon either their skill or ability to labor, and if they saw proper to remain at the homestead and perform such services as would afford them a living, and were to receive nothing more, their creditors have no right to complain. Their mode of living and their conduct in the control of the property was all within the knowledge of creditors. They lived in the same county, or the most of them, where the bachelor brothers lived and this property was located, and no concealment seems to have been made of the relation the brothers sustained toward each other as to its control. If such control and privileges had been given a stranger, the presumption of fraud might and would arise, but it is not unnatural or unreasonable that these two men, who had lost their all, and having no other cares than providing for their own support, would have willingly contributed their services upon the terms stated, to aid their brother in the discharge of the heavy indebtedness covered by his purchase at the sale of their property.

W. B. Samuels, who had an interest in the Samuels & Co. distillery, swears that the two brothers had no interest in it. He is disinterested as between the creditors and their debtors, and must have been apprised of the manner in which this part of the property was owned. It is true that facts appearing at first blush to be persuasive of good faith as to the transaction, may, by reason of even slight circumstances, show a fraudulent intent, but here there is nothing concealed and no circumstance or fact established inconsistent with the ownership of the property by Robert Lancaster. There was both a moral and natural obligation on the part of this brother to provide a means of living for his two brothers in their insolvent condition, and a like obligation on their part to lessen their claims to remuneration for services to be rendered Robert, with a view of enabling him to meet his pecuniary obligations. The property originally purchased, and no part of it, was subject to these debts, and, therefore, the creditors are not injured, unless the products of that to which Robert has the legal title, has been given by him to his two brothers. That there is both a legal and moral claim on the part of these debtors to satisfy their creditors, no one will deny; but this must be done out of their own estate. But where the services of a debtor have been rendered for a compensation agreed upon and understood, and for a brother to whom they were under obligation to aid, in the absence of proof showing a fraudulent purpose, or a secret holding for those performing the services, the chancellor should be reluctant in questioning the *bona fides* of parties directly connected with the transaction, who all, upon oath, place the ownership in a party to whom, under the circumstances, it ought to belong. If financial disaster had overtaken Robert, the loss would have been his, and when the sudden rise in commercial values happened to enrich him, there is no equitable reason for taking his accumulations from him, although the result, to some extent, of the labor and skill of his brothers.

Bump, on Fraudulent Conveyances, says: "Creditors have no power to compel a debtor to labor and earn the means to pay their demands. He may limit his contract to just such an extent as may be adequate to furnish him the means of a scanty subsistence, and in all this he violates no legal right of his creditors. He has the right to labor for another in consideration of the support of himself

and family." Page 269. It is argued that the services of these men, who were distillers, were worth $2,000 per annum, and for that reason the creditors should compel their brother to account for the value of those services. It appears that there were regular distillers at each distillery, overseers on the farm, and that the two brothers were the general supervisors of the work; that they were skilled in making whisky and in conducting the operations of the farm, and yet we would not be disposed to place such a high estimate on their services as has been proven by some of the witnesses, even in a controversy between two brothers, if no arrangement had been made fixing their compensation.

The only question to be determined in this case, however, is: Is the title to these accumulations, vested in Robert, to be held in secret trust for his brothers, so as to defraud creditors? If held for their use, in that way, the right of creditors should be enforced. The circumstances under which the services were rendered have already been stated, and with the sworn statements of the three brothers, aided by the testimony of others, the learned chancellor below has adjudged that no fraud exists, and in that conclusion we must concur.

Judgment affirmed.

L. & N. RAILROAD V. CONIFF'S ADM'R.

(*Filed October* 18, 1890.)

1. *Gross or wilful negligence—Damages for mental suffering and pain before death*—This action was brought by the administrator of an employe of appellant, who lost his life while engaged in the switch-yard, by being struck in the abdomen by a lever used in moving switches, and while cars were being backed along the switch The petition asks damages not only for the loss of intestate's life, but for damages for bodily pain and mental suffering which preceded his death. *Held*—That, as the petition does not state that intestate left surviving him a widow, or child, or children, no recovery can be had for the loss of his life, nor can a recovery be had under section 1, chapter 57, General Statutes, for bodily pain and mental suffering of the intestate before death, as that section provides a remedy for those only who are not employes of the company. No recovery can be had for ordinary negligence of the company, but in order to authorize a recovery for the bodily pain and mental suffering of the intestate before his death, it must be shown that such pain and suffering was the result of wilful or gross negligence on the part of the appellant, and as the evidence shows that the persons in charge of the train were competent to manage it, and were moving it in the usual manner, although neither the conductor nor engineer was in charge of it at the time, no case of either wilful or gross negligence is shown, which would authorize a recovery.

2. *Instructions*—An instruction, in which the jury was told that the company was liable, if those moving the train knew, or, by ordinary attention could have known, the danger of the deceased, was improper under the state of facts proven.

H. W. Bruce, Wm. Lindsay and Rountree & Lisle for appellant.

Edward J. McDermott and Avritt & Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

The action in this case seems to have been instituted for the purpose of recovering damages not only for the killing of the deceased, as authorized by the statute, but to recover for the pain and suffering of the intestate during the time intervening between the infliction of the injury and the death.

In the case of Jordan's ad'mr v. C. N. O. & T. Railway Co., 11, KY. LAW REP., 204, and in numerous other cases, it has been held that no recovery can be had for the loss of life where the person killed leaves no widow, child, or children, and for that reason it is no doubt sought to recover for the mental and bodily suffering of the intestate prior to his death.

In the case of C. N. O. & T. P. Railway Co. v. Adams' adm'r, 11 KY. LAW REP., 833, from the Scott Circuit Court, decided at the last term, it was held, in effect, that where one in the employment of a railroad company, while in the same grade of service, loses his life by the neglect of a co-employe in the same hand-car, at the time the injury was sustained, that no cause of action exists for the loss of life, or any other injury, caused by the one employe to the other. This, and nothing more, was decided in that case, the party causing the injury, and the one killed, being in the performance of the same service.

Section 1, chapter 57, provides that: "If the life of any person, not in the employment of a railroad company, shall be lost in this Commonwealth, by reason of the negligence or carelessness of the proprietor, or proprietors, of any railroad, or by the unfitness, or negligence, or carelessness of their servants, or agents, the personal representative of the person whose life is lost may institute suit and recover damages in the same manner that the person himself might have done for any injury, where death did not ensue."

It necessarily follows that the cause of action did not survive to the personal representative in this case, unless the injury was the result of gross or wilful neglect. Section 1 applies to those not in the employ of the company, and to recover where one dies from an injury caused by neglect on the part of the company, while in its employ, the personal representative must allege and establish gross or wilful neglect, and there can be no recovery for mere ordinary neglect. The intestate could have only recovered for gross or wilful neglect, if he had sustained the injury, and his personal representative can do no more. The question in this case is, has the personal representative made out a case of gross or wilful neglect?

The appellee's intestate was injured, as is alleged, by the negligence of the defendant in so operating its cars as to cause a lever, used by switchmen to shift the cars from one track to the other, to strike the intestate in the abdomen, causing his death. The intestate was in the employ of the company, in the switch-yard of the defendant, at the time of the injury, and it was his duty to protect rear cars in backing, or in going from the one track to the other. How he happened to be at the place where he received the injury, does not appear, as the uncontradicted testimony shows that the rails of the one track did not need changing, at the time, in order to enable the cars to go upon another track. We shall assume that his action was in the discharge of his duty, and that the facts show, when near the lever, the train moving back at the rate of three or four miles an hour, by spreading the rails, caused the lever to strike the unfortunate man. It seems that the machinery, with which the lever is connected, was unlocked, or had been tampered with, and it may be that the intestate was attempting to properly adjust it when the accident happened. The engineer had gone to perform a

call of nature at the time, but the train was being moved by one in the employ of the company, on the train, entirely competent to manage it; the conductor was attending the loading of some cars. There was nothing unusual in the movement of the train, or any reason to suspect danger; still, the young man happened to be near enough for the lever to strike him, and we have failed to see any proof showing either gross or wilful neglect, or even ordinary neglect, on the part of the company, causing the loss of this young man's life.

His brother gives in detail all that occurred at the time; makes a plain, honest and truthful statement of what transpired, and the other employes make a like statement, and, from the testimony, we can not say that these employes are to blame, in any manner, for the death of their fellow workman. The lever, or its boxing, may have been unlocked; the conductor may have been, as he was, engaged in loading scrap iron, and the engineer at the water closet; still, the train was moving slowly, by those competent to move it. The deceased saw it moving; made his way to the rear of the train and, when near the lever, the injury, as stated, occurred. No one had any reason to believe that the machinery for shifting the cars was out of order, or that the intestate was in a position where he might be injured. If they saw his danger, and failed to use proper precautions to prevent injury, the company would be responsible. The intestate, when entering the employ of the company, assumed to run the ordinary risks pertaining to the business, as well as to submit to the ordinary and usual mode of conducting trains by those in charge. The fact that the conductor was loading iron, and the engineer off the train, did not amount to wilful, gross, or ordinary neglect, if those on the train, the fireman and brakeman, were moving it in the usual manner. They were not guilty of neglect, and the intestate, entering the service of the company, assumes such risks as may arise from convenience, or from necessity, necessary to the moving of the train, and certainly when those left in charge have not been guilty of any neglect.

The instructions given, by which the jury was told that the administrator was entitled to compensation for the loss of his intestate's life, should have been refused. Nor should the jury have been told that the company was liable, if those moving the train knew, or, by ordinary attention, could have known, the danger, because not authorized by the facts proven. There is no evidence showing that the train was improperly managed, or that those in charge of it could have, by either ordinary or extraordinary care, avoided the injury. We can not, of course, anticipate the testimony that will be offered on another trial, but this judgment must be reversed, and is remanded for a new trial in conformity with this opinion.

MORTON V. DICKSON.

(*Filed Oct.* 23, 1890.)

Sheriff's sale—Ejectment—Equitable title to land held by stranger in possession—The purchaser of land of debtor, at sheriff's sale, having obtained a deed therefor, instituted an action in ejectment to recover possession of said land from one who, prior to obtaining the judgment on which the execution issued, had purchased the land from the debtor, taking from him a bond for title, and had taken possession of the land under his title bond. For

answer defendant alleged ownership by equitable title, accompanied by possession. In reply plaintiff alleged that the purchase money on the bond was not paid, and, therefore, the holder of the legal title, or those holding under him may maintain an ejectment for the land. From a judgment holding that, the purchase money being unpaid, the person holding possession under the title bond was a tenant of the holder of the legal title and entitled to notice to quit, and dismissing for want of such notice this appeal is prosecuted. *Held*.—That the answer presented a good defense. The holder of the legal title, or those claiming under him, could not treat the contract of sale as rescinded and maintain an action at law to recover possession of the land. He holds the legal title as a security for the purchase money, and his only remedy against the holder of the title bond is in equity for a rescission of the contract or for a specific performance of it.

Prior to the adoption of the Code, and in the absence of any statute the equitable defense could not have been made by the vendee under the title bond, even though the purchase money had been paid, but the remedy was an appeal to the chancellor for an injunction to prevent the entry upon a rightful possession. If the plaintiff had made his purchase and obtained his deed before the entry under the title bond, a different question would be presented, but in this case the action could not be maintained if demand had been made of the possession, and notice to quit given.

Wall & Worthington for appellant.

Cochran & Son and Edward W. Hines for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

On the 15th of September, in the year 1876, one O. P. Wright sold to John S. Dickson a tract of twenty acres of land, executing to Dickson a bond for title, by which he agreed to make to Dickson a general warranty deed to the land, upon the payment of the purchase money. On the 25th of June, in the year 1885, Dickson assigned this title bond to his wife, Margaret Dickson, reciting in the assignment that the purchase money had been paid. Dickson and his wife took possession of the land and have held it since the date of the purchase. In the year 1883 the appellant, Robert Morton, obtained a judgment in the Mason Circuit Court against O. P. Wright, the vendor of the land to Dickson, for $150 and costs, upon which an execution issued, and was levied on this land, for which Dickson or his wife held the bond for title. The land was sold and purchased by the appellant, who afterwards obtained a deed from the sheriff vesting in him, as he maintains, the legal title. He obtained his judgment and the deed under it, after the execution of the title bond and the delivery of the possession to Dickson, but prior to the assignment made by Dickson to his wife, the present appellee, her husband being dead. Having this sheriff's deed, Morton, the appellant, brought his action of ejectment against the wife, Margaret Dickson, to recover the land. An answer was filed by Mrs. Dickson, alleging that she was the equitable owner and in the rightful possession, under the bond for title executed to her husband and assigned to her; that the purchase money had been paid, and that the husband and wife were in the possession, under this purchase, long before any judgment was rendered for Morton, and that she (Mrs. Dickson) was in the possession when the execution was levied; in other words, the equitable title is relied on as a bar to the recovery. In the reply the execution of the bond is not denied, nor the fact of possession, but the recovery is based on the idea that the purchase money, being yet unpaid, the vendor, or

those deriving the legal title through him, may maintain an ejectment for the land, and the court below holding that, as the purchase money had not been paid, Mrs. Dickson was a tenant of the holder of the legal title, and entitled to notice to quit, and none having been given, for that reason dismissed the action.

The case was submitted on the pleadings alone, and counsel for the appellee maintains that the recital in the assignment by Dickson to his wife, shows that the money has been paid and must be taken, upon the submission of the case on the pleadings alone, to be true.

We infer the action was brought in the nature of an ejectment, as some of the authorities maintain, for the reason that the vendee, having failed to pay the purchase money under his executory contract, could be ejected by an action at law. Some, if not all, of the common-law writers say that a vendor may regain possession from the vendee, in an executory contract, after the latter has failed to perform it on his part; that the vendor may elect either to compel specific performance, or treat the contract as rescinded, and bring his ejectment. Sedgwick & Wait, on Trial of Title to Land, section 306. In such cases there must be a demand of possession or a notice to quit. A mortgagee invested, as at common law, with the legal title, was entitled to enter after condition broken, and if we were deciding this case upon the old common-law rule, or even as the law existed in our own State prior to the adoption of the practice that permitted equitable defenses to actions at law, we might consider the question presented by counsel; but such a practice belongs to the past, and now, when the equitable defense is presented, the chancellor will not rescind the contract, although executory, but will require the vendor to ask for a specific performance, unless there is fraud or some other equitable reason for rescission.

When in equity, and in the possession, the holder of a bond for title is treated as if he held the fee subject to the lien of the vendor, and this, necessarily, defeats the action of ejectment. Should the vendee repudiate his executory agreement, or if facts are made to appear showing the contract to be void, the action might be maintained, but the failure to pay works no forfeiture of the right of the equitable owner to the land, or invests the vendor with the right to pursue him as he would a trespasser, or a tenant whose term has expired. Where the vendor vests in his vendee an equitable title to land, and places him in possession, although default in payment is made, he has no remedy at law to recover possession by reason of the default. If the appellant had made his purchase and obtained his deed before the entry of Dickson under his equity, a different question would be presented; but, in this case, the action could not be maintained, if demand had been made of the possession and notice to quit given. The authorities relied on by the appellant, from many of the States, give to the vendor of land, by executory contract, various remedies against the vendee who has failed to comply with his contract. The vendor may institute his ejectment after notice to quit, and recover the possession, the vendee being treated, after default made, as a mere tenant; or the vendor may bring his action at law for the purchase money, or institute his action for a specific performance, subjecting the land to the payment of the purchase money. Such is not the rule in this State, and the action of ejectment is never allowed where the vendor, under an ordinary executory contract of sale, has taken from the vendee his purchase-money notes and placed him in possession. If the party in possession enters as a purchaser, the vendor can not elect to make

himself the owner and regain the possession by any proceeding at law, upon the statement alone that the vendee has failed to pay him. As said in the case of Tabeau v. Tabeau, 78 Mo., —: "Law and equity being now blended, an equitable title, arising out of a contract for the sale of land, is a defense to an action instituted to recover the possession of the land, the subject of the contract."

The actor in this case is the vendor, who seeks, by his action at law, to recover the possession, where he is only entitled to a lien for the purchase money. He asks for no other relief. It is a well-settled doctrine that a party, seeking a specific performance, must show as a condition precedent to his relief, that he has performed, or offered to perform, every thing required of him by the contract, or that he is ready and willing to do that which is required of him, upon a compliance on the part of his adversary. The appellant wants no specific performance, but insists on a recovery of the possession at law, with the purchase-money notes in his pocket. The defense is that the entry and possession was under a valid contract of sale, and this being shown, defeated the action at law. Prior to the Code, and, in the absence of any statute, the equitable defense could not have been made by the vendee, even if she had paid the purchase money, but the remedy was an appeal to the chancellor for an injunction to prevent the entry upon a rightful possession. If the defendant had been the actor seeking, as a vendee, to recover the possession by enforcing the contract, the chancellor would have denied her any relief until she paid the purchase money, if such had been the terms of the contract. No action of ejectment could be maintained, upon the equitable title, by the vendee, nor relief granted in the nature of a specific performance in equity, unless a performance, or an offer to perform, had been shown. It is not conceded or adjudged that a bond for title gives to the vendee a right to the possession before the payment of any part of the purchase money. The right to enter into the possession would depend upon the terms of the executory agreement. If, by the terms of the contract, the right to the possession was with the vendee, the payment to be made in the future, the chancellor would enforce it as readily as if the purchase money had been paid.

Counsel argue this case as if the appellee was endeavoring to obtain the possession when the payment of the money was a condition precedent to the right of entry. The contract showed the injustice that would arise in permitting a recovery of the land in a case like this. The defendant, being placed in the possession, the contract recites: "The said purchase money is *now due*, and the said Dickson is to pay eight per cent. interest thereon, annually, for five years." If, therefore, Dickson, or his assignee, fail to pay the interest annually, the right of entry is claimed, regardless of the value of the land, the improvements made on it, or any other equitable right of the vendee. What right is taken from the vendor when permitted to subject the land to the payment of his debt? He holds the legal title as a security for the payment of the purchase money. His position is that of a mortgagee holding a lien, only that he can enforce in equity, and this being the case, there is no reason for permitting the vendee to treat the contract as rescinded, to enable him to maintain his action at law. In this case the appellant bought the land under an execution against the vendor, the appellee, the purchaser, then in the possession. He acquired neither an equitable nor legal title

Judgment affirmed and the petition overruled.

SPRINGFIELD V. BETHEL, GD'N.

(*Filed Oct.* 25, 1890.)

Improvements and rents—Life estate—Curtesy—A tract containing fifty acres of land was conveyed to husband and wife jointly; the husband died intestate, leaving his widow and three children surviving him in possession of the land. The widow married a second husband and died shortly afterwards, leaving the husband, her three children by her first husband, and one child by her second husband in possession of the land. The second husband, having married again, and the three older children becoming dissatisfied with their stepmother, left home, and this suit was instituted by this appellee, their guardian, for a division of the land and rents.

The lower court ordered a reference to the commissioner to ascertain the amount of improvements and expenditures made by appellant on the land, and for the benefit of the children and for their board, as well as an account of rents due the children after leaving the farm. The commissioner reported the sum of $1,550 for supporting the children; $200 for improvements and a small sum for taxes; allowed the infants for rent $750, and, deducting the one from the other, made the infants owe the appellant $1,026.35, which was more than the entire land was worth. The chancellor, on exceptions filed, disregarded the claim of the appellant and allowed the infants a reasonable rent from the time they left home. *Held*—That the action of the chancellor was correct. The infants were the owners of one-half the land absolutely, and appellant was the life tenant in the other one-half, and the improvements made were not extraordinary, but such as were beneficial to the life tenant, and his claim for the support of the children, who lived poorly, was properly refused, as they derived a support, in part, from their own land.

G. W. Jolly and W. P. D. Bush for appellant.

Stuart & Atchison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

D. I. Burns conveyed to his daughter, Palestine Rafferty, and to her husband, Merrit Rafferty, fifty acres of land, in the county of Daviess. The husband, Rafferty, died in the year 1873, leaving his widow and three children surviving him, and his widow afterwards intermarried with the appellant, Wm. J. Springfield. After this marriage Springfield and his wife, with the children of Rafferty, lived on the small farm for about five years, supporting, clothing and educating the children in the neighborhood schools, and caring for them as parents should. It does not appear that the appellant was a man of any means, but it is apparent that the fifty acres was a comfortable home for all the family, and that the appellant was as much the beneficiary as the children. The testimony shows, however, that he was kind and attentive to the wants of the step-children, and improved rather than wasted their small estate.

In the year 1880 the mother of these children died, leaving her husband and her children in possession of the land. She left also, at her death, one child by the appellant.

In 1881 the appellant again married, and the children, by Rafferty, becoming dissatisfied with their step-mother, left their home, and went to live with their relations.

In 1883 B. F. Bethel, having qualified as the guardian for these children, brought this action for a division of the land and the rents. The appellant filed his answer, in which he claimed $100 per annum

for the support of the children, including their school bills; for improvements made on the land; had the case referred to a commissioner, who reported the sum of $1,550 for supporting the children; $200 for improvements, and a small sum for taxes; allowed the infants, for rent, $750, and deducting the one from the other, made the infants owe the appellant $1,026.35, which was more than the entire land was worth. The chancellor, on exceptions filed, disregarded the claim of the appellant, and allowed the infants a reasonable rent for their land from the time they left their home.

We perceive no objection to this judgment. The improvements made were such as added to the convenience and comfort of the life tenant, and he ought not, in law or equity, to be re-imbursed for this expenditure. His wife owned one-half of the land in her own right, and was entitled to dower in the other half. He weatherboarded the log house; dug a small pond or two; patched up the stable and shed, and is now enjoying the benefits of the expenditure, being on the place, and holding as tenant, by the curtesy, that part of it owned by the wife. The improvements were not of an extraordinary character, but such as a life tenant ought to have made, and to charge these infant children for their board and clothing, under the circumstances, can not be sustained on any principle of law or equity. Their part of the little farm contributed to the support of all. They lived as one family, with but little to live on; and the land of the one upon which stood the cabin that sheltered all, was equal in value to the expenditure made for the children. The claim of the appellant was properly disallowed, and the rent with which he is charged since the children left him, being reasonable, the judgment will not be disturbed.

Nor was it proper to allow, in the division, any thing for the improvements, so as to give one more in value than the other.

Judgment affirmed.

BURKS, &C. V. BURKS.

(*Filed Nov.* 11, 1890—*Not to be reported.*)

Fraudulent conveyances—Consideration—In an action to recover of husband and wife a balance due on a note as purchase money and to enforce a lien on land, the defendants pleaded, as want of consideration, that plaintiff held the notes in secret trust for the benefit of the defendants, husband and wife in fraud of the rights of creditors of the husband. *Held*—That the defendants will not be permitted to plead such facts as a want of consideration, as they who seek equity must come with clean hands.

J. A. Rousseau for appellants.

W. L. Porter for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Lewis.

H. H. Burks brought this action to recover of John and Mary E. Burks, husband and wife, judgment on a note for $487, given December, 1883, in renewal of balance of one for $661, executed in 1869, and to enforce alleged vendor's lien on two tracts of sixty-three and twenty-three acres of land to satisfy the debt.

It appears that about 1866, under judgment against John Burks, a tract of land, owned by him, was sold and purchased by Crain, at the price of $2,012, who, soon after, sold 144 acres thereof to Ross for $2,880, receiving in cash, all but $880, for which a note was given to him, and the land was then conveyed to Ross, John and Mary E. Burks uniting in the deed. Subsequently, H. H. Burks, in some way, acquired the note and collected the amount of it. He also purchased or acquired the claim of Crain to the residue of the original tract, being about sixty-three acres; and, in writing, Crain directed the commissioner of court to convey the title to him, but it was never done.

In January, 1869, H. H. Burks, for the expressed consideration of $661, sold the sixty-three acres and another tract of twenty-three acres to Mary E. Burks, who gave her note therefor, and received from him a title bond, but he never made, or caused made to her, a deed for either parcel.

It is stated, in defense of the action, that Crain's purchase at the judicial sale was made for the use and benefit of John Burks, who was, at that time, financially embarrassed, and the note was given to and held by Crain, only to indemnify him, as surety of John Burks in a certain debt, and to secure payment of the balance of the amount bid for the land, which was about $12; that H. H. Burks did not, in fact, pay to Crain any consideration for either the Ross note or the sixty-three acres of land, but both were transferred to him, to be held for the use and benefit of John Burks; and that the amount of the note collected was more than sufficient to pay the debt for which Crain was surety of John Burks, and the balance of the sum he bid at the sale. They, therefore, plead the note sued on is without consideration. On the contrary, H. H. Burks says he paid his own money to Crain for the note, and also for the sixty-three acres of land. How he acquired the twenty-three acres, which once belonged to John Burks, though not part of the land purchased by Crain, does not clearly appear. Nor is it now a material inquiry; for he sold it before the note sued on was executed, and applied the proceeds, as credit on the original one, without objection by either John or Mary E. Burks; and, consequently, that parcel was excepted from sale, under the judgment appealed from.

It seems to us the defense of want of consideration must fail for two sufficient reasons: First. The theory of it involves a fraudulent design on the part of John Burks to place his property beyond the reach of his creditors. For it is plain, according to his own account of the transactions, such was his purpose in procuring first Crain and then H. H. Burks to hold, in secret trust for him, the sixty-three acres and Ross note; and, subsequently, causing a pretended sale of that land, though in reality a gift of it by him to his wife. In such case equity will not relieve a debtor, unless for direct benefit of creditors, he attempted to defraud. Second. The statements of John Burks and H. H. Burks, the only persons who testified as witnesses, are contradictory and irreconcilable, and there appearing no reason for giving more credence to the former than the latter, the defense must be regarded not established. Besides, the voluntary execution of the renewal note as late as 1883 tends strongly to sustain the evidence of H. H. Burks that he was rightful owner of the sixty-three acres, when he sold it to Mary E. Burks, in 1869.

The other ground of defense is, that the plaintiff is not able to make a good title, as he covenanted to do. It is true no deed for the

sixty-three acres was ever made by commissioner of court to either Crain or H. H. Burks. But the simple result of that omission was to leave the legal title in John Burks, which has since been acquired by his wife, Mary E. Burks, in virtue of her long continued claim and possession, that he does not nor could now controvert.

The lower court erred in striking from the files so much of the joint answer of John and Mary E. Burks as concerned her. But she appears to have afterwards united in a rejoinder, in which all the facts relied on as defense were set up. She, however, was not prejudiced by that order of court, for the only defense she had or could make was want of title in the plaintiff.

Judgment affirmed.

Judge Lewis delivered the following response to petition for rehearing:

H. H. Burks alleges in his pleadings, and states as a witness, he purchased from Crain for his own use and paid a valuable consideration, of his own money, for both the sixty-three acres of land and Ross note. He does not occupy the attitude of holding either the land or note for the use or for the purpose of enabling John Burks to defraud his creditors, and, consequently, there is no obstacle to prevent a court of equity from granting him the relief asked by him, if supported by evidence.

The note sued on having been given as late as 1883, long after the original design was conceived of covering up John Burks' property, if there ever was such design, is sufficient to sustain the right of H. H. Burks to the judgment rendered, for it is difficult to see why, if John Burks and Mary E. Burks did not then owe the amount, they should, nearly fourteen years after the original note, give the one sued on in renewal.

The credit given on the original note, so as to reduce it to the amount of the one sued on, is sufficient to sustain the explanation of H. H. Burks, that it was given on account of the previous sale of twenty-three acres, the proceeds of which John and Mary E. Burks got the benefit of and accepted.

The onus of proof being upon appellants, and having failed by preponderance of evidence to sustain their defense to the note sued on and the lien on the land to satisfy it, there was no alternative for the lower court but to render the judgment appealed from.

SUPERIOR COURT ABSTRACTS.

BAILEY, &c. v. PENICK, &c.

Filed November 5, 1890. Appeal from Todd Circuit Court. Opinion of the court by Presiding Judge BARBOUR, affirming; Judge YOST not sitting.

1. *Fraudulent preference of creditor*—The fact that the amount of a debt paid by an insolvent debtor was small when compared with the amount of the debtor's estate and his large indebtedness will not authorize the conclusion that the payment was in the ordinary course of business, when all other facts and circumstances demonstrate clearly that the debtor intended to prefer, and did so in contemplation of insolvency.

2. *Same*—The fact that the preferred creditor makes no resistance to the suit to have the act declared a preference under the statute, and is even willing that his brothers may take advantage of the act for their benefit, can not destroy the effect of the act itself. When the transfer or payment was made the act of assignment was complete, and can not be affected by the subsequent conduct of the preferred creditor.

Ben. T. Perkins, jr., and Edward W. Hines for appellants; W. L. Reeves for appellees.

CITY TRANSFER COMPANY v. ROBINSON.

Filed November 5, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge BARBOUR, affirming.

1. *Master and servant—Exemplary damages*—The master is liable in exemplary damages for injuries inflicted by the reckless or wanton negligence of the servant while in the performance of his duties.

The defendant, a transfer company, is liable in exemplary damages for injuries resulting from the reckless driving of one of its servants.

2. *Same*—Though the right to recover for mental suffering is recognized only in cases where there is also personal injury, the extent of the physical injury is not material; a slight injury may be sufficient.

While the plaintiff in this case says, in his testimony: "I was not hurt," yet as the facts as he details them show that he did sustain physical injury, and that he meant he had sustained no serious injury the court did not err in telling the jury that they might consider the mental suffering as an element of damage.

3. *Right of bailee to sue for injury to property*—In cases of simple bailment without reward an action may be maintained by either the bailor or by the bailee for any wrong done to the bailee's possession.

Wilfred Carrico for appellant; J. D. Atchison for appellee.

BOTTS, &c. v. UTLEY, &c.

Filed November 5, 1890. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge BARBOUR, affirming on original and reversing on cross-appeal.

1. *Interest on claim against decedent*—Although the statute provides that no interest accruing after the death of a debtor shall be allowed unless the claim is verified and demanded of his personal representative within one year after his appointment, yet where the personal representative induces creditors to postpone the collection of their demands as to enable him to pay without a sale of the decedent's real estate, promising that their claims shall be paid in full, this will be construed as a waiver of demand so as to allow interest, provided other creditors are not affected and the devisees have not been prejudiced by the delay. But the estate should not be held liable for a greater rate of interest than 6 per cent., although the note, executed when the conventional interest law was in force, bore 8 per cent. and the executrix promised to pay that rate.

2. *Construction of will*—A testator, by his will, devised his whole estate to his widow for life, and after her death one-half of it to his two daughters and the other half to his widow with power to dispose of it as she pleased. In a subsequent clause the widow was authorized to sell any part of the estate for her support and to apply it for her necessary use, and one-half of what should be left after her death was devised to the testator's two daughters. *Held*—That the widow is entitled to one-half the estate, which she can dispose of without restriction, and to the whole estate for her life, with the power to sell any part of it and apply the proceeds to her necessary use, one-half of what remains at her death passing to the testator's two daughters.

A. Duvall for appellants; John L. Scott for appellees.

LOUISVILLE WATER COMPANY v. FULLENLOVE.

Filed November 5, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge YOST, reversing.

1. *Powers of officer of corporation*—The authority of an officer of a corporation does not depend so much on his title, or the nature of his office, as on the duties he is in the habit of performing; and he may, by the conduct of the president and directors of the corporation, be invested with power to bind the company by acts not inherent in his office.

2. *Rights of assignee of order. Notice*—R. & Co., who were furnishing to a corporation a certain quantity of lumber, a part of which they were buying from S. to carry out their contract, gave S. an order on the corporation to retain for him from their next shipment of lumber to it, $300. S., who was indebted to A. and B., endeavored, with them, to induce the treasurer of the corporation to accept the order. This he refused to do, but agreed to hold the order and present it to R. & Co., when they settled with the company, and, if they consented, to hold the money for A. and B. He then gave them a paper, signed by him as treasurer, certifying that the company held such an order, describing it. This certificate S. assigned to A. and B., who, for value, assigned it to F. It is shown that the order, when issued by R. & Co., was conditioned upon S. furnishing to them lumber to the amount of the order, but after the date of the order S. furnished no more lumber. In this action by F. against the corporation to recover the amount of the order, *Held*—That the paper was of such a character, and such peculiar circumstances accompanied the whole transaction, as made it the duty of plaintiff to inquire into the circumstances and know the facts, and having neglected to do this she held the certificate, subject to any equities which might exist or arise between R. & Co. and S.

3. *Same. Powers of agent*—As the duties of the treasurer were merely clerical, and the certificate was not issued in the regular course of the company's authorized business, and was neither acquiesced in nor recognized by its president or board of directors, the company is not liable by reason of its issual. A person, dealing in such paper, is chargeable with notice of the agent's want of power to issue it.

T. L. Burnett and Lane & Burnett for appellant; J. E. Gaither and Charles Carroll for appellees.

WILCOX v. PURYEAR.

Filed November 5, 1890. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge YOUNG, affirming.

Contract against public policy—A contract by which one agrees, for money or other personal profit, to use his efforts, influence, &c., to induce a majority of the voters at an election to vote for a particular candidate or for any proposition, as for a subscription by a city or county in aid of a railroad, is against public policy, and, therefore, void.

T. E. Moss for appellant; Burnett & Dallam for appellee.

NORRIS & POPE v. PHILPOT.

Filed November 5, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge YOUNG, affirming.

Implied contract—A firm, having kept a clerk in their employ and accepted his services, and acknowledged that his services were valuable, the law implies a contract to pay him a reasonable compensation for his services, although there was no express contract of employment. And the firm, having been dissolved and been succeeded by a new firm, which undertook to pay the debts of the old firm, the new firm is liable for this debt.

Sweeney, Ellis & Sweeney for appellants; Currice & Clements for appellee.

FEIGHEY, &C. v. FEIGHEY'S ADM'R, &C.

Filed November 5, 1890. Appeal from Harrison Chancery Court. Opinion of the court by Judge YOST, affirming.

Trusts—Limitation—Where all the parties interested in the estate of a decedent, including the administrator, placed the funds of the estate in the hands of certain persons in trust to pay the debts of the decedent, an express trust for the benefit of creditors was created, and, therefore, the plea of the statute of limitations is not available against the creditors, who, when they had properly proved their demands, became the beneficiaries under the trust.

N. L. Bennett for appellants; Cleary & Hamilton for appellees.

BAKER v. KASH, &C.

Filed November 5, 1890. Appeal from Perry Court of Common Pleas. Opinion of the court by Judge YOST, affirming.

County officers—Allowance by county court—After a county officer has entered upon the discharge of the duties of his office, and his services have been accepted and paid for by the fiscal court of the county, one citizen can not bring an action to set aside the orders of that court, upon the ground that the officer is ineligible, and has never taken the oaths required by law.

John L. Scott for appellant.

BANK OF LOUISVILLE v. LOCKRIDGE, &C.

Filed November 12, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge BARBOUR, reversing.

1. *Involuntary assignment—Rights of lien creditors*—In the distribution of the estate of an insolvent debtor, who has committed an act which has been declared to have operated as an assignment under the statute, a creditor whose claim is partially secured by a contract lien on the debtor's estate is entitled to prove the balance of his debt after exhausting his lien, and to share pro rata with the other creditors to that extent. He is not entitled to share pro rata with the other creditors upon the full amount of his claim, without regard to his lien, as in the case of a voluntary assignment; nor is he required, as in the distribution of a decedent's estate, to wait until the general creditors have been made equal with him before he can share in the general estate.

2. *Same*—That section of the statute concerning involuntary assignments which provide that "the action and proceedings as to the mode of proving claims, and otherwise, shall be conducted as actions and proceedings for the settlement of the estates of deceased persons," was intended to regulate merely the practice and not to determine the property rights of the parties.

Humphrey & Davie and W. C. Churchill for appellant; H. L. Stone for appellees.

STARLING, &c. v. CITY OF HOPKINSVILLE.

Filed November 12, 1890. Appeal from Christian Court of Common Pleas. Opinion of the court by Presiding Judge BARBOUR, affirming.

1. *Appellate jurisdiction*—While this court has no jurisdiction of an appeal where the validity of a statute is involved, it is not every suggestion that a statute is invalid that will deprive this court of jurisdiction. When a question has been repeatedly and uniformly decided it should no longer be regarded as a question.

In view of the decisions of the Court of Appeals the power of the Legislature to confer upon cities and towns through their councilmen and trustees the authority to have streets and sidewalks improved at the expense of contiguous lot owners is not an open question.

2. *Street improvements*—The power confered upon a city to grade and improve streets is a continuing one and carries with it the power to regrade and repave streets after they have once been graded and paved.

3. *Same*—Where a lot owner with full notice from the city of an intended street improvement stands by and without objection permits the improvements to be made he will not afterward be heard to say that the improvements was unnecessary and that the council in ordering it to be made acted arbitrarily and illegally.

4. *Same—Pleading legal conclusion*—Even if the city had absolute fee simple title to the improved street, that fact does not relieve the lot owner from liability for the cost of the improvement. But if the title of the city had been a material fact, it should have been specifically set out in order to overcome the legal presumption that the lot owners own to the middle of the street. The allegation that the city is the absolute owner of the improved street, and the defendants have no reversionary or remote interest therein, is a legal conclusion.

Landes & Clark for appellants.

WATTS v. COLLINS' EX'OR.

Filed November 12, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge BARBOUR, affirming.

Contracts—An agreement by which one is to pay interest on a certain sum, and is not to be required to pay the principal unless he makes default in the prompt payment of the interest, is valid and will be enforced. And the right to be relieved from payment of the principal by the prompt payment of interest, being personal to the obligor, continues at his will during his life, notwithstanding the death of the obligee. The right ceases, however, upon the death of the obligor, and the principal then becomes collectible.

E. S. Watts for appellant; Wickliffe & Bell for appellee.

ZIGLER'S EX'OR v. ROBINSON.

Filed November 12, 1890. Appeal from Campbell Circuit Court. Opinion of the court by Judge YOUNG, reversing.

1. *Peremptory instruction—Non est factum*—The court should not give a peremptory instruction to the jury to find for defendant if there is any evidence at all to support plaintiff's claim.

In this action upon a promissory note in which defendant pleaded *non est factum*, none of the plaintiff's witnesses proved the execution of the note by defendant, but they proved repeated promises by him to pay. *Held*—That as the jury had the right to consider all the facts and circumstances in arriving at a conclusion, it was error to give a peremptory instruction to find for defendant.

2. *Burden of proof*—The plea of *non est factum* puts plaintiff upon proof of the execution of the instrument as described in the petition.

Raison & Ahlering for appellant; Nelson & Desha for appellee.

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KENTUCKY COURT OF APPEALS.

RAMSEY v. LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO.

(Filed November 21, 1885.)

1. Negligence—Injury at street crossing—Contributory negligence—Appellant was injured by a train of cars, on appellee's track, coming in collision with a coal cart driven by appellant, who was thrown from the cart and his arm and back injured. In an action against appellee to recover damages for such injury, after the evidence of plaintiff was heard, the court instructed the jury, peremptorily, to find for appellee. On appeal, Held—That said instruction was erroneous and prejudicial to appellant. The evidence showed that appellant was driving his cart at a "sweeping trot along Floyd street, in Louisville, on a windy, dusty day, and did not stop to look or listen to ascertain whether a train was approaching or not; that the train was running fifteen or sixteen miles an hour, and no signal of the approach of it was given by ringing a bell, or blowing a whistle. Contributory negligence, to defeat a recovery, must be at least ordinary neglect. A failure of plaintiff to take unusual care is no defense to an action, and it is well settled that a failure to look for the approach of a train at a crossing is not regarded as a fixed rule by which to establish contributory neglect, as there may be proper diligence without the exercise of that precaution. If the place of crossing is where neither the speed of the train is required to be slackened, nor signals of approach given, it would be culpable negligence on the part of a person, about to cross the track, not to stop and use his sense of sight and hearing: but a different rule prevails in regard to crossings of streets in a city or town, where the dictates of humanity, as well as the law, imperatively require that the speed of railway trains be slackened, and signals of their approach be given. In such cases it would be unreasonable to require each one of the hundreds and thousands of persons, passing a crossing daily, to stop and listen, or look up and down the track, to ascertain whether or not a train is approaching. No such contributory negligence is shown as would prevent a recovery.

2. Petition—Gross and ordinary negligence—In an action against a railroad company to recover compensatory damages the petition need not allege gross neglect of defendant; an allegation of ordinary neglect is sufficient.

Willet C. Trabue for appellant.

Wm. Lindsay for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

This is an action to recover damages for personal injury to the plaintiff, caused by a collision of the defendant's railway train with a coal cart he was driving. It was not necessary for him to state in his petition that the injury was caused by the gross neglect of the defendant's servants or agents, an allegation of ordinary neglect being sufficient to enable him to recover compensatory damages.

At the conclusion of the plaintiff's evidence the court instructed the jury to find for the defendant, and whether that instruction was proper is the only question before us.

The evidence shows that while the plaintiff was driving his cart, to which two mules were hitched, along Floyd street, across defendant's railroad track, in the city of Louisville, it was struck by the train, moving fifteen or sixteen miles an hour, and knocked off the track, and he was thrown out with such violence as to severely injure his back and arm. And according to the testimony of both the plaintiff and the only other witness introduced, no signal of the approach of the train to the crossing was given by those in charge of it, either by ringing the bell or blowing the whistle. It further appears that the railroad trains are, by city ordinance, expressly prohibited running at a greater rate of speed than six miles an hour within the city limits.

According to the evidence in this case it is, in our opinion, clear that the plaintiff had a prima facie right to recover; and we must, therefore, conclude that the instruction complained of was given by the court upon the assumption that there appeared such contributory negligence, on the part of the plaintiff, as defeats that right. The evidence shows that it was a blustering, windy, dusty day, when the collision occurred, and that the plaintiff, when approaching the crossing, was driving in a sweeping trot, and did not, before attempting to cross the track, stop nor listen, nor look along the track but one way.

Stating the evidence in support of the theory of contributory negligence as strong as the record will warrant, which we have done, it is not such as to authorize the court to take the case from the jury. When the defense, in a case like this, is contributory negligence, the proper question for the jury is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary or common care and caution, that but for such negligence, or want of ordinary care and caution, on his part the misfortune would not have occurred. In the first case the plaintiff would be entitled to recover; in the second, he would not. (P. & M. R. R. Co. v. Hoehl, 12 Bush, 41; K. C. R. R. Co. v. Thomas, 79 Ky., 100.)

The degree of negligence, of which the plaintiff must be guilty to defeat a recovery by him, must be at least ordinary neglect, his failure to take unusual care being no defense to the action. (Sherman and Redfield on Negligence, section 29.)

What is ordinary care, or ordinary neglect, must obviously depend upon the obligations and duties resting at the time and place upon the party doing the injury and the party injured, and

the circumstances of each particular case or class of cases. If the plaintiff was guilty of such contributory negligence, in this case, as should defeat his recovery, it must consist in his failure to stop before attempting to cross, and, by listening and looking up and down the track, ascertain whether he could do so safely, and in the great rate of speed at which he was driving his cart. But this court has held that "it can not be regarded as a fixed rule that the failure to look for the approach of a train is negligence on the part of the party injured, as there may be proper diligence without the exercise of that precaution." (P. & M. R. R. Co. v. Hoehl, 12 Bush, 41.)

If the place of crossing is where neither the speed of the train is required to be slackened nor signals of its approach given, it would be culpable negligence on the part of a person about to cross the track not to stop and use his sense of sight and hearing, for, in such case, his safety depends upon his own vigilance, and those in charge of the train would not be responsible for any injury that might be done to him unless they should discover his peril in time, by the use of ordinary care, to avoid injuring him.

On the other hand, the dictates of humanity, as well as the law, imperatively require that the speed of railway trains be so slackened, when approaching the crossing of a street in a city or town, and that such distinct and timely signals be given as, in a great degree, to lessen the necessity for vigilance and care on the part of those passing along the street. It would be unreasonable to require each one of the hundreds or thousands of persons passing daily on foot, or in vehicles, along a public street in a populous, busy city or town, to stop at a railroad crossing, in order to listen or look up and down the track, sometimes visible but a short distance, to ascertain whether a train is approaching, when they can, without doing so, have comparative security against inconvenience and injury by a reduction of the speed of the trains, and easily and certainly warned of its approach by the bell or whistle.

As said in Spencer v. Illinois C. R. Co., 29 Iowa, 60, cited by this court in the case referred to in 12 Bush, a person about to cross a railroad track "is only required to have satisfactory evidence that the road is clear, and this he might have by those warnings usually attending the starting or moving of a train through a town or city, just as effectually and sufficiently as by looking up and down the track." In this case not only was the rate at which defendant's train might lawfully run in the city of Louisville prescribed by ordinance, but, independent of any ordinance, it was the duty of those in charge of the train to give proper signal of its approach to Floyd street, and the plaintiff had the right to assume that these legal requirements would be complied with; and, consequently, it can not be imputed to him as negligence that he did not anticipate culpable negligence and misconduct on the part of the servants and agents of the defendant, of which the evidence shows they were guilty, and exercise the ordinarily unnecessary precaution to stop and listen, and look up and down the track, before attempting to cross it.

Whether the train would or would not have struck the plaintiff's cart, if he had been driving at less speed than a "sweeping trot," which may or may not be a forbidden gait, is a futile inquiry in view of the indubitable fact that the collision would not have occurred if the train had been running only six miles an hour, and the proper signals had been given.

The judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

MATTHEWS v. MATTHEWS.

(Filed October 25, 1890—Not to be reported.)

Mortgages—Chancellor's finding of facts—Appellee executed to his brother, the appellant, deeds for several tracts of land and delivered possession to him. The deeds were understood between them to operate as mortgages upon the maker refunding the purchase money. The finding of the chancellor, as to the amount of money refunded and the amount of rents the appellant should account for, will not be disturbed, as the evidence is conflicting and the transactions extend over a long period of time.

Lafferty & Benton and Ward & Kimbrough for appellant.

Forman & Cason for appellee.

Appeal from Harrison Chancery court.

Opinion of the court by Judge Pryor.

This controversy is between two brothers, the one asking a settlement of accounts between them, originating from an agreement, by which the appellant assumed, or had paid, certain debts of the appellee, and to secure himself obtained deeds to certain real estate that were to operate as mortgages upon the appellee refunding the money. The deeds were not fraudulent, and in the action to cancel the deed, at the instance of a creditor of the appellee, the answer of the one brother was the counterpart of the answer of the other. It is true the appellee denied that he had any beneficial interest, but his wife did, as by the terms of the agreement, when the debts were paid by the husband the reconveyance was to be made to the wife, and she has united in the action as a party plaintiff.

It is not pretended by the defendant that this contract was ever changed, and the testimony in this case is conclusive that it had not been, the case before us presenting only one question necessary to be considered, and that is: Has the appellant been reimbursed in the moneys paid out for his brother, the appellee? Under the agreement by which the deeds were made the appellee also transferred to his brother all of his interest in the personal estate of his father to secure the various debts, and what amount of money the appellant received from that source is one of doubt. There seems to have been no adjustment or settlement of the father's estate, so as to enable one to arrive at any accuracy on the subject. The testimony is directly in conflict as to the amount, and both the commissioner and the chancellor having fixed the sum that seems to be sustained by the evidence, we are not disposed to disturb it.

It is manifest that the appellant had possession of the land; that he rented it, or a part of it, out, and whether treated as a tenant or a mortgagee in possession, he should pay rents. He received the money from the Coleman property. The personal estate, or its value, from the father's estate, and the items that appellant claims as additional sums, with which his brother should be charged, are all doubtful, or about which the testimony conflicts.

The Odor land the appellant derived no benefit from, but in 1880 he had the full possession of the fifty-nine acre tract. It seems to us that the commissioner and chancellor have made an equitable adjustment of the transactions between the brothers. After such a lapse of time, with no account or settlement by the two, such conflicts in the proof would almost of necessity arise; and such being the case, we perceive no reason for interfering

with a settlement that approaches as near to a fair adjustment as was possible, from the facts before the commissioner.

The judgment is affirmed on both the original and cross appeal.

BENT & CO. v. BARNETT.

(Filed October 30, 1890.)

Guardian and ward—Improvements—In 1876 B. had purchased a small interest in a house and lot in Louisville from H., who retained a lien for unpaid purchase money, and inherited one-sixth of the remainder from a deceased child, the remainder of said property belonging to his infant children, for whom he was statutory guardian. B., for himself and as statutory guardian of his children, made a contract with appellants for furnishing the stone work for reconstructing the house, and agreed that they should have a mechanics' lien to secure them for their work and material. Other contracts of a similar nature were made, and the house was remodelled or completely rebuilt at an expense of about $21,000.

After these improvements had been made, B., for himself and as guardian of his children, made a lease of said property to S. and B. for a period of seven years, the tenants agreeing to pay the taxes and insurance on same, and pay a fixed yearly sum for the benefit of the infants, while the residue of the rental should be applied to the payment of the expenses of rebuilding the house. H. asserted his lien against the interest of B. to enforce his claim for purchase money, to which proceeding some of the persons holding claims for material and labor, furnished in rebuilding said house, were made parties, and asserted same against the said property. The chancellor enforced the lien for purchase money, and directed that it be paid out of the interest of B. in said property; that the lessees pay the taxes and insurance, and the yearly allowance to the infants out of the rental, and that the residue thereof be applied to payment of the claims of the material men and holders of mechanics' liens. After the expiration of the lease, and after the infants had arrived at age, appellants, as holders of a mechanics' lien, filed a supplemental petition, alleging that, by reason of the contract with the guardian of said infants, they had furnished material and done work in the improvement of their property to an extent greatly in excess of their claim, and had received nothing therefor, and asked that the enhanced value of said property be subjected to the payment of their debt. Held—That said supplemental petition alleged facts sufficient to authorize the chancellor to grant the relief sought. Under the provisions of the General Statutes the guardian has authority to make a lease of his ward's lands for a period not exceeding seven years, besides, it is his duty, under the principles of justice and equity, to preserve his ward's property, and make it profitable to them. As his wards received the benefits of such contracts, their property should bear an equitable burden to the extent that its value has been enhanced by the expenditure.

Hargis & Eastin and H. L. Stone for appellants.

Jno. S. Jackman for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

W. A. Barnett, the father and statutory guardian of his infant children, five in number, entered into an agreement with one Shryock, by which he leased to Shryock a three-story brick building, in the city of Louisville, for the term of seven years, the lease to begin on the 1st of January, 1876. The object of the

lease was to enable Shryock, who was an architect, to reconstruct the building and then rent it out and apply the rental to a lien held by the Herberts for the purchase money, and to the payment of the costs for reconstructing the building, that cost being estimated at near $15,000. Barnett had purchased in his own right the interest of the Herberts in this property, which was nine thirty-seconds, at the price of $4,900, for which he gave his notes. He also owned one-sixth of twenty-three thirty-seconds by inheritance from one of his children. The five children owned the remaining interest in the building, and this was its condition as to title when the guardian made the lease to Shryock.

Barnett then made a contract as guardian, and in his own right, for he then had an interest in the property with the appellants, J. M. Bent & Co., to execute the stone work on the building for which he was to be paid, and for this he executed notes. He also gave a lien on the rents and a mechanic's lien on the property. He made contracts with other parties for work and material, the entire building costing, before its completion, the sum of $21,959.06.

In January, 1876, he executed another lease to Shryock and Bent in his own right as guardian, for the term of seven years, under which the lessees were to rent out the building and pay taxes, insurance and repairs, to pay the infant a certain sum per month ($90), and the balance to be applied to the payment of the costs of reconstruction, the debts that had already been incurred, as well as those thereafter incurred, necessary to the completion of the building, and also to pay the Herbert heirs the purchase money due them by him, Barnett.

One of the material men, Robert Biggs, shortly after this lease was made, filed his petition in the Louisville Chancery Court to enforce his mechanic's lien, under a contract with Barnett. When this petition was filed the children, by Thornberry, their next friend, filed their petition against their father, who was then statutory guardian, alleging that they were suffering for the necessaries of life, and had, or were receiving, no income from their estate. The cases were consolidated, and the creditors who had worked upon and furnished material in erecting the building, asserted their lien. The heirs of Herbert filed their petition, or asserted their claim for the purchase money due them by the guardian, and after this purchased back their interest, thereby divesting Barnett of the title he had received from them. The consolidated causes were submitted to the chancellor, who enforced the lien of the Herbert heirs, and a mechanics' lien on the one-sixth of twenty-three thirty-seconds of the building that came to Barnett by inheritance in favor of certain mechanics and material men, who had complied with the law, and further decided that from the renting under the lease to Shryock and Benton the taxes, insurance and repairs were to be paid; $90 a month to the children, and the balance of the rents to be paid out to the workmen and material men in proportion to their respective claims.

Bent & Co., it seems, had purchased material and employed labor on the building, and at the expiration of the seven years' lease had received nothing for their work and material furnished. They then tendered a supplemental petition, alleging that the work they did on the building was necessary to make it habitable; that it had greatly enhanced its value, and nothing had been received by them from the rents. They asked that the property be placed in the hands of a receiver, and the rents

applied to the payment of their debt. They also claim that Barnett was a co-tenant with his children, and had the right to make the improvement, and, therefore, they were entitled to be substituted to his rights, so that they could compel the children, as co-tenants, to contribute to the costs of reconstruction. A general demurrer was filed to the petition, as amended, and sustained by the vice-chancellor, and the appellants declining to plead further, their petition was dismissed, except as to their claim against Barnett in his individual right.

Barnett, it seems, had gone into bankruptcy, and had but little, if any, estate when these contracts, with reference to the reconstruction of the building, were made and executed. The question presented is: Were the plaintiffs, on the facts alleged, entitled to relief?

We have had some difficulty in reaching a conclusion in this case, as the record of the former hearing to which the supplemental petition was filed, as well as the pleading itself, presents a case so full of equity as to disturb the conscience of the chancellor in the attempt to deny all relief, and, on the other hand, the guardian, without any authority from the chancellor, had encumbered the realty of the infants to an extent that if the property itself could be subjected to the payment of the cost of construction, it would take from them the entire building.

The building was not only repaired but reconstructed. It was in fact a new building, reared upon the site of the old, and the fact that the father was a co-tenant with his infant children did not authorize the expenditure, and if they had been adults their co-tenant could make no such expenditure, and then require contributions from co-tenant, unless they had, in some manner, consented to the change. This is not a case of mere ordinary repairs, where, for the preservation of the property, one tenant caused the repairs to be made, and, therefore, the right of the tenant to make such an improvement, and then ask for contribution from the co-tenants, is not involved in this case. (Freeman on Co-tenancy, section 262; 1 Washburn on Real Property, 421.)

The father being both the natural and statutory guardian of the infants, conceived that it was necessary to reconstruct an old dilapidated building, that would soon cease to yield an income to his children, and, with a view of advancing their interest, in the best of faith, entered into this contract with the appellants, who, in like good faith, have executed the contract and expended over $7,000 in enhancing the value of this property, the rents of which are now being enjoyed by these children, who have arrived at the age of twenty-one years. They have expended not one cent for an improvement out of which, if the facts alleged be true, they are receiving a handsome income, and but for which the building would have been valueless, and the entire propery worth no more than the value of the ground upon which the new building stands.

Was it then to the interest of the infants that the improvement should be made, and, if so, to what extent should the income of the property be charged in order to re-imburse the expenditure made by the appellants?

If the father of appellees had made the investment out of his own means, instead of the means of others, thereby enriching his children at the expense of his creditors, a chancellor would have subjected the income to the extent of the enhanced value to the payment of his debts, and when he induces others to invest their means in improving property for the benefit of those who have the right to look to him not only to see that their property is so managed as to make it productive, but whose

claims upon him for support and maintenance can not be disregarded, we see no reason why, if it results in enriching the children or so enhancing the value of their property as to increase the income of their estate, those making the improvement should not, at least, share with them in the increased income caused by the improvements made.

Are the infants to become the recipients of such an investment from the funds of a stranger, upon the idea that it was a voluntary donation from the father, and the material men or laborer required to look to him for payment? Will that which enhances the value of the building and the income from it be regarded as an unreasonable burden upon the property of the infants, when the contractor and builder asks only for an appropriation of a part of the increased income, caused by his labor and material, to the payment of his debt? He has worked no harm to the infants, but leaves them in a much better condition than they were before the improvement was made, and if so, ought the chancellor, in equity and good conscience, deny all relief? We think not. The guardian is entitled to the care and management of all the estate of the ward, real and personal, and by our statute may lease the real estate until the ward arrives at age; provided the lease is not for a longer term than seven years. (Section 6, article 2, chapter 48, General Statutes.)

This leasing of the estate, in this instance, was for the benefit of the wards; and, upon arriving at age, if the cost of the improvement from which these benefits flow has not been paid, the chancellor should adopt some means of re-imbursing the expenditure where it works no other injury to the ward than taking from him a part of the income originating from the appellants' material and labor. In the case of Graham & Butler v. Chatoque Bank, 5 B. M., 45, the guardian of the infants, as in this case, leased a lot of ground in the city of Louisville to Dupont for a term of years, Dupont agreeing to build a house upon it at a cost of $3.500, and to pay an annual ground rent of $200. The rent was paid to the guardian, and the building erected by the lessee. The children, or one of them, on becoming of age repudiated the contract of leasing, and this court held that the child, becoming of age, having received the ground rent, it would be inequitable to permit him to enter without making a fair remuneration, to the extent the land had been actually and beneficially ameliorated.

In the case of Athey v. Knott, 6 B. M., 25, where the father had made improvements on the land of his infant son that greatly enhanced its value, this court, referring to the case of Graham & Bulter v. Chatoque Bank, held that if the son, when arriving at age, should see proper to enter, "the vice-chancellor, under the circumstances, should require him to do what was equitable in regard to the improvements, and until that period the creditor of the father was entitled to an equitable portion of the rent, to be applied in discharge of his claims."

In Hobbs v. Harlan, 10 Lea (Tenn.), 268, it was said: "If a guardian, with a view to increase the annual rents of his wards, put improvements, such as houses, upon their land, he will be allowed to reimburse himself for the principal sum thus expended, without interest, out of the increased rentals, but not out of the corpus of the estate, or the ordinary rentals," etc.

The fact that the children are now of age, and in possession, can make no difference; if the appellants have an equitable claim upon the rents of this property it should be enforced. It was expressly agreed in writing that these parties should have a lien or become entitled to the rents in discharge of their debts, and their right to file a notice, etc., of an intention to assert a

lien, or the evidences of their debt, as required by the mechanics' lien law, was expressly waived, that is, the appellants were to have a lien, whether they filed their claim or not; and while this could not affect others it was binding, as between the guardian and appellants, to the extent they could contract.

The vice-chancellor, in his judgment rendered in 1878, recognized the existence of these liens and the right of creditors to the rents. The lease had seven years to run from its date, and, at the expiration of the seven years, the chancellor's judgment to the extent it had gone had performed its functions, but the rents paid no part of the appellants' debt. It was not a final judgment, that is, a judgment determining that if the seven years' lease fails to pay you, the creditors are without remedy. The original agreement with the guardian as to liens, and the right to the rents until the debts were satisfied, still existed, and, while it was not binding on the infants, the original judgment enforced the lien and gave to the appellants the benefit of the lease upon equitable grounds.

While there is no question before the court, except as to the sufficency of the supplemental petition, that petition is based on the facts developed in the original case, and the judgment rendered upon these facts. It is apparent that the estate of the infants (now adults) can not be burdened with the interest accruing on these notes, nor should they be compelled to pay more than the actual cost of furnishing the stone, for which the notes were given, without interest, and this should be paid out of the enhanced rental value of the property, by reason of the improvements, after deducting these from the insurance, taxes and cost of keeping the premises in repair.

These views, upon the facts presented in the original action, are not to preclude any defense the appellees may have to the recovery. We simply adjudge that the facts stated, if true, entitles the party to relief, and if no defense exists it should be granted, as herein indicated.

Judgment reversed and remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

CARUTHERS, TRUSTEE v. NEEL, &c.

(Filed October 30, 1890—Not to be reported.)

1. Trusts—Life estate—Under the provisions of the particular will the trustee exercised proper discretion in not permitting a young lady, the cestui que trust, to spend the whole amount of income from her estate before she arrived at age, but it was proper to pay over to her the accumulated income from said estate when she arrived at age and married, as she was then competent to manage all of her estate, she having only a life estate in the property.

2. Decedent's estate—Damages recovered from railroad company—Damages recovered by the widow and children of a decedent, who was killed by the willful negligence of the employes of a railroad company, does not belong to a trustee or executor of the testator, but belongs to the widow and children.

J. C. Beckham for appellant

T. J. Beard for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

Fielding Neel, of the county of Shelby, died, leaving a last will by which he gave his estate, after making provision for his widow, to his granddaughter, Mrs. Amos, for and during her life, and then to her children, with a devise over, if she had no children. The will is here for construction, and involves only one question, and that is the right of the life tenant to the entire income of the estate devised directly to the trustee for her immediate benefit. The granddaughter was an infant and unmarried when the will was executed, and, therefore, we find a clause in the will providing that a liberal education should be given the child, and so much of the income of the estate was necessary should be applied to this schooling and other expenses, and an amount to pay the board of Mrs. Hickman, who then had charge of the young lady. It was the duty of the trustee during her minority to see that she did not expend more of her income than was necessary for one in her condition in life. She had an ample income, and doubtless more than was necessary for providing her with every comfort, as well as the ordinary expenses for board and clothing. The trustee should not, therefore, as he did not, allow her to expend all of her income merely because she had it. After she became of age and married, she was in a condition to use and manage, according to her own best judgment, the entire income, and there being no restriction as to this use by any provision of the will, it was the duty of the trustee to pay it over.

As to the fund derived from the railroad company on account of the death of the testator, caused by the willful neglect of its employes, it was not assets in either the executor or trustee's hands. There was a widow and those surviving the testator who were permitted to bring the action, and for whose benefit the statute authorizing the action was passed. It is a right given to the beneficiaries under the third section of that statute, and is not derived by inheritance or by a general devise from the party killed. The widow and grandchild having received this money, and the trustee and executor having no interest in the fund, he has no right to complain.

Judgment affirmed.

JONES v. GORHAM, &c.

(Filed November 1, 1890.)

Conveyances—Insanity—Undue influence—This is an action to set aside a conveyance made by wife of appellant to a third person of a tract of land which was then in turn conveyed to appellant. The grounds relied on to set aside said deed is insanity of the wife at the time of its execution, and undue influence of the husband. The only evidence of insanity proven is that a few weeks next before the execution of the deed she made three unsuccessful efforts to commit suicide, and she did afterward commit suicide. Held—That suicidal tendency itself is not sufficient to prove the existence of insanity or the incapacity to contract, there being no other fact conducing to show the lack of mental capacity of the wife, the conveyance is upheld. The fact that an agreement was made that the wife should convey her property to appellant and he should will the property to her, so that the survivor should have the whole estate, is not evidence of undue influence.

Kennedy & Son for appellant.

W. S. Gudgell, R. Gudgell and Ross & Owens for appellees.

Appeal from Nicholas Chancery Court.

Opinion of the court by Judge Bennett.

On the 9th of May, 1884, Laura Jones, wife of the appellant, conveyed to —— Robinson her small tract of land, on which she and the appellant lived, in trust, to be conveyed to the appellant, which said Robinson on that day executed. On the 18th day of June, following, said Laura died, and this action was thereafter instituted by her mother and brothers and sisters, as her heirs, to have said conveyance set aside upon the ground that said Laura was by reason of insanity non compos mentis, and the undue influence of the appellant.

The material facts relied on as proof of insanity are: That said Laura, within a few weeks next before she made the deed, made three attempts to commit suicide, and she, after the making of said deed, did commit suicide, and she, about the time of making said deed, would lie down on the wet ground without any rational motive and pick the grass in a strange manner, and would lock herself up in a room and weep, and she was despondent and gloomy, and her speech was incoherent and irrational, and lastly, the opinion of witnesses that she was insane.

The proof is clear that she made, in April, 1884, two or three unsuccessful attempts to kill herself, and that she did, eventually, kill herself. But the proof that she otherwise acted irrationally, or that she was otherwise irrational, or that her speech was incoherent and irrational, is contradicted by the overwhelming preponderance of the evidence. The evidence of her physicians who attended her about the time she committed these suicidal acts, and about the time that she is said to have talked irrationally, etc., is to the effect that while she was in delicate physical health, she was rational and possessed good sense and judgment. Her merchants, with whom she traded in April, 1884, say that she was rational, and possessed good business capacity. Her nurse, who was her attendant for several weeks next before her death, says that she was rational and had good judgment. Her neighbors and the hands on the place, who were well acquainted with her, and saw her often during the time that she is said to have been insane, say that she was rational and possessed good judgment and strong will power. The witnesses, twenty in number, are not of kin to the appellant, save one or two, while all the witnesses for the appellees, save one or two, are either the appellees themselves or their kin.

Therefore, we are brought to the question, how far is the fact of the suicidal intentions, and which were eventually carried into execution, to be considered in determining the condition of Mrs. Jones' capacity to make the contract? This question is answered by the cases of Duffield v. Morris, 2 Harrington's Delaware Reports, 375, and Brooks v. Barrett, 7 Pickering's Reports, 94, and other cases, to the effect that suicide does not of itself prove the existence of insanity, or the incapacity to contract; that a person may commit suicide and be quite rational as regards all else; that suicide is not inconsistent with the idea of a sound mind. It is an act contrary to reason, education and natural instincts, but why should it be evidence of insanity and more than other acts that are contrary to reason, education any natural instincts. It seems to be a general rule that suicide may

be considered in connection with other evidence to establish insanity, but it does not of itself establish that fact, nor does it create of itself that presumption of insanity. There is no proof whatever tending to establish undue influence on the part of the appellant. The fact that Mrs. Jones and the appellant agreed that Mrs. Jones was to deed the appellant her estate and he was to will her his estate, so that the survivor should have the whole estate, does not tend to establish undue influence.

The judgment is reversed and the case, upon its return, must be dismissed.

BRIDGFORD v. FOGG, SHAW, THAYER & CO.

(Filed November 1, 1890.)

1. Supersedeas bond—Sureties—A judgment having been rendered in the lower court against S., H. & Co. for a debt, and appellant became their surety on a supersedeas bond executed in the Superior Court. On the appeal prosecuted to said court the judgment was reversed as to S., and the party known as the company of said firm, but affirmed as to H. In an action on said supersedeas bond appellant claims that he is not bound, as he was surety for the firm known as S., H. & Co., and not for H. alone. Held—That appellant is liable on said bond.

2. Void judgments—A judgment rendered by a court having jurisdiction of the parties and the subject-matter is not void, but may be erroneous.

Simrall & Bodley and R. J. Elliott for appellant.

C. B. Seymour for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellees, Fogg, Shaw, Thayer & Co., instituted this action against W. L. Bridgford on a supersedeas bond executed by the latter as surety of Smith, Henry & Co. on an appeal to the Superior Court from a judgment rendered in the Jefferson Court of Common Pleas, in favor of the appellees against Clark A. Smith, H. B. Henry and James Bridgford, partners, under the style and firm of Smith, Henry & Co. On the hearing of the appeal in the Superior Court the judgment appealed from was reversed as to Clark A. Smith and James Bridgford and affirmed as to H. B. Henry. That judgment remains in full force, and the surety on the supersedeas bond is insisting that he is not liable for the default of Henry, because he became the surety of the firm, and not of any individual member of the firm. It seems from the proceedings in the original case that the firm of Smith, Henry & Co. had been dissolved, and the firm of H. B. Henry & Co. succeeding it (H. B. Henry alone composing the latter firm), the appellees consented to look to H. B. Henry & Co. for their claim and not the old firm. The court below made them all liable, and on the appeal to the Superior Court that court adjudged that the original firm was not liable, released Smith and James Bridgford from all responsibility, and left the judgment in full force as to Henry.

The contention now is that as there was no cause of action set up against H. B. Henry & Co. in the petition, the judgment entered against H. B. Henry was and is void. It must be con-

ceded, as the record is now presented, that H. B. Henry was alone responsible for this claim, and as his liability is fixed by the judgment, and the execution was stayed by reason of the supersedeas bond executed by the appellant, there can be no doubt as to his liability upon it. That the agreement is not proven as alleged may be cause for a nonsuit, but if judgment is entered against three when the testimony shows only one liable, it is not void, or if a cause of action is good as against two of the defendants and no cause of action as to the third, and a judgment is asked against all and so rendered, it stands good as to all until reversed.

To illustrate: Suppose a contract alleged to have been executed by three parties, and on the trial it appears that only one of the defendants entered into it, but still the court rendered judgment against all three of the defendants. The entire judgment is superseded and reversed as to the two not liable and affirmed as to the one who made the contract, and whose liability is unquestioned; why is not the surety in the supersedeas bond liable?

The appellant insists that he is not liable because the judgment is void. That can not be. A judgment by a court having jurisdiction of the subject-matter and the parties is not void, but may be erroneous. In this case the firm of Smith, Henry & Co. was sued. It turned out that a contract had been made by which Henry was alone liable, but the court below believing that all were liable, rendered a joint and several judgment against them, and that judgment was superseded, not only as to Smith and Bridgford, but as to Henry, and affirmed as to the latter. If the court below had sustained the defense of Smith and Bridgford they would have been discharged in that court. The contract being alleged to have been made by the firm, the proof showing that it was made by one of its members, the firm having no interest in it, a nonsuit would have followed, but here there was a judgment and an affirmance.

Judgment affirmed.

RENDER v. McHENRY COAL CO.

(Filed November 13, 1890—Not to be reported.)

Landlord and tenant—Lease—Payment—The lease of lands for mining purposes made to the appellee by appellant stipulated that the parties of the second part hereby obligate themselves to pay the parties of the first part, or his assigns, the sum of one-fourth of one cent for every bushel of merchantable coal taken from said land by them, and they further obligate themselves to take at least one hundred thousand bushels per annum, or upon their failure to do so they are to pay as if they had, at the end of the year when the royalty is due for each year, and the deficiency may be counted for them out of any year when they took exceeding the one hundred thousand bushels, the agreement being that the mines shall yield to the parties of the first part the sum of $250 per year, one year with another, and more than that if the amount of coal mined shall exceed one hundred thousand "bushels. In an action to recover the rents for about nine years, about four years and seven months of which the mines were not worked, the appellee pleaded as payment that the royalty paid on coals mined during that time amounted to about $12,000. Held—That said answer was a good plea of payment, and appellants were not prejudiced by the decision of the lower court sustaining said defense.

E. Dudley Walker for appellant.

H. D. McHenry for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor.

On the 6th of November, in the year 1872, the appellant leased to Pendleton and McHenry for an indefinite period certain land in the county of Ohio, for the purpose of mining coal. The lease was subsequently transferred to the McHenry Coal Company, that has operated the mines for a number of years. This action was instituted by the lessors against the company in which various breaches of the covenants contained in the lease are set forth, only one of which is involved in this appeal. That breach is the failure to pay the annual or semi-monthly rental of the mines. That part of the lease fixing the rental or the amount to be paid by the lessees is as follows: "The parties of the second part hereby obligate themselves to pay the parties of the first part, or his assigns, the sum of one-fourth of one cent for every bushel of merchantable coal taken from said land by them, and they further obligate themselves to take at least one hundred thousand bushels per annum, or upon their failure to do so, they are to pay as if they had at the end of the year when the royalty is due for each year, and the deficiency may be counted for them out of any year when they took exceeding the one hundred thousand bushels, the agreement being that the mines shall yield to the parties of the first part the sum of $250 per year, one year with another, and more than that if the amount of coal mined shall exceed one hundred thousand bushels."

The lessees worked the mines for several years, paying the royalty as provided by the terms of the lease and then ceased to work for four or five years, as the operation of the mines involved them in loss, or for other reasons that do not affect the question involved. The appellant contends that for the years the lessees failed to take out coal that they (the lessors) must be paid for such year the sum of $250, while, on the other hand, the lessees say the appellant have been paid for those years by the excess of royalty paid on coal taken out prior to the cessation of their work.

Whether this payment has been made depends on the construction given that portion of the lease in reference to the payment to be made the appellant.

It is evident that the mines were to yield to the appellant one year with another $250, and if there was no cessation of mining, and coal was taken out each year in a quantity making the royalty exceed $250, the appellant would be entitled to the excess, the agreement being "that the mines shall yield to the parties of the first part the sum of $250 per year, one year with another, and more than that if the amount of coal mined shall exceed one hundred thousand bushels." Suppose, however, the appellees should mine as much as one million of bushels in two successive years, and then cease to mine for several years, would the appellees then have the right to look to the excess of royalty paid for the two years in which they took out the coal to meet the payments of the $250 for each of the years in which the mines were not worked? We think that such is the proper construction of this provision of the lease, if the excess paid in royalty is sufficient to meet the deficiency. It is expressly provided that the lessees are to take out at least one hundred thousand bushels each year, "and upon their failure to do so they are to pay as if they had at the end of the year, when the royalty is due, for each year, and the deficiency may be counted for them out of any year when they took exceeding one hundred thousand

bushels, the agreement being that the mines shall yield the party of the first part the sum of $250 per year, one year with another."

The lessors (appellants) were contracting so as to make the mines yield them one year with another $250, and the appellees agreeing to pay that much and more if the royalty on the coal taken out exceeded that sum. It was but an experiment, doubtless, when the leasing for mining purposes took place, the appellees agreeing to pay not more than $250 per year unless the quantity taken out justified the payment of a greater sum. Nor does such a construction of the contract work any hardship on the appellants, for if they received, as the pleadings show, royalty for nine years, amounting to near $12,000, and then the appellees ceased to work, there being no evidence of bad faith, it would be a hardship on the latter to compel them to continue the payment of the $250 per annum, when, by the terms of the contract, they had the right to look to the excess of payment to supply the deficiency.

The object and purpose of the stipulation as to the consideration to be received by the lessors was to entitle them to royalty on all the coal mined, the amount of royalty received to average not less than $250 per annum, and if they have received as much as $12,000 for the period of nine years, as the pleadings conduce to show, instead of $250 for each of these years, they ought not to complain. There is no bad faith alleged or any breach complained of on the hearing, except the failure to pay for the four years and seven months the company failed to take coal from the mines. It is simply a claim of indebtedness on the one side and payment alleged by the other.

All other claims set forth in the petition were dismissed without prejudice.

Judgment affirmed.

GOODIN'S EX'ORS v. KENTUCKY LUMBER CO.

(Filed November 11, 1890.)

Damages—Injury from floods—Negligence—Navigable streams—In March, 1886, an unprecedented flood in the upper Cumberland river damaged the farm of appellants' intestate by washing away his houses, fences and barns, and this action was afterwards brought against the appellee, as the owner of logs above said farm, for damages, alleging that the injury resulted from the negligence of the company in placing its logs near the bank of the river, without being secured, and in such a position as caused the high water to take them off, lodging them upon his land, against his dwelling, outhouses, fencing, etc., causing almost the entire destruction of all improvements on his farm. It is also claimed that these logs were being rolled into the river, after the rise had taken place, and at a time when an ordinarily prudent man would have foreseen the danger to the farms below. The lower court ordered a nonsuit, on the ground that the Cumberland river was a navigable stream. Held—That an action would lie against any one who, by his negligence and carelessness, caused a loss and injury to another, although his acts were done in the exercise of his right of transporting logs over a navigable stream. The rule seems to be that if a stream, in its natural condition, is capable of being used for floating rafts, logs, etc., and has, in fact, been used for that purpose, the public has an easement in it. The Cumberland river, above the falls, had for years been used by the public for floating logs down its channel in high water, and appellee had the right to float its logs down the stream to its mills below the falls, in the usual manner, using ordinary care to prevent injury to those owning lands along the

river. This was its only outlet for bringing its logs to market, but if, in the enjoyment of this public easement, it carelessly or wantonly destroys the property of those who live on the banks of the river, it is liable in damages for such injury. The nonsuit was proper, as there was no evidence showing want of care on the part of the appellee in either placing the logs on the banks, or in floating them down the river.

A. Duvall and J. M. Unthank for appellants.

J. W. Alcorn, Wm. Lindsay, J. H. Tinsley and R. D. Hill for appellee.

Appeal from Whitley Common Pleas Court.

Opinion of the court by Judge Pryor.

In the month of March, in the year 1886, a rise in the upper Cumberland river, unprecedented in its character, caused the waters to sweep over the lands, from hill to hill, on either side, destroying farm houses, fencing, orchards, and, in fact, making the entire improvements a wreck on all the farms bordering on the river for miles above the falls. The appellant's testator, John Goodin, owned a valuable farm that was almost ruined by the overflow, and prior to his death instituted this action against the Kentucky Lumber Company, alleging that the material injury and loss sustained by him was caused by the negligence of the company, in placing its logs near the bank of the river, without being secured, and in such a position as caused the higher water to take them off, lodging them upon his land, against his dwelling, outhouses, fencing, etc., causing almost the entire destruction of all improvements on his farm. It is also claimed that these logs were being rolled into the river, after the rise had taken place, and at a time when any ordinarily prudent man would have foreseen the danger to the farms below. There seems to be no special averment as to what constituted the negligence, except the general statement that the logs were negligently placed on the banks and in the river, causing the injury; but this, it seems to us, authorized testimony to show that the logs were placed loose in the river, at a time when any ordinarily prudent man should have anticipated the injury that would result from such acts on the part of the company's employes. The trouble in this case arises from the failure of proof on this point, and while the court below seems to have disposed of the issue by ordering a nonsuit, on the ground that the river was a navigable stream, still if the evidence was wanting showing neglect on the part of the defendant, the nonsuit was proper.

It seems to us it was an immaterial question as to whether the river was or not navigable. If the injury resulted from the neglect of the company, a liability would arise. It is manifest from the proof that the Cumberland river above the falls, for many miles, had been used by the public for years floating logs down its channel, in high water, to the mills below. The river was subject to this public servitude, and had been used for such purpose for a long period of time. The rule seems to be that if the stream, in its natural condition, is capable of being used for floating vessels, rafts, logs, etc., and has, in fact, been used for that purpose, the public has an easement in it. (Brown v. Chadborne, 31 Me., 9; Treat v. Lord, 42 Maine, 552.) These logs had to be floated to the saw-mills below, so as to be made into lumber, and this stream was the only outlet to the market, and whether carried in rafts, or singly, is immaterial, if the natural power of the stream was sufficient to transport the logs. The

public have the right to use it, but not in such a manner as to destroy, by neglect, or wantonly, the property of those who live on its banks. It depends, at last, on the nature and character of the stream, and its capacity for use in the aid of commerce, as to whether an easement exists in the public, and when the stream, or the soil over which it runs, is private property, and is incapable of being used, in its natural condition, for transportation, the public can assert no right over it, except to condemn it for public use. Having the right to use this stream, the placing of logs on its banks, that they might be taken off by the high water, does not constitute negligence, and we fail to find any testimony showing that the logs were negligently handled, or that they were placed in any position that would justify a reasonably prudent man that injury would result from their being carried below by the high water. The company was in the exercise of a legal right, and by a sudden rise in the river that was not anticipated by either the company or the owners of the land below, the entire farms in the bottoms were overflowed, and the logs of the defendant, as well as the logs of others, causing much damage as they were carried away by the stream.

We see no reason for holding the company responsible under the circumstances, and a nonsuit was properly ordered.

Judgment affirmed.

JACKSON v. COMMONWEALTH.

(Filed November 11, 1890—Not to be reported.)

1. Criminal law—Malicious shooting and wounding—Evidence—Appellant was convicted on an indictment charging him with maliciously shooting and wounding one Williams, and McKee was indicted jointly with him. The shooting took place in the night, and, on the trial, a witness stated that Williams, shortly before the time when he claimed to have been shot by the appellant, had a shooting scrape in the night with two men by the name of Bush, who lived near the place where the shooting in question occurred, but the court excluded this statement. Held—That said testimony was incompetent.

2. New trial—The refusal of the court to grant a new trial, on account of surprise at the testimony of prosecuting witness, is not subject to exception.

Ewell & Smith, W. R. Ramsey and N. B. Hays for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Hugh Jackson, was jointy indicted with Abe McKee, for maliciously shooting and wounding Alexander Williams, the accusation being that Jackson did the shooting, and McKee, being present, encouraged it. A severance of trial was granted. The defense was that the appellant did not do it. It occurred in the night. The direct testimony is conflicting. According to Williams' evidence the appellant is guilty. According to his own and that of McKee, he is not. Both sides are, to some extent, confirmed by other testimony.

Under these circumstances the verdict can not be disturbed

unless an error of law was committed upon the trial, which, considering the entire case, was prejudicial to the substantial right of the accused. It is urged, first, that this occurred in the rejection of certain testimony; and, second, in instructing the jury. They were told in substance, in the first instruction, that if they believed from the evidence, to the exclusion of a reasonable doubt, the appellant maliciously shot and wounded Williams, they should convict him of felony. In the next one, that if they found from the evidence, beyond a reasonable doubt, that he did shoot and wound him, but in sudden heat and passion, and not in malice, then they should find him guilty of a misdemeanor. By the third instruction they were directed, in case they found him guilty, but had a reasonable doubt whether of felony or misdemeanor, to convict him of the latter. In a fourth instruction he was given the benefit of the rule as to a reasonable doubt upon the whole case.

The instructions embodied the whole law of the case. They were as favorable to the accused as he had a right to demand. We perceive no error in this respect. Moreover, no exception was taken to the first instruction, and under it the appellant was found guilty. The witness, Abe McKee, stated that Williams, shortly before the time when he claimed to have been shot by the appellant, had a shooting scrape in the night with two men by the name of Bush, who lived near the place where the shooting in question occurred. This statement was excluded at the instance of the State, notwithstanding an objection of the accused. We fail to see upon what ground it can be urged that it was competent evidence, unless by way of raising a presumption that one of these men, named Bush, and not the appellant, shot Williams. Waiving the question of its being too far fetched to be admissible upon this score, it is evident it would not have affected the result of the trial.

One of the grounds upon which a new trial was asked was surprise at the testimony of Williams, and the discovery, after the trial of evidence to refute it. There had, however, been an examining trial, and it not only appears that Williams then testified substantially as upon the final trial, but that what was claimed to be the newly-discovered testimony was then also offered in evidence. Moreover, under our Code, the action of the trial court, upon a motion for a new trial, is not subject to exception.

Judgment affirmed.

CITY OF OWENSBORO, &c. v. HICKMAN, &c.

(Filed November 11, 1890.)

Constitutional law—Elections—Registration—This action was instituted by appellees, as citizens of Owensboro, against the appellant, as mayor and councilmen of the city, to compel them to order an election, to be held on the first Monday in December, 1890, for the election of city officers, and to appoint officers to hold said election, as provided by the city charter of 1888. Appellants base their refusal upon the grounds that the registration and election laws for the city of Owensboro, of May 9 and May 13, 1890, provided that no one can vote at an election in December unless he shall have registered during the three days commencing on first Monday in July, 1890, and that they had no knowledge of the passage of said acts until it was too late to provide for such registration; consequently, the present incumbents hold their offices until an election can be held, after the registration is had in July, 1891. The registration law provides that but one registration should

be held in any one year, and no one shall be registered except those who will be qualified to vote at the August election following. Held—That said registration law violates section 7 of the Bill of Rights, which provides that all elections shall be free and equal. Said law adds an additional qualification to the right of a citizen to vote, which, under the pretense of regulating the right, really subverts it. Registration laws, when they are reasonable regulations for ascertaining those who are entitled to vote, are upheld as constitutional, but when they serve to disfranchise a large class of citizens they should be held invalid. This law provides a registration in July for all elections to be held within one year, and applies alike to the election of State and county officers in August, to the election of congressmen in November, and to the election of city officers in December, and disfranchises all from voting who are not qualified to vote at the August election. The mandamus was properly awarded.

W. T. Owen and W. N. Sweeney for appellants.

Powers, Atchison & Miller for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

The appellees, who are voters in the city of Owensboro, and also candidates for certain city offices, which, under the charter of 1882, should be filled by an election to be held on the first Monday in December, 1890, sue for themselves, and the other citizens of the place, to compel, by mandamus, the appellant, Joseph Lee, as mayor, to make proclamation for the election, and the other appellants, as members of the city council, to select election officers in conformity to the charter provisions. This they are bound to do, unless the legislative acts of May 9 and May 13, 1890, providing for a registration of voters in the city, and for voting by ballot, are valid. This is affirmed by the appellants, and denied by the appellees.

The two acts, although as passed at different times, but at the same leigslative session, relate to the same general subject, are dependent upon each other, and must be treated, as to the question now presented, as one law. The ballot act assumes that a registration has been made. The voting is required to conform to it. The election by ballot depends upon a compliance with the provisions of the registration act. If it be invalid, both must fail.

The appellants say they were enacted without their knowledge; that they did not learn of them until it was too late to provide for a registration for any election in December, 1890, and that by their provisions none can now be had until July, 1891; that as by their terms no one can vote unless he be registered, there can, therefore, be no election, as there has been no registration; and the mayor can not, therefore, be required to issue any proclamation for an election, or council be compelled to select officers for one, but that the present city officers, by the terms of the city charter, hold over until their successors are chosen.

The question, therefore, to be determined is the constitutionality of the registration law. If it be doubtful, the action of the legislature must be upheld. The law provides that the common council shall appoint registration officers, at its first regular meeting in June of each year. They are to make the registration on the first Monday in July and the two succeeding days, save the fourth day of the month is not to be one of them; and

every person is entitled to be registered who would be entitled to vote at the succeeding August election.

The provisions of the act apply to all elections, whether municipal, county or State, and authorize but one registration a year, it to govern in all the elections occurring within a year from its making, in which the citizens of Owensboro participate. If the name of the voter be not on the registry made in July, then he can not vote whether he wishes to do so at the State election in August, or the congressional election in November, or the municipal election in December, or at any election, special or otherwise, which may be held for any purpose, within a year from the registration. The act says: "No vote shall be received unless the name of the person offering to vote is on the registry provided in this act." No person can be registered unless he personally appears before the officers of registration, and no provision is made or provided whereby a voter can, in any way, manifest his right to vote, if he fails to register in July. He is deprived of the privilge, as to all elections, for a year from that time.

If it be true, as suggested in the opinion of the judge below, that in some elections the citizens of the city do not vote separately, but that votes are cast both by those living within and without the city, then some of these voters will be governed by a registry and others not. Voters living within the city will not be allowed to vote in these elections if unregistered, while those living oustide will be permitted to do so, although unregistered. Waiving this difficulty, if the statement in the opinion be correct in the execution of the law, let us consider it in some other respects.

It may now be regarded as settled law that, in the absence of constitutional inhibition, the legislature may pass registration laws, even of a local character, if they merely regulate, in a reasonable and uniform manner, how the privilege of voting may be exercised. It was so held in the leading case of Copen v. Foster, 12 Pick., 485, and the courts of many of the States have so decided. (Byler v. Asher, 47 Ill., 101; Edmonds v. Banbury, 28 Ia., 267; Auld v. Walton, 12 La. An., 129; Hyde v. Brush, 34 Conn., 454; State v. Baker, 38 Wis., 71; Patterson v. Barlow, 60 Pa. St., 54; Monroe v. Collins, 17 O. St., 665; Commonwealth v. McClelland, 83 Ky., 686.)

It is merely providing machinery for ascertaining, prior to the election, who are the legal voters. It is only furnishing a reasonable regulation, under which the right is to be exercised. The true theory, upon which these laws are based, is that they must not impair or abridge the elector's privilege, but merely regulate its exercise by requiring evidence of the right. The right can not be impaired, but it may be regulated. Evidence as to it may be required, consistent with the right itself. The purpose is to prevent abuse of the privilege and to guard the purity of our elections. Looking at them in this light, their importance and, indeed, necessity, in densely populated localities, is evident. They rid the election officers of the duty of determining difficult questions in haste and confusion upon the election day, and, by means of them, it is known in advance who will claim the privilege of voting. They serve, therefore, to give peace and purity to elections, and should be upheld, unless violative of constitutional right.

It is the constitutional duty of our legislature to regulate elections. The Constitution is silent as to how are when it shall be ascertained who are entitled to vote. It is a privilege more than a right. Some persons are not entitled to exercise it, and it is, therefore, the right and duty of the legislature to provide in

such way as to it may seem best, provided it be constitutional, a mode of ascertaining who are legal voters. This is indispensable to free and fair elections; and the ascertainment of it, by means of a uniform and reasonable registry law, is but an exercise, by the legislature, of a proper power. It creates only a condition to the exercise of the privilege. Some inconvenience or hardship will result from any law looking to this end. All human work is imperfect. The elector is invested by the Constitution with the privilege of voting.

It is the sign of sovereignty in him; yet he may, for various reasons, and without his fault, be unable to exercise it upon the day of the election; he may be unable to go to the voting place; and yet no one will claim that the law, fixing a day for the election, or requiring the voter's presence at the polls as a condition of the exercise of this right of suffrage, is void upon the ground that he was then unable to vote. If he be afforded a reasonable opportunity, before the election, to register, it is but a reasonable regulation for the exercise of the privilege.

A registration law, however, will not be held valid which, under the color of regulating the manner of voting, really subverts the right. If, for instance, it prescribes a qualification for the elector, in addition to those provided by the Constitution, it will be declared invalid. In the language of one writer, to be upheld, "it must be regulation purely, and not destruction."

Mr. Cooley says: "All regulations of the elective franchise, however, must be reasonable, uniform and impartial. They must not have for their purpose, directly or indirectly, to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise. If they do, they must be declared void." (Cooley's Con. Lim., page 603.)

Section 8, article 2 of our State Constitution, provides: "Every free, white male citizen, of the age of twenty-one years, who has resided in the State two years, or in the county, town or city in which he offers to vote, one year next preceding the election, shall be a voter; but such voter shall have been, for sixty days next preceding the election, a resident of the precinct in which he offers to vote, and he shall vote in said precinct, and not elsewhere."

Guided by the rules above indicated, let us see if the registration law now before us contravenes this constitutional provision; whether it is unreasonable, and really denies the privilege of voting, instead of regulating the manner of its exercise. As already stated, it provides for but one registration within a year. It must be made within three days, and in July of the year, and only those can register who may be qualified to vote at the succeeding August election. It is to determine the right to vote at any and all elections for a year from that time, and those who can not so register are denied the privilege of voting for a year thereafter. This is very different from the provisions of the registration law which was considered by this court in the case of the Commonwealth v. McClelland, supra. It is evident that under the provisions of the law now in question several classes of voters, although constitutionally qualified, will be deprived of the privilege of voting for a year, and without any fault upon their part. Those who have been prevented by sickness or absence from registering in July; those otherwise qualified, but who have resided in the city less than sixty days before the August election; those who may remove to the city after the August election, but may be qualified to vote at subsequent elections, occurring during a year, following the registration; those who had not become of age at the August election

but have, before the other elections within the year, and, possibly, other classes, are all deprived of the right to vote at any election held within a year of the time of registration.

Such a law strikes down the right itself, and is not a mere regulation of it. Containing no provision for special registration, it, instead of facilitating and securing the privilege and guarding against fraud and corruption, not only impedes, but actually subverts and destroys the right itself, and is in direct conflict with section 7 of our Bill of Rights, which declares that "all elections shall be free and equal."

While the legislature may enact registration laws, yet they, like all other laws, must conform to the Constitution. It can not do indirectly what it can not do directly. And this statute as effectully deprives those we have enumerated of their constitutional privilege of voting as if it had declared in express terms that they should not do so. Although constitutionally qualified to vote in December, yet to do so they must have been qualified voters in the city in August preceding, and registered as such in July previous. Such a registry law is not merely unreasonable, but it adds to the qualifications required of the voter by the Constitution, and abridges his rights under it. This being so, it is unconstitutional; and the judgment below, so holding and awarding the mandamus, is, therefore, affirmed.

HUGHES v. COMMONWEALTH.

(Filed November 22, 1890—Not to be reported.)

1. Criminal law—Manslaughter—On the trial of appellant for manslaughter, it being questionable whether the deceased died from the effects of a blow inflicted by the accused, the verdict of the jury on that point will not be disturbed.
2. New trial—The decision of the lower court, overruling a motion for a new trial, is not subject to exception.
3. Trial—Exceptions—An objection that the verdict is not sustained by the evidence is not available, as no exception was taken to it at the time it was returned.
4. Verdict—A verdict is not void for uncertainty, which found against the "within named defendant," appellant being the only person on trial, although he was indicted jointly with another.

Geo. A. Prentice and P. B. Miller for appellant.

P. W. Hardin for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Holt.

This is a conviction for manslaughter. The lowest punishment was awarded. The circumstances proven render it questionable whether the deceased died from the effects of the blow from the accused. This, however, was a question for the jury to determine. It can not be said that the verdict is without evidence to support it, and, in the absence of error of law, prejudicial to the substantial rights of the accused, it must be sustained. Such an error, to be available, however, must be excepted to when it occurs by the party who may wish to complain of it

thereafter; and by section 282 of the Criminal Code the exception must be shown upon the record.

But one exception was taken by the accused during his trial, and it was to the order refusing him a new trial. Section 281 of the Criminal Code expressly provides that the decision of the trial court, upon a motion for a new trial, shall not be subject to exception. An error in this respect is not, therefore, available upon appeal.

The verdict was not void for uncertainty. Another party was jointly indicted with the appellant. The verdict, as returned, did not name the appellant, but found against "the within named defendant." Only the appellant, however, was on trial.

Judgment affirmed.

WALKER v. LESLIE.

(Filed November 22, 1890.)

Jurisdiction—Boundary—Res adjudicata—Pleading—Appellee, in his petition in equity, states that he is the owner and in possession of a tract of land, and adjoining it is a tract of land of which appellant is owner and in possession; that appellant is by fraud, force and violence, attempting to change the division line and get possession of about ten acres of appellee's tract; that appellant has opened the fence, hauled timber from the ten acres, and prevented appellee repairing the fence and cultivating the land, and appellant is giving out in speeches that he is the owner, with fraudulent intent and purpose, to confuse the boundary line between them, and keep appellee from enjoying and using said land, and prays that appellant be perpetually enjoined from entering on or disturbing the land, and that the division line be established, and appellee quieted in his title to said land. The first paragraph of the answer contains a general denial of the wrongs charged in the petition. The second paragraph denies that the line described in the petition is the true division line, and says appellant, and not appellee, is owner of the ten acres. In the third paragraph appellant alleged that before commencement of this action recovery for the same alleged trespass was sued for, and the same issue here made was tried and determined in his favor by verdict of a jury, upon which judgment was rendered, which he pleads in bar of the present action. The court overruled the motion made by appellant, when he filed his answer, that the case be transferred to the ordinary docket, and sustained a motion made by appellee to strike out the third paragraph of the answer, and on the trial the chancellor found in favor of appellee. On appeal, Held—That the appellant's motion to transfer the case to the ordinary docket should have been sustained, as the issues involved were of a purely legal nature. While it is true that purely legal issues, tried by a chancellor, without objection, will be treated as having been tried by a properly instructed jury, yet as objection was made to such trial the action of the court in overruling said motion could be sustained only because some equitable ground attaches to the controversy. These grounds are, first, confusion of boundary, occasioned by fraud; second, a relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries, and that by his neglect or misconduct the confusion of boundaries has arisen; third, where an action in equity is necessary to prevent a multiplicity of suits. This is a case of controverted boundary between independent proprietors of adjoining lands, and none of the grounds enumerated exist for the interposition of the chancellor. The court also erred in striking out the third paragraph of the answer, as it was in effect a plea of res adjudicata. The allegation of the petition, in

the former action, was that appellant committed a trespass on the ten acres belonging to appellee. The answer was simply a denial of the wrongs alleged in the petition, and did not necessarily involve a trial of the title to the land, as appellee, being in the possession, could have recovered in an action of trespass, without having the title to the land. While the title, as well as possession of the land, may, in an action of trespass quare clausum fregit, be incidentally put in issue, and has in this action been done by the second paragraph of the answer; still, to maintain such action, the alleged trespass must be shown, when denied, to have been committed, and if the issue in respect thereto has been once tried and determined, another action for the same cause can not be maintained.

R. T. Burns and W. M. Connolly for appellant.

James M. York, L. T. Moore and Stewart & Stewart for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Lewis.

Appellee states in his petition, substantially, that he is owner and in possession of a tract of land, and adjoining it is a tract of which appellant is owner and in possession, title to each being derived from a common vendor; that appellant is, by fraud, force and violence, attempting to change the division line and get possession of about ten acres of appellee's tract; has opened the fence on that line, hauled timber from appellee's side of it, and prevented him repairing the fence or cultivating the ten acres; and that he, appellant, is giving out in speeches he is owner, with fraudulent intent and purpose to confuse the boundary line between them, and keep appellee from enjoying and using said land. The relief prayed for is judgment perpetually enjoining appellant entering on, or disturbance of, the land in dispute; establishing the division line, as described in the petition and claimed by appellee, quieting his title and possession, and all other proper relief.

Appellant, in his answer, denies the trespass and wrongs, as alleged, and the fraudulent purpose to change or confuse the division line between the two tracts. In the second paragraph he denies the line described in the petition is the true division line, and says he, not appellee, is owner of the ten acres; and in the third paragraph he states that, before commencement of this action, recovery for the same alleged trespass was sued for, and the same issue here made was tried and determined in his favor, by verdict and judgment of court, in an action where appellee was the plaintiff and appellant defendant; and judgment in that is pleaded in bar of recovery in this action. Appellant, at the time of filing his answer, made a motion to transfer the action to the ordinary docket, which was overruled. But a motion by appellee to strike out the material allegations of the third paragraph of the answer, which had the same effect as a general demurrer, was sustained.

It was stated by the plaintiff in his petition as cause of the previous action, referred to in the third paragraph, that he was owner and in possession of the same ten acres now in controversy, and that the defendant thereto unlawfully, with force and arms, entered and tore down and removed a portion of his fences, by reason of which he was deprived of use of said land and sustained damage in the sum of $100, for which judgment was prayed.

The answer contained simply a denial of the alleged trespass;

consequently, no issue involving either title or boundary of the land was made, or could have been legally tried and determined, in that action, which was in the nature of an action of trespass quare clausum fregit. For, though the plaintiff is alleged in his petition to be owner, he, having undisputed possession to a described line, might have just as effectually, if at all, maintained the action without as with title. It is true one of the instructions given by the court on trial may be reasonably interpreted as requiring the jury to determine the actual location of the division line between the two tracts, and to find for the plaintiff, or defendant, according to their belief, from the evidence, as to such location. But as the defendant did not, in his answer, deny existence of that line as described in the petition, nor set up any claim of title to, or possession of, the land upon which he was alleged to have unlawfully entered, he was not entitled to a verdict upon any other than the single issue made by the pleadings; nor can the judgment dismissing the action, in pursuance of a simple verdict for the defendant, be treated as conclusive of any other than the question whether the defendant committed the particular acts complained of in the petition.

Section 6, Civil Code, provides: "1. An action of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable. 2. All other actions must be ordinary." It has, however, been held by this court that when a purely legal action is brought and prosecuted in equity, without objection, the same weight will be given, on appeal from the judgment of the chancellor to his finding of facts as would have been given to the finding of a jury correctly instructed. (C. & St. L. R. Co. v. Wooley, 12 Bush, 451.)

But the motion to transfer this action to the ordinary docket was equivalent to an objection to trial of it by the chancellor, and appellant is, therefore, entitled, as matter of right, to reversal of the judgment, if that motion was overruled erroneously.

Fraley v. Peters, 12 Bush, 469, like this, was a case of controversy between owners of two adjoining tracts of land in regard to their boundary line, and, except no charge of fraud was there made, similar acts of the defendant were complained of in the plaintiff's petition, and the same relief was prayed for as here. No motion was, in that case, made to transfer to the ordinary docket, and the judgment establishing the line, as claimed by the defendant, was, on appeal, affirmed under operation of the rule mentioned, to treat the finding of facts by the chancellor like the verdict of a jury. But it was held that the trespasses alleged to have been committed were properly cognizable only in a court of law, and the dispute concerning boundary presented no ground whatever for intervention of the chancellor.

It seems to be a well-settled rule, approved by this court in the case referred to and others, that existence of a controverted boundary between independent proprietor of adjoining lands, by no means constitutes a sufficient ground for interposition of a court of equity to ascertain and fix that boundary, such cases being left to the proper redress at law; and to maintain such action in chancery there must be some equitable ground attaching itself to the controversy. These grounds are: 1. Confusion of boundary, occasioned by fraud. 2. A relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries, and that by his neglect or misconduct the confusion of boundaries has arisen. 3. When an action in

equity is necessary to prevent a multiplicity of suits. (1 Story's Equity, sections 619, 20, 21.)

It is not in terms, or effect, stated by appellee in his petition that appellant has fraudulently, or otherwise, changed the actual boundary line between their respective tracts of land; for the allegation, he is "by fraud, force and violence attempting to change the division line," fairly construed, means merely that he is asserting that line to be at a location different from that claimed by appellee, and by force has entered upon and attempted to take possession of the land in dispute. There is no relation between the parties making it the duty of appellant to preserve and protect the boundary, by neglect of which or misconduct on his part a confusion of boundary has arisen. No necessity is shown for interference of a court of equity to prevent multiplicity of suits. Nor is there, in legal contemplation, a confusion of boundary between them; but, as said in Fraley v. Peters, this is an ordinary case of dispute between independent proprietors of adjoining lands, which may be settled by a single suit at law. A court of equity may interfere, by injunction, in case of trespass to land, when necessary to prevent irreparable mischief, or to suppress multiplicity of suits and oppressive litigation. (Story's Equity, section 928.) Or, when there are repeated trespasses, by an irresponsible party, and there is no adequate remedy at law. (Musselman v. Marquis, 1 Bush, 463; Ellis v. Wren, 84 Ky., 255.)

But those conditions do not exist in this case. On the contrary, adequate remedy for the acts complained of in the petition can be afforded by an action ordinary, hence no necessity existing for resort to a court of equity, it has no jurisdiction to grant the specific relief, by injunction, prayed for. Nor has it, for the reasons already stated, jurisdiction to establish the division line described in the petition. It is equally without jurisdiction to quiet the title and possession of appellee, as prayed for, for the reason no question of title is properly involved, the contest being solely in regard to the true location of the division line, which, as well as question of possession, may be determined by action at law.

It thus follows the lower court erred in overruling the motion of appellant to transfer the action to the ordinary docket, and also in sustaining the motion to strike out the material allegations of the third paragraph of the answer, which is, in tenor and effect, a plea res adjudicata.

But when the transfer is made there will, in the present state of the pleadings, be two obstacles to recover by appellee: First, no relief, cognizable directly in a court of law, is prayed for in the petition; second, former adjudication and determination, in favor of appellant, of the alleged trespass. It will, therefore, become necessary, before appellee can succeed in this action, that his petition be so amended as to contain what is, by section 90 of the Civil Code, made an indispensable requisite, a prayer for the specific relief he may be entitled to, which is damages for the alleged trespass; and then he will fail, if commission of the identical acts, now complained of, was made an issue and determined in favor of appellant in the former action; for while the title, as well as possession of the land, may, in an action of trespass quare clausum, be incidentally put in issue, and has in this action been done, by the second paragraph of the answer of appellant, still, to maintain such action, the alleged trespass must be shown, when denied to have been committed; and if the issue, in respect thereto, has been once tried and determined, another action for the same cause can not be maintained; for a

party, though having clear title and actual possession to land, can not maintain an action against another for alleged acts of trespass thereon never committed by him.

Therefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

GREEN'S EX'ORS v. GREEN.

(Filed November 25, 1890—Not to be reported.)

Mortgages—Advancements—Decedents' estates—A testator during his lifetime had assumed payment of about $2,000 for his son, and by way of indemnifying him the son executed a deed of conveyance to his father of a tract of land on which he resided, and at the same time the father gave the son a writing by which the son was to repay the father as much of said sum as he might, from time to time, be able to pay, and if the whole sum was paid during testator's life he was to convey the land to his son's wife during life, remainder to her children; and if all was not paid during the life of the testator, then after his (testator's) death what sums his son had paid him were to be added to the interest of the son in his estate, and if the value of his interest shall not be as much as $2,000, then, to whatever extent it may be, his heirs are to convey to the son. In a suit by the father against the son for the possession of the land this court construed said conveyance and writing to constitute a mortgage, not payable until after the death of the father, and the payments made by the son to be treated as advancements to the son, and in the same suit the amount of payments made up to that time was ascertained. After the father's death the heirs brought a suit for a settlement of the estate. Held—That the wife and children of the son were entitled to have allotted to them so much of the land as, at a reasonable valuation, would cover the amount of payments made by the son, added to his share of the estate, while the residue of the land represents assets of the father's estate, and subject to the payment of the remainder of the mortgage debt.

Wood & Day for appellants.

Peters & Tyler for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

John Green, who is now dead, left several children surviving him, and also his widow. He devised his estate to his wife for life, and what remained at her death was devised to his children, or their descendants, equally. The widow having died, this action was instituted for a settlement of the estate undisposed of, and a distribution as directed by the testator. It seems that the testator, many years prior to his death, had assumed to pay for his son, Samuel Green (an appellee), about $2,000, and to indemnify him against loss, took from his son an absolute conveyance to the land upon which the son lived. At the time the deed was executed he gave to his son a writing, by which the son was to repay the father as much of said sum as he might, from time to time, be able to pay, and if the whole sum was paid during testator's life, he was to convey the land to his son's wife during life, remainder to her children; and if all was not paid during the life of the testator, then, after his (testator's) death, what sums his son had paid him were to be added to the interest of the son in his (testator's) estate; and if the value of

his interest shall not be as much as $2,000, then, to whatever extent it may be, his (testator's) heirs are to convey, etc.

This writing was construed by this court, in the year 1883, in a litigation between the father and son, as to the right of possession by the father of the land under the deed, this court holding that it was, in fact, a mortgage, and the payment for the son was in the nature of an advancement; that the claim of the father did not bear interest, the object being to secure a home for the son's wife and children, the debt not being payable until after the father's death. It was ascertained in that action how much the son had repaid of this money, and whether he has paid any other sum since the termination of that suit does not appear. It is conceded that all the money has not been refunded, and the balance due stands as a debt owing the estate of the father, with a lien on the land or a part of it.

The interest of the son in the father's estate, as it now appears, is only $220, and that, added to what the son had paid prior to his father's death, is the interest of the wife and children of Samuel in the land.

Whether the balance due by the son has been regarded as part of the assets is not certain. We infer that it has not; and if not, when added, will increase the son's interest in the estate. They must have so much of the tract as this will pay for at a fair valuation, and the balance of the land left is subject to the mortgage lien.

The devise by the testator has nothing to do with the question involved here. The $2,000, less the amount paid, constituted a part of the testator's estate, and the interest of the son in the whole estate, when added to the amount paid, is to be invested in this land at a fair value. This interest may exceed $220 when the balance due on the $2,000 is made part of the estate. The reason the wife and children of the son are entitled to the extent of the interest of the son in the father's estate, and to the extent of the payment made, before a lien can be asserted by the representatives of the testator, is because such is the express stipulation in the writing between the father and son.

This court held that no obligation existed on the part of the son to pay this debt, unless his interest in his father's estate was insufficient for that purpose, and as the amount coming to him falls short of paying the debt, the liability must be enforced, as provided by the agreement. The proper construction of the writing, and the one already placed upon it, gives to the wife and children of Samuel a preference to the extent of the payments made by him, and to the extent of his interest in his father's estate, his own indebtedness to be taken as a part of the assets. The wife and children of Samuel should be brought before the court and the land allotted them. The former litigation will be conclusive as to the amount paid by Samuel up to that time.

The judgment denying the executors of the father any relief is reversed and remanded for proceedings consistent with this opinion.

Judge Holt not sitting.

CITY OF MAYSVILLE v. STANTON.

(Filed November 25, 1890—Not to be reported.)

1. Municipal corporation—Negligence—Failure to protect streets and to construct sewer properly—Appellee brought this action to recover of appellant, the city of Maysville, damages for its failure to construct barriers that

would protect Front street from being washed into the Ohio river, thereby damaging and injuring a lot fronting on said street, and owned by appellant. The petition alleges that the city authorities, being fully aware of the condition of the street and the ravages of the river upon it, purposely and negligently failed to protect the bank so as to prevent the river from washing it away, but willfully and negligently refused to protect or preserve the street in any way, and that they had full control over said street, with authority and power to protect the same. As a second complaint, for which a recovery in damages was sought, appellee alleged that appellant carelessly and negligently constructed a drain through Front street that washed into and carried off portions of the street and of said lot. Held—That no recovery can be had for a failure of the city to protect Front street from washing by the river, as the proof shows conclusively that the city had never assumed control of the street, or regarded it in any way as coming under the control of the city council, without which no duty rested on the city to repair or protect same.

2. Instructions—Measure of damages—It was error to instruct the jury on the second ground of complaint, that the measure of damages in such action is "the diminished value of the property, the annoyance and trouble to which plaintiff has been put, and the cost of any repairs which he has made, and which were reasonably necessary by the injury, if any, to plaintiff's property, caused by the neglect of the defendant." The true measure of damages was the diminished value of the realty, caused by the wrongful act of appellant, that is, what was the value of the land injured before the trespass, and what its value after the commission of the wrong.

Edward W. Hines and Cochran & Son for appellant.

Allan D. Cole and Thomas R. Phister for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

The appellee is the owner of a lot in the town of Maysville that borders upon what is alleged to be Front street, that lies between his lot and the Ohio river. This lot has been injured by the high water washing away the banks of the river, so as to cause portions of the street to fall in, making it so narrow as to render the approach to plaintiff's lot difficult and dangerous. It is alleged in one count of the petition that the city authorities, being fully aware of the condition of the street and the ravages of the river upon it, purposely and negligently failed to protect the bank, or to prevent the river from washing it away, but wilfully and negligently refused to protect or preserve the street in any way; that they had full control of the street, with the power and authority, conferred on them by the city charter, to use the revenue of the city to keep in repair the streets, and to levy and collect a tax for that purpose. As an additional ground of complaint it is alleged that the defendant carelessly and negligently constructed a drain through Front street that washed and cut into the street, carrying off portions of the street and a part of plaintiff's lot, thereby depriving him of the use of the street, and destroying a part of his lot, to his great damage.

As to the first cause of action the court gave a peremptory instruction, holding, upon the facts proven, that it was not incumbent upon the city to keep what was called Front street in repair. If the council, having been invested with the power to improve and keep the streets of the city in repair, neglected to exercise that power, when it was manifest that the interests of those owning property on the street, as well as the public interest, required it, and that injury to property would result from

this omission of duty, the city should be held responsible. But before this liability arises it must appear that the city had assumed control of the street, or regarded it in some way as coming under the supervision of the city council. The facts show that prior to the year 1820 a small village, called Limestone, adjacent to the city of Maysville, had been laid out by January and others, and upon the plat or map of the town was Front street, running parallel with the river for some distance. This street was then used as a country road that seems to have been abandoned or gone out of use by reason of the encroachment of the river upon it. The village was never incorporated until some time in the year 1845, when it was incorporated and called East Maysville. The trustees of that town seem not to have attempted to prevent the washing of the banks that was gradually undermining the street and making it very narrow in many places, and above the town, that part of it, known as the county road, had been abandoned. It appears that East Maysville never improved that street, and that for more than twenty-five years it has been, in many places, in such a condition as vehicles could not pass. In 1867 the town of East Maysville was annexed to Maysville proper, and at the time that was done the public travel had changed from Front street to Second street; in fact it is shown that before the one town was merged in the other that a saw-mill or log-way was across that street, so as to prevent travel. The defendant never assumed control of this Front street as such, nor attempted to improve it, and with an ownership of this lot since 1858, no step has been taken by the appellee to compel the city to improve it. We think it clear, from the testimony of the plaintiff, that no obligation existed on the part of the city to keep this front passway in repair, or to restore it to its original condition. From the proof it was not required, nor was it expedient, for the city of Maysville to improve that which had been almost wasted away prior to its acquisition of the territory. In our opinion, therefore, the court properly instructed the jury to find for the defendant on this branch of the case.

As to the injury resulting from what is alleged to have been the negligence of the city in constructing a drain through Front street, the jury returned a verdict for $450. That finding says, in effect, that the falling in of portions of plaintiff's lot was caused by the negligence of the defendant. The case, upon this issue, went to the jury under an instruction as to the measure of damages that the appellant says is erroneous. The testimony is conflicting as to the cause of the damage to appellee's property, but the verdict of the jury being against the defendant, for the purposes of this appeal it must be assumed that the injury was the result of defendant's neglect. What, then, is the measure of damages? For an injury to land, the general rule is that the plaintiff is entitled to recover the diminished value of the realty, caused by the wrongful act of the defendant, that is, what was the value of the land injured before the trespass, and what its value after the commission of the wrong. The appellee asked the court for this instruction, that was given: "The measure of damages is the diminished value of the property, the annoyance and trouble to which plaintiff has been put, and the cost of any repairs which he has made, and which were reasonably necessary by the injury, if any, to plaintiff's property, caused by the neglect of the defendant."

It is plain, from the language of this instruction, that the jury had the right to conclude that they could find the entire damage, being the diminution in value of the lot, by reason of the injury,

and, in addition, the cost of any repairs made by the plaintiff for the protection of his lot. This protection may have saved appellee's property from injury and made it more valuable than when left exposed to the washing from this drain; if so, the appellant should not be compelled to pay its cost, and then to pay the diminished value of the land, without reference to the cost of protection that, by the instruction, the city was also required to pay. The jury should have been told that the appellee, if they believed the injury was the result of defendant's neglect, was entitled to recover the diminished value of the lot, if any, caused by the act of the defendant. All the expense reasonably incurred in the protection of the property will enter into the estimate. This they have the right to consider, but not so as to charge the defendant with that which would restore the property to its former condition, and, in addition, the diminution of value caused by the original wrong. The diminution in value is the real estimate to be made.

Another and more serious objection to the instruction consists in permitting the jury to give damages for the annoyance and trouble of the appellee, in reference to the wrong complained of. This is not an element of damage in a case like this, and leaves the jury at sea in rendering a judgment for compensation only. This, from the proof and pleadings, is a case entitling the appellee to compensation for the injury alleged to have been brought about by the city discharging its duty, through its employes, in an improper manner. There was nothing willful in the act done, and compensation in such a case is what the jury should allow, if, upon all the facts, the appellee should be entitled to a verdict.

For the reason of the error in the instructions the judgment must be reversed, and is remanded for a new trial and for proceedings consistent with this opinion.

Judgment affirmed on the cross appeal.

ZIMLICH, &c. v. ZIMLICH, &c.

(Filed December 4, 1890.)

Wills—Testamentary capacity—Undue influence—Instructions—Undue prominence given particular fact—A testator died, leaving surviving him a wife and her two children, and eight children by a former wife. By his will he made an equal division of his property among his children, giving to his younger children more than to his first children. The first children contested the will, alleging want of testamentary capacity on the part of the testator, and undue influence of the wife. A trial resulted in a verdict against the will. On appeal, Held—That the verdict was clearly against the evidence, and the court erred in giving the following instruction, viz.: "That the testator, if of sound mind, and not controlled by the undue influence of others, has the right to discriminate between the objects of his bounty in such manner as he chose to do, if done by him of his own volition, and understanding, at the time, the effect of such discrimination between the objects of his bounty; that if the testator, in making such discrimination, showed unreasonableness or gross inequality, the jury have the right to consider that fact, in connection with all the other evidence, in determining whether or not the testator was, at the time of making his will, of sound mind, and not under undue influence." This instruction gave undue prominence to the single fact of inequality of distribution as an evidence of undue influence. While proof of such fact was competent evidence for the jury to consider, in connection with other facts proven, it was improper and

misleading to single out that fact and embody it in an instruction. Where a fact put in evidence is competent only for a particular purpose, it is proper for the court to tell the jury for what purpose they may consider it. The true rule as to undue influence is that, to invalidate a will on that ground, it must appear that the testator, at the time of making his will, could not resist it, and that the will was the result of that influence, and not the free agency of the testator. The proof shows that although the testator's wife had that kind of influence over him that a good wife usually has over a kind and considerate husband, still the absence of the exercise of that influence over the testator would not authorize a finding that the will was executed under her influence.

J. R. Smith, George L. Everbach and Elliott & Hemingray for appellants.

Barnett, Miller & Barnett and O'Neal, Jackson & Phelps for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

Joseph Zimlich, a resident of Jefferson county, Ky., in October, 1885, made his will. He died in 1887. He was twice married and left eight children by his first wife, the most of whom were grown, and two by his second wife, who were infants of tender years. His second wife also survived him.

He willed to his wife, during her life or widowhood, the farm, containing twenty-six acres, on which he lived, remainder to six of his eight children by his first wife, and his city property to his said wife during her life or widowhood, remainder to his eight children by his first wife, and sixteen acres of land to his two children by his second wife, two acres of which he subsequently sold. The children by the first wife successfuly attacked this will upon the grounds, first, of the testator's want of testamentary capacity; and, second, undue influence of his wife. Upon the trial of these issues four witnesses swore that the testator, in their opinion, had not capacity to make a will. On the other hand, thirty-three witnesses swore that he was mentally capable of making a will. These witnesses are, first, the attorney that wrote the will; and, second, another attorney who had a business transaction with the testator after the will had been made; these witnesses testify that the testator was quite competent to make a will; third, the testator's banker; fourth, his tenants, who had frequent business transactions with him, before, about the time of the making of the will, and after then, all swore that he was competent to make a will; fifth, his neighbors swore to the same fact, and lastly, several of his children by his first wife swear that they saw no change in his mental faculties, but only physical decay. Now the four witnesses that swear to the testator's incapacity give no fact or circumstance that indicates that they possessed opportunities to judge of the testator's mental capacity that the witnesses for the will did not possess. On the contrary, it is evident that the latter witnesses possessed the best opportunities to judge of that matter. Without further elaboration it is sufficient to say that the verdict of the jury is so clearly against the weight of evidence as to indicate, if they were not misled by instruction No. 5, passion or prejudice.

The question, then, arises: Was instruction 5, given by the court, erroneous? Said instruction is: "That the testator, if of sound mind and not controlled by the undue influence of others,

has the right to discriminate between the objects of his bounty in such manner as he chose to do, if done by him of his own volition, and understanding, at the time, the effect of such discrimination between the objects of his bounty; that if the testator, in making such discrimination, showed unreasonableness or gross inequality, the jury have the right to consider that fact, in connection with all the other evidence, in determining whether or not the testator was, at the time of making his will, of sound mind, and not under undue influence of others." While gross inequality of distribution between the natural objects of the testator's bounty does not of itself, or by itself, establish undue influence, or the want of testamentary capacity, yet, in connection with other evidence of testamentary incapacity, or undue influence, such inequality is competent evidence. But is not the singling out of such evidence in an instruction misleading? It seems to us that it is. The jury are told that the test of testamentary capacity is the testator's capacity to know his heirs and relations, and the claims that they have upon his bounty, etc.; and as it is known by all that the claims of the testator's heirs, under like circumstances, upon his bounty, are equal, the fact that the distribution among them was grossly unequal would be as readily considered by the jury as evidence upon the subject of testamentary capacity, or of undue influence, as any evidence tending to establish these subjects, the only difference being that the gross inequality can only be considered in connection with other evidence of testamentary incapacity or of undue influence. This results from the fact that the testator has the legal right to dispose of his estate as he may wish, even to discard the natural objects of his bounty, and give his estate to a stranger without assigning or having any good reason for so doing whatever. This is his perfect right of alienation; and to say that the fact that he disposed of it out of the natural or usual course, thereby exercising his perfect right, was of itself evidence of a want of a disposing mind, or of undue influence, would virtually defeat this right. It is, therefore, taken alone, incompetent evidence of testamentary incapacity, or undue influence; but after the introduction of other evidence tending to show testamentary incapacity, or undue influence, the fact of gross inequality may also go to the jury, to be considered by them as evidence of that fact, and it then goes to the jury as any other competent evidence upon that subject, the force and the effect of which they can see and consider, as well as other competent evidence, without their attention being especially directed to it by the court, and the doing of which, by the court, is calculated to give the fact, in the minds of jury, undue prominence. When the facts, or inferences therefrom, all tend to illustrate any issue, it is not right for the court to single out any one of them in an instruction. It is misleading to do so. It is only when the fact put in evidence is incompetent, except for a particular purpose, it is proper for the court to tell the jury for what purpose they may consider it. But the inference that may be drawn from the fact of gross inequality of the distribution of the testator's estate relates to the whole issue of testamentary capacity, or undue influence, the bearing of which may be as readily seen and comprehended by the jury as any other fact appertaining to that issue, and to single out that fact in an instruction is misleading. (Broaddus v. Broaddus, &c., 10 Bush, 299.)

The rule as to undue influence is that, in order to invalidate a will on that account, it must appear that the testator at the time of making the will could not resist it, and that the will was the

result of that influence, and not the free agency of the testator. (Lucas v. Cannon, 13 Bush, 650.)

While there is proof that the wife was on friendly terms with the testator, and that she had that kind of influence over him that a good wife usually has over a kind and considerate husband, but the proof wholly fails to establish undue influence on the testator in making the will. On the contrary, the proof establishes the fact that the testator was controlled by his own mind, and followed, in making the will, a fixed purpose of his own.

The judgment is reversed and the case is remanded, with directions to grant a new trial.

FARRIS v. COMMONWEALTH.

(Filed November 22, 1890.)

1. Criminal law—Indictment—An indictment against appellant, setting out the acts constituting the offense, charged as follows, viz.: "The said Bud Farris * * * unlawfully and feloniously did break and enter the store house of T. with the intent then and there to steal therefrom, and did, unlawfully and feloniously, take, steal and carry away therefrom one lot of pants of the value of $25, the personal property of said T., with the fraudulent intent to convert the same to his own use, and to permanently deprive said T. of same." Held—That it did not charge two offenses, viz.: The offense defined in section 4, article 6, chapter 29, General Statutes, and the common law offense of larceny. The gravamen of the offense denounced by the statute is the breaking into the store house with a felonious purpose. This being so, the indictment may properly charge, not only that the breaking was with the intent to steal, but that the party actually did steal, therefrom. The stealing shows the intent of the breaking into the house.

2. Instructions—The court erred to the prejudice of appellant in giving instructions to the jury. After instructing them properly as to the statutory offense charged in the indictment, it then instructed them as to both grand and petit larceny, and this error was not cured by the verdict.

Chas. G. Richie for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

The indictment against appellant, Bud Farris, is, as it states, for "feloniously breaking a store house with intent to steal, and stealing articles of value therefrom."
In setting out in the body of it the acts constituting the alleged offense, it says:

"The said Bud Farris * * * unlawfully and feloniously did break and enter the store house of Tapp, Leathers & Co. * * * with the intent then and there to steal therefrom, and did, unlawfully and feloniously take, steal and carry away one lot of pants, of the value of $25, the personal property of said firm, with the fraudulent intent to convert the same to his own use, and to permanently deprive said firm of its property therein." * * *

The statute upon which it is based provides:

"If any person shall feloniously, in the night or day, break any warehouse, store house, office, shop, or room in a steam,

wharf or other boat, whether such place be or be not a depository for goods, wares or merchandise, and whether the goods, wares and merchandise be or be not exposed for sale in such place, with intent to steal, or shall feloniously take therefrom or destroy any goods, wares or merchandise, or other thing of value, whether the owner or other person be or be not in such house, office, room or shop, he shall be confined in the penitentiary not less than one nor more than five years."

A demurrer to it was presented, and the accused having been convicted, it is now urged that it should have been sustained upon the ground of a misjoinder of offenses.

If open to this objection, it was proper to present it by demurrer. It is claimed that both the statutory offense breaking the store house, with intent to steal, and the common law offense of grand larceny are charged. If this be true, then the objection was undoubtedly well taken, because section 126 of the Criminal Code provides that an indictment shall charge but one offense, save in the cases enumerated in the succeeding section, and the two just named are not embraced by it.

Is this indictment, however, of a dual character? Does it really charge two offenses?

In proof that it does, counsel urges if the portion which avers that the accused did "unlawfully and feloniously take, steal and carry away" the property, be omitted, there yet remains the charge of breaking into the store house with intent to steal; and if the latter be omitted, yet the charge of larceny remains; and that this fact evidences a misjoinder of offenses.

We do not think so. The gravamen of the offense denounced by the statute supra is the breaking into the store house with a felonious purpose. This being so, the indictment may properly charge not only that the breaking was with the intent to steal, but that the party actually did steal property therefrom. The stealing shows the intent of the breaking into the house. It is the very best evidence if it; and if it can be proven under an averment of a breaking with intent to steal, we fail to see why it can not be charged in the indictment without rendering it liable to the charge of duplicity. The averment and evidence in support of it only verifies the intent as felonious with which the breaking was done.

In the case of Oliver v. Commonwealth, 5 Bush, 376, where the indictment for burglary, instead of averring that the breaking was done with intent to steal, which would have been sufficient, went further and alleged the ulterior felony, or that the accused actually did steal, it was held that this did not vitiate it. The court said: "But in this case more is charged in the indictment than was necessary, and the attorney for the Commonwealth, instead of stating the intent, has alleged the actual commission of the ulterior felony in the house broken, and entered, as a substitute for the usual averment of the intent to commit the particular felony, which certainly should not vitiate the indictment, for the commission of the felony, where one is actually committed, is the very best evidence of the intent to commit it; and this accords with the general doctrine on the question."

Where the breaking with the intent to steal is shown, the offense is complete; but the legislature saw fit to add to the statute "or shall feloniously take therefrom," not as establishing the breaking, but as showing the felonious intent.

The statutory offense is the breaking with the intent to steal, or the breaking followed by a stealing, which evidences the

felonious intent merely, and which may, therefore, be charged in the indictment.

The words of the statute: "With intent to steal, or shall feloniously take therefrom," relate to the offense of breaking the store house merely; and both the intent and the stealing evidencing it may, therefore, be charged in an indictment under this statute. While, therefore, the court did not err in overruling the demurrer, yet when it came to instruct the jury it, owing doubtless to the press of business and consequent haste which often attends the trial court, fell into an inconsistency, and in effect adopted the view contended for by the counsel for the accused as to the indictment.

After instructing the jury properly as to the statutory offense charged in the indictment, it then instructed them as to both grand and petit larceny. It thus authorized them, without regard to any housebreaking, to convict the accused of either of these common law offenses, the value of the property stolen being the turning point between them, provided they believed, to the exclusion of a reasonable doubt, that he did the stealing. This error is not cured by the verdict, because of its general character. It is: "We, of the jury, find the defendant guilty, as charged in the indictment, and fixed his punishment at three years in the penitentiary."

The testimony showed the breaking of the store house by some one, and the possession, not long after, by the accused of some of the stolen property. The jury may, upon the evidence and under the instructions, have found the accused guilty of breaking the house with the felonious intent, or they may have found him guilty of grand larceny without regard to any breaking of the house. Whether the one or the other, it is impossible to tell from the verdict. The punishment for each offense is the same by our law. They were told by the instructions that they could do either, and were, therefore, instructed that they could convict the accused of grand larceny, when he was not charged with such an offense. While the verdict is "guilty, as charged in the indictment," yet, taking the court's instructions, the jury were bound to believe that he was charged with both housebreaking and larceny, and that they had a right to convict him of either, and it can not be told from the verdict which had been done. Error in instructions leading to such a result can, in no possible view, be regarded as cured by the verdict. Such uncertainty can not be permitted in the administration of criminal law.

Judgment reversed and cause remanded for a new trial.

TRUE v. COMMONWEALTH.

(Filed November 25, 1890.)

Criminal law—Manslaughter—Instructions—Appellant was indicted jointly with one Sellers for the murder of one Robertson, and prosecutes this appeal from a judgment of conviction for manslaughter, the evidence showing that Sellers did the shooting, which resulted in the death of Robertson. The court gave the following instructions: "If the jury believe, from the evidence, that Samuel Sellers shot and killed said Robertson, they should acquit the defendant, True, unless they believe, from the evidence, beyond a reasonable doubt, that the defendant, True, at the time of said shooting and killing of Robertson by said Sellers, was present and did, in some manifest manner, encourage, incite, approve of or aid or consent to said shooting of

said Robertson by said Sellers, or that he was near enough to the scene of said shooting and killing, with the intention of giving aid or assistance to said Sellers, as to afford the same if occasion should require it." Held—That said instruction was erroneous and prejudicial to the substantial rights of the appellant as the words "approve of" and "consent to" do not, singly or combined, express the idea of willful contribution to or procurement of a felonious act, which is necessary to constitute guilt.

J. F. Askew for appellant.

P. W. Hardin for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Lewis.

Under a joint indictment for murder of James H. Robertson against Samuel Sellers and William True, the latter, tried separately, was convicted of manslaughter and prosecutes this appeal.

The circumstances attending the homicide, actually committed by Sellers, are about as follows: While church services were going on at night, in what is called Muddy Ford Church, certain persons outside the building made such loud noise, by swearing, and, as one witness says, worse, as to disturb the preacher, who requested some one of the congregation to go out and stop it, but no effort was made to do so. When the services were closed Robertson, the deceased, accompanied by the preacher and others, came out of the building on their way home, and, according to the version of some of the witnesses, Robertson accosted Sellers, saying: "I will make you pay for this;" and in reply to Sellers' question, "what?" he answered "for being here in this condition;" whereupon Sellers asked him if he knew his, Sellers', name, to which he replied he did, but did not call it, though requested to do so; and Sellers refusing to let go his hand Robertson jerked loose and started home. But soon Sellers, accompanied by True, overtook him, and then Robertson turned and asked why he followed him. Whereupon Sellers, asking him if he was unwilling for a gentleman to accompany him home, commenced in vile and opprobious language to abuse him. The evidence shows that Sellers dropped back two or three times to converse with True, but what was said by them no witness fully heard, one testifying to words "go on," "hands off," "I will." At the close of the last conversation between them, Sellers advanced rapidly, with a pistol in his hand, towards Robertson, who, with the preacher, had in the meantime been walking briskly, and when he got to where Robertson was the latter struck or struck at him with a stick, and Sellers commenced firing, whether at the same time Robertson turned around does not clearly appear. But when Sellers fired Robertson started to run and was shot in the back and killed, that shot being accompanied by this language of Sellers: "Run you d—d son of a bitch."

About the same time another person, Bailey, who left the church with Robertson and the preacher, and had advised Robertson to go on and not mind what Sellers said, because he was drunk, was also shot by a man behind a bush, who, the evidence tends strongly to show, was appellant True.

The only ground relied upon for reversal of the judgment is the following instruction, third of the series: "If the jury believe, from the evidence, that Samuel Sellers shot and killed said Robertson, they should acquit the defendant, True, unless they be-

lieve, from the evidence, beyond a reasonable doubt, that the defendant, True, at the time of said shooting and killing of Robertson by said Sellers, was present and did, in some manifest manner, encourage, incite, approve of or aid or consent to said shooting of said Robertson by said Sellers, or that he was near enough to the scene of said shooting and killing, with the intention of giving aid or assistance to said Sellers, as to afford the same if occasion should require it."

In the first instruction the guilt of defendant, of murder or manslaughter, according to the circumstances under which the homicide occurred, was put upon the hypothesis "that Samuel Sellers, whom the defendant, True, being present, encouraged, aided or abetted, shot and killed said Robertson, not in his self-defense as explained in second instruction."

That instruction, the first, except so far as it seemed to assume the presence and acts mentioned of defendant, True, is unobjectionable, for the words "encourage, aid or abet" mean or imply the will of a person has contributed to the act actually committed by another, and fully and accurately described an accessory before the fact, if he is too far away to aid in the felonious act, or a principal in it if near enough to aid. And so the words counsel, advise or assist, may be, and frequently are, used to describe the offense of a person who, not actually doing the felonious act by his will, contributes to, or procures it done, and thereby becomes a principal accessory, according to the situation he may be in at the time. Or the words "approve of" and "consent to" do not, singly or combined, express the idea of willful contribution to or procurement of a felonious act, which is necessary to constitute guilt. For a person may be present and heartily approve of an act after it is done, without being at all willing to or capable of aiding, advising or procuring it done, especially if it be felonious. Or he may consent, in the sense of offering no resistance to commission of it, without the slightest contribution to it by his own will.

It seems to us the instruction must have been necessarily misleading, and, therefore, prejudicial to the substantial rights of the defendant.

And the judgment is, therefore, reversed for a new trial and further proceedings consistent with this opinion.

GILLIM, &c. v. DAVIESS COUNTY, &c.

(Filed December 4, 1890—Not to be reported.)

1. Railroad bonds—Excessive issue—Daviess county, being authorized to issue $250,000 worth of bonds in aid of a railroad, in the last issue, when only $25,150 of the authorized issue were due, the county court issued and delivered, at the same time, 185 bonds of the value of $500 each. The validity of said last issue having been questioned on an appeal to this court, and afterwards to the Supreme Court of the United States, it was decided that the issue of said bonds, beyond the amount of $250,000, was unauthorized, and that the test of the validity of said bonds was the time at which they were delivered, and as $97,500 of bonds were issued and delivered, when only $25,150 worth of bonds were authorized, the holders of said bonds were entitled to receive their pro rata share of said $25,150, principal and interest.

2. Interest—Set-off—The county court, having for several years paid interest on the whole amount of the bonds last issued, is entitled, by way of set-off, to a credit against the holders of said last issue of bonds to what may have been overpaid to them.

3. Res adjudicata—After the decision of the Supreme Court of the United States was rendered and the case had been referred back to the lower court, the chancellor undertook to modify his former judgment by fixing the serial letters and numbers as the criterion controlling the validity of said bonds. Held—That this was the mere opinion of the chancellor, and not binding on either the county or the bondholders, they not having been brought before the court at that time.

Weir, Weir & Walker and W. T. Ellis for appellants.

J. D. Acthison and Fairleigh & Straus for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The record before us is familiar to this court. It is a case in which several important and interesting questions have been heretofore decided by this court and the United States Supreme Court, leaving scarcely an open question to be considered.

The county of Daviess had issued bonds amounting to $67,350 in excess of the stock subscribed by that county to the Owensboro & Russellville Railroad Company. The excessive issue of bonds was held invalid in all the courts where the question was raised. The act under which the county subscription was made only authorized the issue of bonds for $250,000, still bonds, under a misapprehension of the power conferred, were issued to the amount of $317,350. The bonds were issued and delivered, from time to time, by the county court, and going into the hands of parties who made no inquiry as to the power of the county court, the question arises as to how this loss is to be sustained, or rather borne, by the various holders of the bonds. It has already been adjudged that the county is only liable to the extent of $250,000. The Supreme Court, in the case of the County of Daviess v. Dickerson, the latter holding some of the bonds, in determining which were valid and which invalid, said: "We can have no doubt that the test is, which were first delivered, if that can be ascertained, and without regard to the classification of bonds, according to time of payment, in the order of the county court."

There is no difficulty in showing the bonds that were first delivered, as the clerk kept a register showing the time of delivery. On the 22d of March, 1870, the bonds of the county had been delivered, so as to pay all the stock, except $25,150. At that date the county judge delivered to the railroad company 185 twenty-year bonds. They were for $500 each, and of the series letter E, numbering from 71 to 255, inclusive, amounting to $92,500—$67,350 more than the balance due from the county on that day. The bonds were delivered at the same time, and, therefore, the $25,150 due by the county must be applied to the payment of these bonds.

Such was the decision of the Supreme Court, made doubtless in view of the reversal in the case of Dickerson, who had recovered in the court below. If upon the retrial in the Federal court his bonds were of the class last delivered, then he could only recover to the extent of his pro rata portion of what was, at the time of the delivery, due by the county. Besides, we think it just and equitable that those holding bonds that were delivered in the proper exercise of the power conferred on the county court should be paid, and those obtaining the bonds after that power had been exhausted should sustain the loss.

The main ground of contention, viz., the present appeal by the appellant, is that in the original action, by which the taxpayers of Daviess county enjoined the collection of the coupons or interest on the invalid bonds, or the excess over $250,000, the chancellor below had determined, by his judgment, that the numbers and letters with which the bonds were marked must determine which were valid and which invalid, and, therefore, the question is res adjudicata, and can not be affected by the decision of the Supreme Court, or by the judgment in the present action.

In the original action by the taxpayers against the Daviess County Court a nd the railroad company, the unknown bondholders were made parties by a warning order, and the case was submitted upon the single point raised by the pleadings, and that was on the demurrer to the answer of the county court, in which was involved the right to issue bonds in excess of $250,000, or require the payment of the interest on the excess, the bonds not being due. The chancellor held that the excessive issue was void, and restrained the collection of the interest. The case was affirmed by this court on the question involved. On the return of the case the chancellor undertook to modify his judgment by determining that the numbers, etc., on the bonds controlled or determined the question as to what bonds were valid and what invalid, and the county court, adopting the opinion of the chancellor, paid interest on bonds that, in the present case, are held to be invalid.

After these proceedings were had the present appellees, Wathen and wife, on the 3d of April, 1882, tendered an answer and cross petition in the case of the original action by the taxpayers, the style being Howard, &c. v. Daviess County Court, asking to be made defendants, alleging that they were the holders of the bonds, and wanting an equitable distribution of the tax collected between the holders of these bonds. The court refused the filing of the answer, and on an appeal this court held that Wathen and wife should be heard; that no question of equitable distribution had been made on the former appeal, and that all the bondholders should be brought before the court with a view of a final decision as to the right of the parties. That decision has been had in this case, the chancellor below adjudging, as already indicated, that the bonds of the county became valid and binding in the order of their delivery. The modification of the judgment rendered in the original case, that was affirmed by this court as to what bonds were valid and what not, was the mere opinion of the chancellor, and not binding on these bondholders. Nor was it binding on the county court, so as to make the county responsible to the holders of these bonds declared valid by the chancellor, and then make the county liable for those declared invalid by the judgment in the present case. The county was a mere holder of the funds in trust for the bondholders, and ready to pay to those entitled. The bondholders, who were resident and nonresident, were not before the court by name, and had the right to appeal and open the case. This Wathen and wife did, and this court seeing on their appeal that no distribution of the fund had been made, required all the holders of bonds to be brought before the court, in order that an equitable distribution might be had. A judgment of distribution affected, necessarily, all the bondholders. It either enlarged or diminished the amount that some were entitled to receive. They were all entitled to be heard as to the validity of these bonds, and the opinion of the chancellor upon a question not in issue, and that was not binding on the bondholders, should not be held binding on

the county court. If one of the class of bondholders was entitled to open the case that equity might be done, it necessarily applied to all, and for that reason this court, in the Wathen case, opened the judgment for all. If the right of the county were alone involved in the case, there might be some reason for holding the opinion of the chancellor in the first case as final, but to require the county to pay the bonds that are held to be valid by the one court and invalid by the other would be an anomalous proceeding, and the more so if the county is required to obey both judgments, if they are to be so-called; for, in that event, the county would at last pay the greater portion of the excessive issue.

On some of these bonds that have been held invalid the county has been paying interest, and claimed a credit in the court below, when paying out to the bondholders their proportion of the $25,000, by what had been paid them by way of interest. This right was denied them, and a cross appeal has been prayed by the county court. We perceive no reason why the county is not entitled to the credit. If the interest has been paid upon a greater sum than was due, the county should be credited by it; but we think, under the circumstances, no interest should be allowed on this excess of interest paid.

The judgment is affirmed on the original appeals and reversed on the cross appeal and remanded for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

DAVEZAC v. SEILER.

(Filed November 26, 1890.)

1. Contracts against public policy—One who has paid money under a contract, which was void as against public policy, can not recover it back.
2. Same—An agreement by a purchaser at judicial sale to give one an interest in the property, or some benefit, if he will not object to the confirmation of the sale, is void as against public policy.
3. Recovery of money paid under mistake—Where money has been paid under a clear mistake of law, and ought not in good conscience be returned, it can be recovered back, but the mere fact of payment without consideration is not proof of mistake upon the part of the payor as to his liability.
4. Same—Res adjudicata—Where the innocent holder of a negotiable note, which was executed without consideration, recovered judgment against the maker, and the maker, in the same action, recovered judgment against the payee, the recovery by the maker against the payee was allowed independent of any question of mistake, and upon the ground that the payee, having received the money on the note by discounting it, should, as between him and the maker, pay it, there being no consideration for the note. Therefore, the decision of the Court of Appeals, affirming the judgment in that case, is not conclusive as to the right of the maker of the note to recover back what he

has paid upon other notes of the same series, upon the ground that they were paid under a mistake of law. Nor was the fact that the maker was allowed to recover against the payee in the former action inconsistent with the idea that the contract was against public policy, as the parties were thereby left where they were when the agreement was made, whereas, if the maker had been refused relief in that action, the court would have, in effect, assisted the payee in the enforcement of a contract which was against public policy.

Hallam & Myers for appellant.

J. P. Tarvin and B. B. Graziani for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Barbour.

This is an action to recover money paid under an alleged mistake of law, and it is insisted for the appellee that the opinion in the case of Davezac v. Seiler, recently decided by the Court of Appeals, is conclusive of his right to recover.

The controversy in that case, and the controversy in this case, grow out of the same transaction, and a rather extended statement of the facts is necessary to an understanding of the questions involved.

In April, 1883, Seiler, in his own name, but really for the firm of Brenner & Seiler, of which he was a member, purchased at decretal sale the Nieyemer brewery, in Covington, for the sum of $10,000. The property was appraised at the time of sale at $40,000.

Shortly after the sale Davezac represented to Brenner & Seiler that, though he was not present at the sale, he had instructed the commissioner to bid $11,000 for him for the property, and that unless he was admitted as a joint purchaser with them he would object to the sale. No agreement, however, was then reached. In December following Seiler & Davezac signed a writing, in which it was recited that the brewery "shall be paid for and owned in equal parts by Seiler, Brenner & Davezac, and each of them shall stand one-third in any deficiency in the claim of Seiler (who was a creditor) against said property in said suit, not paid out of the proceeds of said sale." Brenner refused to sign the agreement. Davezac paid no part of the purchase money, nor did he pay any part of Seiler's claim.

In July, 1884, pending a suit by Brenner v. Seiler & Davezac, to have the purchase declared for the benefit of Brenner & Seiler and to exclude Davezac, and in which suit Davezac was asserting his claim to a one-third interest in the property, a written agreement was entered into between Seiler & Davezac, "that in the event said suit is so decided as to exclude Davezac from the one-third interest to said purchase, I promise to pay said Davezac $6,000 at the termination of said suit."

Brenner succeeded in the lower court, and, pending an appeal from the judgment, another writing was, in January, 1885, entered into by Seiler and Davezac, whereby it was agreed that the appeal should be prosecuted in their joint names, and "if decided in favor of Brenner, the costs of the appeal and all expenses thereof are to be paid by Davezac, but if said cause is reversed or so decided that Davezac shall be adjudged entitled to one-third of the * * * property, * * * said Davezac is to assign and transfer to Seiler all the interest so adjudged in his favor, and Seiler is to pay the expenses of said appeal. In either event Seiler is to pay his three notes of even date herewith to Davezac

for $6,000 in all, to wit, for $1,500, payable in ninety days, for $1,500, payable in seven months, and for $3,000, payable in nineteen months, and all controversy between Seiler & Davezac is hereby settled." The three notes were executed in conformity with this agreement and were made payable and negotiable in bank. The two first notes were paid at maturity. The last note was discounted to the bank, and not being paid at maturity, the bank sued Seiler as maker and Davezac as indorser. Seiler answered, setting up the foregoing facts, and alleging that there was no consideration for the execution of the note. That the answer was no defense to the action is conceded, and judgment was rendered against him in favor of the bank. Seiler, however, made his answer and cross petition against Davezac, alleging that Davezac had received the benefit of the note, and asking, in the event judgment should be rendered against him in the bank, that he be given judgment against Davezac for the amount. Judgment was rendered for him against Davezac, and upon appeal this judgment was affirmed, and it is the opinion delivered therein which it is now insisted for the appellee is conclusive of this case, which is an action to recover the $8,000 paid on the two $1,500 notes, which it is alleged was paid under a mistake of law.

If the case decided by the Court of Appeals is to be regarded as of the same character as this, manifestly it is, as counsel insists, conclusive. But is it of the same character? It was not so treated by counsel in argument, nor do we think it is so treated in the opinion of the Court of Appeals. On the other hand, it was treated as an action to recover of Seiler on a contract, which, as between him and Davezac, was without consideration. If the note had been nonnegotiable, and had even passed into the hands of an innocent party, Seiler could have made the same defense that he could have made as against Davezac. But, while on account of the commercial character of the paper, Seiler could make no defense as against the bank, when sued upon it in conjunction with Davezac, who received the money on it, as between him and Davezac it was Davezac's duty to pay it; but as the bank could not be compelled to look to Davezac, and was entitled to judgment against Seiler, Davezac should be required to refund to him what he was required by the judgment of the court to pay to the bank.

Clearly the facts do not show a case of the voluntary payment of the money by Seiler without consideration and under a mistake as to his legal liability. As said in the opinion of the Court of Appeals, the real question in the case was whether there was any consideration for the execution of the note, and the court holding that there was no consideration, by its judgment required Davezac to refund to Seiler, not what the latter had under a mistake voluntarily paid, but the money which was, at that very time, being coerced from him by the bank, from whom Davezac had obtained it.

It is true that in its opinion the court says: "It is urged that if there was any mistake upon Seiler's part, it was one of law, in supposing that he was liable to Davezac, and that he can not recover by reason of a mistaken belief upon his part as to the law. Manifestly, however, if Davezac has obtained his money without any consideration whatever, if it was not due, but obtained through a clear mistake, and should not in conscience be retained, he should be allowed to recover it." But the question before the court was not as to whether the money was paid by mistake, because it was not, but whether the note was executed without consideration.

In a suit on the note by Davezac v. Seiler, the question as to

whether Seiler executed it under a mistake as to his liability would have been immaterial, if there was, in fact, no consideration for it; and in a suit by the bank against Seiler and Davezac the same rule should apply, for if there was no consideration for the note, Davezac, having received the money on it by discounting it to the bank, as between him and Seiler, independent of any question of mistake, should pay it, and such was, in effect, the judgment of the chancellor. That the Court of Appeals did not intend to treat the action as one for the recovery of money, paid under a mistake, is manifest upon a further consideration of the opinion, for whether Seiler was laboring under a mistake as to his liability or not, if the execution of the note was superinduced by an agreement which was against public policy, and the note was afterwards paid. Clearly a court of equity would not aid Seiler in an effort to recover it back, and, therefore, if the court had regarded the action as one for the recovery of money paid by mistake, it would have been necessary to determine whether the agreement, out of which the note arose, was against public policy; but the court expressly said that it was not necessary to determine that question, and compelled Davezac to refund to Seiler what the latter had paid to the bank; and this was proper, though, besides the want of consideration, there was the additional circumstance that the note was superinduced by an agreement which was contrary to public policy, as the parties were thereby left where they were when the agreement was made, whereas, if Seiler had been refused the relief the court would have, in effect, assisted Davezac in the enforcement of a contract which was against public policy.

We have thus endeavored to draw the distinction between the case relied on and the one now presented for adjudication.

The question as to the right of a party to recover money paid under a simple mistake of law is a perplexing one. The current of authority outside of this State denies the relief; but in this State it has been repeatedly announced that "no principle is more conclusively settled in this State than that, when money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor or conscience was not due and payable, and which ought not to be retained by the party to whom it was paid, it may be recovered back." (1 Bush, 382.) This is the abstract proposition, but the decisions on the subject, though not always distinctly stated, appear in almost every case to be founded on mixed considerations, and not exclusively upon mere mistake or ignorance of the law, unless it be in actions to recover taxes paid, in which cases the decisions are, in a great measure, made to rest upon principles of public policy. We, however, concede the rule to be that when money is paid under a clear mistake of law, and ought not in good conscience to be retained, it can be recovered. But was there any mistake on the part of Seiler? That he acted with full knowledge of all the facts is clear. His sole ground for relief is his alleged mistake as to the law. This mistake consisted in his belief that Davezac had the right to except to the confirmation of the sale by the commissioner. Why did not Davezac have the right, upon laying the foundation by a guarantee of an advance in the price, to except to the sale? While it is true that he had no such interest as would have afforded a consideration for the agreement by Seiler to pay him for withholding the exercise of his right to except to the confirmation, we can see no reason why he, as well as any other person, might not exhibit such a state of facts to the chancellor

as would show a gross sacrifice of the property if the sale should be confirmed. Whether he would have been successful or not was, as said by the Court of Appeals, a mere matter of conjecture, but that he had the right to make the objection seems to be conceded in the statement. It was the rule in England to open biddings to any one who would guarantee an advance of 10 per cent. This rule, though, is not followed in this State, and the chancellor will not set aside a sale upon the mere guaranty of an advance in price. But the confirmation or rejection of the sale is largely in the discretion of the chancellor. Will it be said that the chancellor should not order a re-sale, when it is made to appear that property worth $40,000 sold for only $10,000, and there is, in addition, a guarantee for a reasonable advance upon a re-sale? Would it be presumed that the owners of the property, or the beneficiaries in the proceeds of the sale, would be indifferent or not desire the re-sale? We make these suggestions, without determining how the questions should be answered; for, under all the facts, after the protracted litigation in which Davezac's claim was involved, we do not think it can be said that there was a clear mistake upon the part of Seiler, at the time he paid the money, as to the law in this particular. Then the only mistake of law that can be claimed is that, as the notes were without consideration, Seiler paid them under the belief that he was liable upon them. The logic of this reasoning is that, in every case where money is paid without consideration, the fact of its payment is proof of mistake upon the part of the payor as to his liability.

But aside from the question of mistake, we are of opinion that "where property is sold at judicial sale, an agreement by the purchaser to give one an interest in it, or some benefit if he will not object to the confirmation of the sale, is void as against public policy. The effect of it is to prevent fair competition, and to sacrifice the property of the debtor." As the money sought to be recovered in this case was voluntarily paid under such an agreement, it can not be recovered back.

We have not discussed the case as to Hallam, as it is virtually conceded that the judgment must be affirmed as to him.

The judgment against Davezac is reversed and the cause remanded, with directions to dismiss the petition. The judgment as to Hallam is affirmed.

SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

Filed November 12, 1890. Appeal from Green Circuit Court. Opinion of the court by Judge Young, affirming.

1. Appellate practice—Where an appeal is prosecuted from a judgment on a verdict without a motion for a new trial having been made and overruled, nothing is brought before this court except the pleadings, verdict and judgment, and if the pleadings and verdict authorize the judgment rendered it will be affirmed without regard to the rulings of the court on the trial, further than they appear in the judgment.

2. Pleading—In an action by or against a corporation it is not necessary especially as to domestic corporations, to aver that they have been duly organized. The want of proper organization is a matter of defense.

3. Same—Allegation as to time—If the time when an act was done is not material to the cause of action, it need not be stated in the petition.

In a penal action by the Commonwealth against a railroad company for peforming work and labor on the Sabbath day, it was sufficient to allege that the acts complained of were done on the Sabbath during the year 1887. The month and day of the month is immaterial. But under such a petition the court will allow the plaintiff to prove only one Sabbath day during the year named.

4. Same—Presumptions—The allegation that the acts complained of were done in Green county, omitting the word "Kentucky," is sufficient for the purposes of this action, as the courts knew judicially that there is such a county in the State, and can not assume that the plaintiff, who brings an action in Green county, in this State, can mean that the act complained of was committed in a county of that name in another State.

Lyttleton Cook and Jeff Henry for appellant; J. G. Craddock and P. W. Hardin for appellee.

GUENTHER v. FROEHLE.

Filed November 12, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

Infancy—In this action to recover the purchase price of goods bought by the defendant when an infant, the defendant having parted with the goods before he arrived at maturity, his infancy, at the the time of the contract, is a bar to the action.

Sweeney, Ellis & Sweeney for appellant; G. W. Williams & Son for appellee.

CHESAPEAKE & OHIO RAILWAY v. GREGSTON.

Filed November 12, 1890. Appeal from Bracken Circuit Court. Opinion of the court by Judge Yost, reversing.

Railroads—Negligence in passenger in jumping off moving train—A passenger must not attempt to get either on or off a train while it is in motion, if it be obviously dangerous to make the attempt, although he may have been advised, or even ordered, by the servants of the company to do so. Such an attempt is at the peril of the passenger when he is a person of ordinary intelligence, and not acting under constraint.

The act of a passenger in jumping from a train running twenty miles an hour was such a reckless act as will prevent him from recovering of the company for the injuries sustained, although the conductor may have advised him to jump.

Wadsworth & Son and Cochran & Son for appellant; John L. Scott for appellee.

PUSEY v. SMITH'S ADM'R.

Filed November 19, 1890. Appeal from Meade Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Limitation in favor of sureties—This action, instituted July 30, 1888, upon a note due January 1, 1870, is barred by limitation as to a surety in the note, although the surety died in 1878, and no administration was granted until 1883. The only exception, as applicable to this case, to the running of the statute in favor of the surety, is that it shall not apply to the six months during which an action can not be brought against the personal representative.

2. Granting of administration—If the surety dies before the statute has run, and none of the parties who are entitled to preference in the administration apply at the second county court from the death of the intestate, the court will grant administration to the creditor, or some other person, in its discretion.

3. Limitation—New promise—Payments, or promise to pay, made by a surety in a note, or by his personal representative, do not suspend the running of the statute of limitation in favor of him or his representative.

Thomas B. Fairleigh for appellant; J. W. Lewis & Son for appellee.

SPENCER, &c. v. COMMONWEALTH.

Filed November 19, 1890. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Indictment under kuklux law—An indictment charging the defendants with "the offense of banding, confederating and conspiring together, and exhibiting and delivering and sending a threatening letter" to a certain person, describing the letter, charges with sufficient certainty the offense denounced in the first section of what is commonly called the kuklux law. While the charge of banding, confederating and conspiring together was unnecessary, it did not vitiate the indictment or constitute the offense, the one named in the second section of the law.

2. Same—Demurrer—If the indictment charged any public offense within the jurisdiction of the court, the demurrer was properly overruled, and the opinion of the court, expressed at the time of overruling it, as to the nature of the offense charged, was not a matter for exception.

3. Reversible errors—Exceptions—This court can reverse a judgment of conviction in a misdemeanor case only for errors of law appearing on the record, and the error can only be made to appear by reserving proper exceptions. The instructions given can not be reviewed by this court, as no objection was made or exception taken to them.

C. T. Atkinson for appellants; W. W. Halstead for appellee.

WILLSON, &c. v. STEPHENS, &c.

Filed November 19, 1890. Appeal from Whitley Court of Common Pleas. Opinion of the court by Judge Young, affirming.

Guardian and ward—As the income of a ward was only $96 per year, her guardian was justified in expending the whole amount for her support and education. And as she was a delicate child up to the age of twenty years, and did no service for the family of the guardian, the guardian is not to be charged with anything on that account, but as she did considerable service for the family after that time, the guardian must account for the value of such services, and the chancellor's estimate of their value is accepted as correct.

Hill & Denham for appellants; Crawford & Mason for appellees.

HICKS, &c. v. DEPOSIT BANK OF GLASGOW.

Filed November 19, 1890. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, affirming.

New trial—A new trial should never be granted upon the ground of newly-discovered evidence unless it be of such a nature as would have a decisive effect upon the case, and would, in the opinion of the court, have a preponderating influence upon another trial. Still more is this the proper rule to be followed when the newly discovered evidence relates to points litigated upon the former trial, and is simply cumulative in its character.

Thos. H. Hines and Boles & Duff for appellants; W. L. Porter and Lewis McQuown for appellee.

BIBB v. JONES, ASS'EE.

Filed November 19, 1890. Appeal from Owen Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Sale of attached property claimed by third person—Attached tobacco, pending the action of the court upon a petition of a claimant, was sold under

an order of court on account of its perishable nature, and the proceeds afterwards paid to the claimant, who was adjudged to have been the owner of the tobacco. The claimant then brought this action against the plaintiff in the attachment to recover the damage he suffered by reason of the attachment alleging that the tobacco, by reason of improper handling after the levy of the attachment, deteriorated greatly in value, and by reason of that fact sold for much less than its value at the time the attachment was levied. Held—That the petition states a cause of action.

2. Res adjudicata—Estoppel—Where the matter in controversy has been tried upon a particular issue between the same parties in another and different action, and there has been a finding therein, such finding operates as an estoppel only when it is especially pleaded and relied upon.

Lindsay & Botts for appellant; Thomas R. Gordon for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. TURNER.

Filed November 19, 1890. Appeal from Knox Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

1. Burden of proof—As the defendant by its answer denied every material allegation of the petition, it would have been entitled under the pleadings to a verdict if no evidence had been introduced, and, therefore, the burden of proof was on the plaintiff.

2. Evidence—Damages—In this action to recover damages for personal injuries resulting from defendant's alleged negligence, in which loss of time was relied on as one of the elements of damage, it was competent for plaintiff to testify as to the nature of his occupation and his earnings therefrom.

3. Railroads—Liability for injuries to shippers while loading freight—Where a railroad company places empty cars upon its track for the purpose of being loaded or unloaded by the owners of the freight, and such owners, with the express or implied consent of the company, proceed to load or unload such freight, the company has no right, without sufficient notice and warning, to move the cars thus being loaded or unloaded.

After a steam boiler had been loaded upon a flat car a brakeman in the employment of the railroad company directed the owner of the boiler, who had contracted with the company for its shipment, to get on the car and brace his boiler, and while he was attempting to do this the train, without warning or signal, was moved, catching his foot between the drawheads and mashing it. Held—That the company is liable.

J. W. Alcorn and Wilson & Rawlings for appellant; Crull & Matthews for appellee.

ROGERS v. McKITRICK.

Filed November 26, 1890. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, affirming.

Judicial sales—Statute of frauds—A parol agreement made by a purchaser at a judicial sale with the defendant whose land is being sold, that to avoid a sacrifice of the property he will purchase it and allow the defendant to redeem it, devolves a trust upon a purchaser, and is not within the statute of frauds.

F. S. Foster, Samuel Avritt and C. S. Hill for appellant; Rives & Spaulding for appellee.

SPENCER v. MATTHEWS.

Filed November 26, 1890. Appeal from Henry Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Usury—Limitation—An action to recover usury which has been paid must be brought within one year after payment thereof, although the payment was made in ignorance of the law. The statute relating to the recovery of usury applies, and not the statute relating to actions for relief, on the ground of mistake.

Wm. Carroll for appellant; Pryor Foree for appellee.

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KENTUCKY COURT OF APPEALS.

WOOD v. DAVIS, &c.

(*Filed Nov.* 15, 1890—*Not to be reported.*)

1. *Corporations—Right of trustees to purchase trust property for their own benefit*—A corporation organized for the purpose of mining lead, owned lands, the title to which was vested in three trustees for the use and benefit of the corporation. A debt against the corporation having been reduced to judgments, and executions thereon levied on the land held by the trustees, it was, by the purchasers under the execution sales, conveyed to officers and stockholders of the corporation, who are now asserting title to the same under said sales. *Held*— That said purchases enured to the benefit of the corporation, and the land was held in trust by said stockholders for the use of the corporation, but subject to a lien in favor of said stockholders to reimburse them in such sums as they may have paid on the debts of said corporation.

2. *Parties to actions*—An action enforcing satisfaction of a lien on property held for the use of a corporation can not be maintained until the corporation is made a party to the action.

Nunn & Cruce and S. Hodge for appellant.

Blue & Blue for appellees.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1872 the Memphis Lead Mine Company was organized and began to mine for lead and other minerals in the county of Crittenden. The defendants in this action constituted the board of directors, and the land used by the corporation, or upon which it conducted its business, had been conveyed to F. S. Davis, John Overton and W. A. Goodman for the use and benefit of the corporation, these trustees being invested with the legal title. There were

many stockholders in the enterprise and not parties to this proceeding, nor is the corporation itself a party plaintiff or defendant. One of the plaintiffs in the present action held a claim against the corporation for the sum of $3,201, due in August, 1883. That claim had been reduced to a judgment against it in September, 1873. An execution issued on this judgment and was levied on the land, the title to which was vested in Davis, Overton and Goodman, and was sold and purchased by Wood under the execution, and by Wood sold and conveyed to one J. W. Chaney, who sold and conveyed the land to John Eakin and others in trust for himself and his associates, all of whom are the defendants, and were officers and stockholders in the corporation. In November, 1880, after this purchase by the defendants, some adverse claim by an actual occupancy of the land was set up by McKinney's heirs, and these defendants instituted an action of ejectment in the name of Davis, Overton and Goodman, who held the legal title as trustees, to recover the possession. The action was prosecuted to a judgment, and the land, or a part of it, recovered.

After this recovery, the debt, or a part of it, remaining unsatisfied that was due Wood, another execution was issued and levied on this land for the balance of the judgment, and the land sold and purchased by Hodges, the co-plaintiff of Wood, and Hodges and Wood are asserting a title to the land derived under that purchase, or if no title passed, they want the land sold to pay the balance of their debt. The defendants say in their answer they purchased the land that had been conveyed to Wood by the sheriff, and by Wood to Moore, and by Moore to the defendant in their individual right and not as members of the corporation, or for the benefit of the corporation, and that Wood having sold the land under the execution deed, conveyed it to Moore, he is estopped to set up any claim as against them; but if not estopped, the defendants having paid off a part of the judgment, should be substituted to the right of Wood, or as creditors of the corporation ask that the land be sold to refund the money they have advanced for it. As before stated, the corporation is not before the court, and the parties are litigating in regard to their respective claims or liens, if any, and subjecting the property of the corporation to the payment of their debts when the latter has not been heard or even made a party to the proceedings.

The chancellor held below, and properly, we think, that as against Wood these defendants are entitled to a preference, if a lien exists, and this he seems to have adjudged. We must assume, in the absence of proof to the contrary, that the manager of the corporation had the right to execute the obligation on which the judgment is based, and that the sale under it, by virtue of the execution, passed the title. The trustees, Davis, Overton, &c., held the mere naked title in trust for the corporation, and it was, therefore, by reason of the statute subject to levy and sale. Anderson v. Brisco, 12 Bush, 344; General Statutes, chapter 63. The chancellor below held that the satisfaction of the debt by the defendants enured to the benefit of the corporation and gave them a lien for the money paid in satisfaction of Wood's claim. This, we think, was proper, inasmuch as the evidence shows that they paid it in good faith, supposing that they could hold it as against the corporation itself. If, however, the land belonged to the corporation, and the debt paid by the defendants only constituted a lien, what reason is there to deny to the appellant the right to make the balance of his debt out of the land? If it is the property of the corporation, it should be made liable. That it is the property of the corporation, as appears from the rec-

ord before us, is manifest. Its chief officers will not be allowed to purchase in the property and hold it for their own benefit, and the fact that they brought the ejectment and recovered the land in the name of the trustees, who held the title, shows conclusively that they regarded the purchase as that of the corporation.

The conveyance of record, however, was in Wood, and by him conveyed to Moore, and by the latter conveyed to the defendants, who were the officers and stockholders of the old company, and, therefore, it seems to us the equity of this case is to subject the land to the payment of the debts paid by the defendants, and that still owing Wood or Hodges. The latter as execution purchaser has not paid the purchase money. The corporation should be heard before any judgment is rendered, and what is said in this opinion is not to affect any defense on the part of the corportion, although the defendants, who are holding the legal title, are before court.

The judgment is reversed, and remanded for proceedings consistent with this opinion.

BREEDING, &C. V. FLANNERY.

(*Filed Dec.* 4, 1890—*Not to be reported.*)

1. *Fraud—Rescission of contract—Attachment—Non-residence*—A vendor, having no title to land, sold and conveyed it to an innocent vendee, and executed a conveyance therefor, reserving a lien for the unpaid purchase money, being two notes, executed to the wife of the vendor, and which were afterwards transferred to her sister. The purchaser instituted an action to rescind the contract and cancel the deed and notes, alleging fraud of the vendor, and that he was a non-resident of the State, and obtained an attachment which was levied on the land. *Held*—That said contract was properly rescinded and the notes ordered canceled, as the allegations of fraud and non-residence were properly proven.

2. *Improvements*—Where contract for sale was rescinded, and notes canceled as fraudulent, the holder of the notes has no claim to improvements erected by vendee.

J. R. Botts for appellants.

M. M. Redwine for appellee.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, Flannery, brought this action to rescind a contract and cancel the deed made to him, in pursuance of it, by W. H. Curnutte and wife, for 100 acres of land, and to recover back $117 of the purchase money paid by him; and to that end an attachment was issued, upon the ground the defendant was a non-resident of the State.

Appellant, Thursa Sparks, afterwards married to appellant, Breeding, being, upon her petition, made a party to the action, filed an answer and counter-claim, in which she prayed judgment on two notes, for $70 each, assigned to her by the wife of W. W. Curnutte, to whom they were executed by appellee for the deferred payments of the land.

By the judgment appealed from the sale of the land was rescinded and the deed from W. W. Curnutte to appellee, as well as the two notes held by appellant, Breeding, were canceled, and judgment

was, at the same time, rendered against a party, summoned as garnishee, for the amount of a note he had executed to the wife of W. W. Curnutte, for land sold by him, to be applied to payment of the $117 mentioned. It was further adjudged that appellee surrender possession and reconvey the land to W. W. Curnutte.

It appears that at one time I. Elliott made claim to the land in contest, now situated in the county of Elliott, but in an action between him and Atkins' heirs, in the Morgan Circuit Court, then having jurisdiction, it was adjudged he did not, but they did, have title; and in his deposition, taken in this case, he virtually admits he had no title at the time he sold it to L. A. Sparks, under whom Curnutte claimed it, but sold it under the mistaken belief, induced by information given him by Sparks, he had gained the suit between him and Atkins' heirs.

What were the terms of the sale from Elliott to Sparks do not appear, nor is it shown what Curnutte, who is his brother-in-law, paid Sparks for it, if any thing, for no title papers, to or between any of the parties, are filed; nor does Elliott say he had any other than a mere possessory claim.

It is clear Curnutte did not have any title to the land when he sold to appellee, and the evidence tends strongly to show he made the sale with full knowledge he had no title, and for the purpose of defrauding appellee, for he left the State not long after the sale, and there is no other apparent reason for causing the notes executed to his wife, instead of to himself, than that he designed to thereby put it out of the power of appellee to resist collection of them; and there can be little doubt the notes were transferred to appellant, Thursa Sparks, his sister-in-law, in furtherance of that purpose. For she does not attempt to show any consideration or reason for the transaction between herself and the wife of Curnutte, whereby the two notes were attempted to be assigned to her.

Although the deed to appellee contains a covenant of warranty, and he does not allege he has been evicted or disturbed in his possession of the land by the holder of a superior title, still he had the right to bring this action, upon the ground of either actual fraud or non-residence of the vendor, both of which he alleges and shows exist.

Having the right to maintain the action, there was no other alternative for the lower court, in view of the fact the vendor is without pretense of title, than to render the judgment rescinding the contract, which necessarily resulted in cancelling the two notes given for deferred payments, for having been obtained, and also transferred to appellant, for the purpose of defrauding appellee, they are not enforcible against him by either of them. The party summoned as garnishee has not appealed from the judgment, and we need not, therefore, consider whether it was error in the lower court to adjudge payment by him to appellee of the amount of the note given by him to the wife of W. W. Curnutte.

Appellant was not entitled to judgment for excess of value of rents over improvements put on the land, even if there had been such excess. For whatever appellee may owe on that account is to W. W. Curnutte, vendor of the land, and not to appellant, whose only cause of action was the two notes.

Judgment affirmed.

HAYS V. COMMONWEALTH.

(*Filed Dec.* 4, 1890—*Not to be reported.*)

1. *Criminal Law—Jurisdiction—Verdict*—The trial of appellant, charged with killing his uncle in Washington county, resulted in his conviction and imprisonment for five years in the penitentiary. On appeal, it is insisted that a reversal should be had, because the proof on the trial did not show what county the offense was committed in. *Held*—That the proof authorized the conviction, as it was shown that the offense was committed in the Hendren district, about sixteen miles from Springfield, and the jury were instructed to convict, if they believed from the evidence that the offense was committed in Washington county, and, after verdict, their finding will not be disturbed. Besides, it will be presumed that the trial court knew its jurisdiction, and the trial was had in the proper county. Section 5, article 1, chapter 29, General Statutes construed.

2. *Instructions—Self-defense*—It was not error to instruct the jury that, if they believed from the evidence that appellant, with a gun on his shoulder, passed the yard where deceased was standing, and stopped and looked at him viciously, before the killing took place, with an intention of killing the deceased, then they could not acquit him upon the ground of self-defense, although in danger from the deceased, unless he in good faith retired from the conflict and was afterwards placed in danger, real or apparent.

3. *Evidence—Dying declaration*—It is no objection to the admission in evidence of a dying declaration of deceased, that at the time it was made deceased was under the influence of narcotics. Such objection would go to its credibility alone.

4. *Same—Threats*—Where there were eye-witnesses to the commission of the homicide, appellant was not prejudiced by the refusal of the court to admit testimony showing that, previous to the killing, the deceased had made threats and attacks upon appellant.

5. *Verdict*—A verdict in the following form "We, the jury, find the defendant guilty, and fix his punishment at five years in the penitentiary," is a substantial compliance with section 257, Criminal Code of Practice. Besides, the verdict was rendered in obedience to the instructions of the court, authorizing a conviction for manslaughter.

P. B. Thompson, sr., and W. Sweeney for appellant.

P. W. Hardin for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, John H. Hays, in a quarrel shot and killed his uncle, Thomas Milburn. The punishment awarded is five years in the penitentiary. A reversal is asked upon several grounds.

The one mainly urged is that the evidence does not show the shooting was done in Washington county, where the indictment was found and the case tried. Section 5, article 1, chapter 29 of the General Statutes provides, that all offenses shall be tried in the courts of the county in which they are committed, unless it be otherwise specially provided.

The instructions, both as to murder and manslaughter, required the jury to believe from the evidence, beyond a reasonable doubt, that the shooting was done in Washington county, before they could convict the accused.

The only evidence is, that it occurred at the house of John H. Milburn, and he testified:

"I live in the Hendren district, sixteen miles from Springfield."

The trial judge and the jury knew that Springfield was the county seat of Washington county, and it must be presumed they knew that "Hendren district" was in that county.

If it be proven an offense was committed in Frankfort, it is unnecessary for the witness to say that it was in Franklin county. If the testimony fixes any town or district as the place where the crime was committed, and the jury are required by the instructions to find that it was committed in the county where the indictment was found, before they can convict, and they do so find, it would be exceeding even that strictness which properly attends the administration of criminal law to set aside the verdict because the witness failed to expressly say that it occurred in that county. To do so would be more technical than substantial. The testimony showing that it occurred in "Hendren district" was as conclusive and satisfactory, doubtless, to the jury that it had been done in Washington county, as if it had been proven that it occurred in Springfield. They, no doubt, knew the district as a subdivision of the county, and they found the offense had been committed in the county. Moreover, it was the duty of the trial court to know its jurisdiction, and, if the offense was committed without it, to send the case to the proper county for trial.

The evidence is conflicting as to whether the accused or the deceased sought and provoked the difficulty. One witness says, as the accused, with his gun in his hand, was passing by the yard in which the deceased was standing, he stopped and looked at him viciously for half a minute. The dying declaration of the deceased puts it a greater length of time. Upon this state of evidence the court did not err in giving the fifth instruction, by which the jury were told that, if they believed from the evidence, beyond a reasonable doubt, the accused did so with the intention of killing the deceased, then they could not acquit him upon the ground of self-defense, although in danger from the deceased, unless he in good faith retired from the conflict, and was afterwards placed in danger, real or apparent.

It is evident the instructions were as favorable to the appellant as he had a right to ask, and they embraced the entire law of the case.

The writing introduced as a dying declaration relates altogether to the circumstances immediately attending the difficulty. It is clearly shown that it was made when the deceased was *in extremis*, and under a sense of impending dissolution. The fact that he was then somewhat under the influence of narcotics was addressed to the credit to be given to his statement, and did not furnish ground for its exclusion as evidence.

The appellant offered to prove threats and attacks upon him by the deceased, antecedent to the fatal difficulty. This evidence was rejected. In view of the entire testimony, it is clear its non-admission was not prejudicial to the substantial rights of the accused. There were eye-witnesses to the difficulty, and it is perfectly evident the accused could, with safety to himself, have avoided killing the deceased, had he chosen to do so. He was going along a passway and had passed the deceased, who was in his father's yard. There were two fences between them, and the accused had a loaded gun, while the deceased had nothing but a pocket-knife, if, indeed, he had any weapon. If the accused had gone on about his business the difficulty would have ended, and he has only been convicted of manslaughter.

It is said, however, that the verdict does not fix the offense, and

that, therefore, no judgment should have been rendered upon it. The indictment was for murder, and the verdict is:

"We, the following jury, find the defendant guilty, and fix his punishment at five years in the penitentiary."

The 257th section of the Criminal Code provides, that a general verdict, upon a plea of "not guilty," shall be "guilty" or "not guilty;" "and, if guilty, fixing the offense and the degree of the offense, and the punishment in cases in which the jury is required to fix the degree of punishment." Certainty is highly important to a proper administration of the criminal law, but it should not go so far as to sacrifice substance to form. Under our law one indicted for murder may be convicted of manslaughter. The jury were told if they found the accused guilty of murder, they must fix his punishment at death, or confinement in the penitentiary for life; but if guilty of manslaughter, at not less than two, nor more than twenty-one years' confinement in the penitentiary.

It is, therefore, absolutely certain from the verdict that the jury intended to, and did, find the accused guilty of manslaughter. While properly the verdict should have said so, yet it substantially does by the punishment awarded.

Judgment affirmed.

PENICK, RECTOR, &C. V. THOM'S TRUSTEE.

REYNOLDS' AD'MR V. THOM'S TRUSTEE.

(*Filed Dec.* 6, 1890.)

Trusts—Devise for charitable purposes—In 1861 the last will and testament of John H. Hanna was admitted to probate in Franklin County Court. By the terms of the will, which was executed in 1858, he devised to John N. Norton, then rector of the Episcopal Church, at Frankfort, of which church the testator had long been a member, fifty shares of stock of the Farmers' Bank of Kentucky, to be held in trust for the benefit of the parish school connected with that church, and also made a devise of a like number of shares of stock of the same bank for the use and benefit of the Orphans' Home of the Episcopal Church, in Frankfort. The language of the clause of the will relating to the last-named devise is as follows:

"I give and bequeath to John N. Norton, trustee, and in trust, fifty shares of the stock of the Farmers' Bank of Kentucky, for the use and benefit of the Orphans' Home of the Episcopal Church of the Ascension, in Frankfort, and the semi-annual dividends of said stock are to be paid over to Mrs. Mary S. Hanna, to be used by her for the support of said Orphans' Home, and, upon her death, then the said Norton is to designate some person to make the disbursements for the uses aforesaid."

The Orphans' Home was at that time conducted in a building owned by Mrs. Hanna, and was so continued until 1881, shortly after the death of the trustee, Norton. By his will, Norton appointed Penick, the present rector, to take charge of and distribute said trust fund. Mrs. Hanna had died testate in 1870, and after her death, until the death of Norton, the trust fund had been distributed under his direction.

By the terms of her will, Mrs. Hanna devised the property, known as the Orphans' Home, to appellee, Mrs. Thom, if at any time sufficient funds should not be raised to support said home, and the property ceased to be used for that purpose. The home ceased to be used as an orphans' home in 1881. Mrs. Thom now claims the fifty shares of bank stock, alleging that upon the failure of existence of such an institution as the Orphans' Home, said funds passed, under the will of John H. Hanna, to his widow as

a residuary legatee, and from Mrs. Hanna, under her will, to appellee, Mrs. Thom.

Held—That appellee is not entitled to said funds, as it is evident that it was the intention of the testator to create a trust fund for the benefit of orphan girls connected with the Episcopal Church, in Frankfort. The abandonment of the property known as the Orphans' Home, owned by Mrs. Hanna, in nowise affected the devise of the charitable fund by her husband. It was not dependent on it, and it is a well-settled principle of equity that a trust will not fail for want of a trustee so long as the objects of the testator's bounty can be ascertained.

A. Duvall for Penick.

D. W. Lindsay for appellant, Reynolds' ad'mr.

Wm. Lindsay and Frank Chinn for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Pryor

On the 29th of July, in the year 1861, the last will and testament of John H. Hanna was admitted to probate by the county court of Franklin county. That paper was executed on the second day of December, in the year 1858. The testator had no children, but left surviving him his widow, Mary Hanna, and two adopted children, Hunt Reynolds and his sister Catherine, now Mrs. Thom, to whom he devised the greater portion of a large estate. He had long been a member of the Episcopal Church of the Ascension, in the city of Frankfort, and, by the provisions of his will, made a special devise of fifty shares of stock of the Farmers' Bank of Kentucky for the benefit of the parish school connected with that church, and also made a devise of a like number of shares of stock of the same bank for the use and benefit of the Orphans' Home of the Episcopal Church, in Frankfort. This last devise is the subject-matter of the present controversy between the devisees of the testator on the one side, and E. A. Penick, the rector of the Episcopal Church, on the other. The devise reads as follows:

"I give and bequeath unto John N. Norton, trustee, and in trust, fifty shares of the stock of the Farmers' Bank of Kentucky, for the the use and benefit of the Orphans' Home of the Episcopal Church of the Ascension, in Frankfort, and the semi-annual dividends of said stock are to be paid over to Mrs. Mary S. Hanna, to be used by her for the support of said Orphans' Home, and, upon her death, then the said Norton is to designate some person to make the disbursements for the uses aforesaid."

The trustee, Norton, who was then the rector of the church, and so continued for a number of years after the death of the testator, accepted the trust and paid the funds over to the widow of the testator, as directed, until her death, that took place in the year 1870. The widow, who also owned a large estate, left a last will and testament by which, as is claimed by the appellee, she devised to her (Mrs. Thom) the fifty shares of bank stock that had been given by her husband, the original testator, to the Orphans' Home. By the will of the husband, John H. Hanna, his wife became the devisee of all his estate that might have been omitted to be devised, or that might become a part of his estate in any way, or, to use the language of the will, "by reason of any omission, lapse, casualty, inadvertence, or want of form, shall remain and vest in my wife," &c.

It is claimed by Mrs. Thom that the Orphans' Home had been

abandoned, and there being now no such institution in existence to accept the charity, the bank stock passed, under the will of John H. Hanna, to his wife, Mary, under the clause referred to, and that she (Mrs. Thom) took it under the will of Mrs. Hanna, as the devisee of all her bank stock, &c. By the will of the testator, the trustee, Norton, was to pay the dividends over to the widow, that she might apply them, during her life, to this charity, and the widow, when she made her will, being desirous of enlarging the charity, and with the view of making the home more useful as a benevolent institution, dedicated the property known as the Orphans' Home to the uses of an asylum for poor orphan girls, where they could be maintained and educated until they could earn their own support, vesting the title in her nephew, Hunt Reynolds, with the provision, that if no sufficient fund was raised for the support of the asylum, the property was to revert to him, or he should, in that event, retain it as his own property. The funds were not raised, and the orphan girls, then in what was called the home, remained there until the year 1881, under a further provision of the will of Mrs. Hanna that they were to remain in the home until they severally became of the age of sixteen. It appears, therefore, that the orphan girls who were in this home, or some of them, remained there for near eleven years after the death of the widow of the testator. That his widow contributed more to the support of these orphans than all others, is apparent, and that she was the real founder of the benevolent enterprise, will be conceded; but it does not follow, that because the funds necessary to maintain or enlarge the asylum, as it was intended to be called and used by the testatrix, were not raised, therefore, the trust fund, placed in the hands of the rector of the church, Norton, by the original testator, passed under his will to his widow, and from the widow, by virtue of her will, to the appellee, Mrs. Thom. Norton, the trustee under the provision of the testator's will creating this trust, was directed, upon the death of his widow, *to designate some person to make the disbursement.* The rector, who was invested with the title as trustee to this bank stock, resided in Frankfort for many years, had control of the fund, or, doubtless, applied it for the uses contemplated, until the year 1881, when he died, being at that time a resident of the city of Louisville, and by the provisions of his will, and acting under what he supposed was the power conferred by Hanna's will, transferred to the present rector of the Episcopal Church, at Frankfort, the fifty shares of stock, to be applied to the charitable use intended by the original testator, and in that way E. A. Penick, the present rector of the church, is made defendant to the action, and the court below, adjudging that the stock passed to Mrs. Thom, the appellee, under the will of Mrs. Hanna, he has brought the case to this court. It is plain that neither the widow of the testator nor any of the devisees could destroy the trust reposed in the trustee, Norton, for the benefit of the orphan girls, or of the Orphan's Home of the Episcopal Church, in Frankfort, and while the benevolence of this Christian woman may have added more to the prosperity of the home and happiness of the orphans within it than all the other members of the church combined, still, the charity is not defeated because of the failure to raise the funds necessary to found or even continue the asylum, as desired by her. While the testator designates as the object of his charity the "*Orphans' Home of the Episcopal Church, in Frankfort,*" it clearly appears that the title to the house, called the home, was in the widow of the testator, and no devise having been made to the church of any home, the devise of the charity was, in

effect, to the orphan girls who were poor and needy, children of those who had been members of that church, or such as might be adopted as deserving of its care and protection; in other words, the charity was recognized by the testator as being connected with the church, and from the members of which, doubtless, contributions were made, as the evidence conduces to establish, although his contributions and devise constituted the principal fund.

The title to the building, as is alleged, is now in the devisee of Mrs. Hanna, and the fund is claimed by another of her devisees upon the ground that the testatrix, in some way, had a contingent or vested interest in it, although dying and making her will ten years before it is claimed the home was abandoned. Why another home may not be provided, or the income of the fund expended in the support, education and maintenance of orphan girls, in such manner as will carry out the benevolent purpose of the testator, we can not well see. None, in fact, exists. We say it should be applied to the orphan girls, because the means of the testator and his wife had been so applied by them while each lived to contribute, and for a period of twenty years this class of children received its benefits. It was not the intention of the testator to make any other disposition of this fund than that contemplated by the devise. The devise became absolute and irrevocable when the will was probated, and, with the title to the property in his widow, he could not have supposed that this home would continue in the particular house He may have believed, and, doubtless, did believe, that his widow would dedicate the building some day as a home, and this she did on certain conditions that were never complied with, but the failure of her purposes can not affect the charity of her husband. His intention was to make the fifty shares of stock a perpetual fund for the benefit of orphan girls, to be under the control of, or as an adjunct to, the church of which he had so long been a member. He invested the rector of that church with the power to appoint some one to apply the income of the fund after the wife's death, not to be used in the property owned by her or her devisee, but to be applied to the wants of poor orphan girls, who seem to have been made the sole object of the charity that was continued to be bestowed under the will of the testator from the year 1861, when it was probated, until the death of the trustee, Norton, in the year 1881, a period of twenty years.

In the month of May, 1881, a period of less than three months after the death of Norton, the trustee, this action was filed, claiming an abandonment of the home, and that the beneficiary, or beneficiaries, named by the testator, had no longer an existence. That this was not a devise to orphans generally, will be admitted, but that it was a devise to orphans connected with, or under the care and patronage of the Episcopal Church, in Frankfort, is manifest. He connects the home, by the devise, with this church, calling it "*the Orphans' Home of the Episcopal Church of the Ascension, in Frankfort;*" places it under the control of the rector of that church, with the power in the latter to appoint his successor; makes a similar devise to the parish school of that church, showing plainly the object the donor had in view, and that he regarded the beneficiaries as the orphanage of the church to which he belonged. He made no devise of the building subject to the use of the charity, but passed the title from him, because he felt assured the fund would be forever applied to those who were to receive its benefits, *and those beneficiaries were the orphans who then were, and might thereafter be, placed under the care and patronage of the Episcopal Church, at*

Frankfort. That the testator confided in his wife with reference to this charity, and that it would be continued by her after his death, is not questioned, and that confidence seems not to have been misplaced. She, in fact, controlled the application of the fund as she wished, and, doubtless, interested other members of her church in its success; and, even if it be conceded that the devise was to aid the wife in maintaining these orphan girls, it still affords no argument in favor of a construction that has, by the judgment below, rendered nugatory the most worthy of all charities.

It is insisted by counsel for the appellee, that to create a home, and then appoint a trustee, would be the exercise of a prerogative and not a judicial power; in other words, because the donor has shown a purpose to create a charity, and it has failed, the court ought not to undertake to create one for him. It is not the benevolence of the chancellor, but that of the testator, that must be effectuated, if it can be done, without resorting to some arbitrary rule. It is an established maxim of interpretation, says Mr. Perry, "that the court is bound to carry the gift into effect, if it can see a general charitable intention, consistent with the rules of law, but no forced construction will be adopted to uphold the gift." It is true that a gift may be charitable, and the chancellor without any power to enforce it, but the intention of the donor must be consulted in a case like this, as it would in construing any other provision of his will, and that he desired his bounty or charity to be distributed to the poor girls, orphans, under the control of his church, is almost as plain as if he had written it in express words, and because he used the words, Orphans' Home of the Episcopal Church, when the church had no title to the home, or the house called the home was owned by another, and the children deprived of its use, affords no reason for destroying this charity that was administered by the wife and the trustee for twenty years to those who were the objects of the testator's bounty. These objects still exist, and the fund should be applied to their wants.

Section 2 of chapter 13, General Statutes, provides that "no charity shall be defeated for the want of a trustee, or other person in whom the title may vest, but courts of equity may uphold the same by appointing trustees, if there be none, or by taking control of the fund or property and directing its management, *and settling who is the beneficiary thereof*."

In the case of Cromie's heirs against the Louisville Orphans' Home Society, reported in 3 Bush, 365, it was held that if the Society was not a legal corporation, or incapable of holding title, the gift was, in effect, a beneficial gift to poor orphans, and would be sustained on that ground, the court, however, holding that the corporation could take.

In this case the class of persons who are the beneficiaries of this fund are ready to accept its benefits, and the rector of the Episcopal Church, in Frankfort, who was selected by the former trustee, Norton, to take charge of the fund, is ready to receive it for them. How it shall be controlled, or by whom the income shall be disbursed, must be determined by the chancellor below. The vestry of the Episcopal Church, under the advice and direction of its enlightened and Christian rector, who should be made the trustee, would, doubtless, disburse the income to such orphan girls as are poor and needy, and who are accepted as under the care and patronage of this particular church, located in Frankfort.

The judgment below is reversed, and the cause remanded for further proceedings consistent with this opinion. The appeal of Reynolds' administrator is dismissed.

ANDERSON V. FITZPATRICK & BURTON.

(*Filed Dec.* 9, 1890—*Not to be reported.*)

1. *Lien for materials furnished*—No lien can be enforced under chapter 70, General Statutes, for materials furnished in the construction of a building, unless a statement, as required by section 6, be filed in the office of the clerk of the county court within sixty days.

2. *Attachment—Jurisdiction—Non-residence—Lien on land*—An amended petition was filed in an action, alleging that lumber was sold and delivered to Joseph Anderson, Charles Anderson and Amanda Anderson jointly, at their instance and request, and for which they agreed to pay the sum charged; that Joseph Anderson is a non-resident of the State, and that since the creation of the debt Joseph Anderson, by gift, transferred his said lumber, with design to cheat his creditors, and said lumber was used in the erection of a dwelling house, and praying that said lot, with the improvements thereon, to the extent of the lumber furnished by Joseph Anderson, be subjected to the payment of plaintiff's debt. From a judgment sustaining attachment as to Joseph Anderson, and ordering a sale of the lot for the payment of the purchase money and the debt for lumber, also for personal judgment against Charles Anderson, he has appealed, urging as grounds for reversal that the rendition of the personal judgment was erroneous, and the court had no jurisdiction to order a sale of the lot. *Held*—That as appellant knowingly received the benefit of the lumber received from Joseph Anderson, in the construction of the house, besides he had paid nothing therefor, the personal judgment was proper, as such voluntary gift of the lumber was fraudulent and void, as to the creditors of Joseph Anderson, under section 2, article 1, chapter 44, General Statutes. It was unnecessary to obtain a return of no property found against Joseph Anderson, before jurisdiction in equity was acquired, as his non-residence afforded ground for resort to such jurisdiction, and the chancellor thereby had the right to declare the transfer of the lumber fraudulent and void, and subject to the payment of the debt; and as the lot, including the improvements, was subjected to the payment of purchase money, it was not improper to satisfy appellee's debt at the same time and in the same way.

Cornelison & McKee for appellant.

Ed. C. O'Rear for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action September 30, 1887, against Joseph Anderson, Charles Anderson and Amanda Anderson, to enforce a lien, as provided by chapter 70, General Statutes, on a lot, the title of which is in Charles Anderson, for materials, lumber, furnished for erection of a dwelling house thereon. But more than sixty days having expired, after the materials were furnished, before the statement required by section 6 was filed in the office of the clerk of the county court of the county in which the building is situated, the lien was lost, and the action in equity could not, therefore, be maintained for that cause.

December 23, 1887, appellees filed an amended petition, in which they state Charles Anderson promised to pay them for the building material furnished, at the prices set out in the account filed with the petition, and that said materials were used in erecting a dwelling house on the lot, before that time vacant and unoccupied; and also stated he, Charles Anderson, was about to use, convey, or otherwise dispose of his property, with the fraudulent intent to cheat, hinder

and delay his creditors in collection of their debts, and, upon that ground, an attachment was prayed for, issued and levied on the lot.

December 7, 1888, appellees filed second amended petition, in which they state the lumber mentioned was sold and delivered to Joseph Anderson, Charles Anderson and Amanda Anderson jointly, at their instance and request, and for which they agreed to pay appellees the sum charged; that Joseph Anderson is a non-resident of the State; that since creation of the account sued on, Joseph Anderson, by gift, and without consideration, transferred his property to Charles Anderson, with design to cheat his creditors, &c., and that the property given by Joseph Anderson was lumber and other building materials, that was used to construct the dwelling house on said lot; and, therefore, pray the transfer of said property be adjudged void, and that to the extent said property of Joseph Anderson has been used in constructing improvement on the lot, with consent of Charles Anderson, said lot be subjected to satisfy appellees' demand.

Upon final hearing, the lower court adjudged that Charles Anderson was primarily a party to the contract for sale of the lumber, and that he, together with Joseph Anderson, bought, and promised and agreed to pay appellees therefor. It was further adjudged the lot be sold to satisfy, first, a vendor's lien, set up and claimed by the party interested, and then the claim of appellees, for which a personal judgment was also rendered against Charles Anderson. By a supplemental judgment the attachment as to Charles Anderson was discharged, but sustained as to Joseph Anderson. Amanda Anderson, wife of Charles Anderson, is not shown to have any interest in the lot, or liable in any way to appellees; nor does she appeal from the judgment, Charles Anderson being the only appellant.

Whether appellant promised and agreed to pay, or be responsible, for the lumber furnished by appellees, does not clearly appear, for the evidence is contradictory on the subject. But the lumber was furnished and used in constructing the dwelling on his lot, with his knowledge, and was accepted, and has since been enjoyed by him. In fact, the evidence does not show any other lumber, beside that obtained from appellees, was used in making the improvements on the lot. There is evidence showing full knowledge by appellant the lumber was being furnished by appellees to erect the buildings on his lot, and that he promised and agreed, after it was so delivered, to pay appellees therefor. We do not, therefore, feel authorized to disturb the personal judgment rendered against appellant; for, though it is for a few dollars more than is claimed in the petition, that error can be corrected as a misprission of the clerk.

But as the attachment against appellant was discharged, because the grounds thereof, being controverted, were not sustained, the question arises whether the lower court had jurisdiction to do more than render a personal judgment against him. It seems to be conceded that Joseph Anderson really made the contract with appellees for sale and delivery of the lumber, and made all the payments therefor, which appellees received, and, consequently, he was unquestionably bound to them for the value thereof If he was bound solely, and not jointly, with appellant, as is urged in defense of the action, then the latter was bound to him primarily for the value of the lumber, because he received and got the benefit of it, and is still bound, not having paid any thing therefor, unless, as he alleges and has proved, the lumber was given to him voluntarily and without valuable consideration, which, in contemplation of section 2, article

1, chapter 44, General Statutes, was fraudulent and void as to appellees, existing creditors of Joseph Anderson. Though there had been no previous judgment against Joseph Anderson for the amount of appellees' account, followed by execution and return of no property found, jurisdiction in equity having been properly acquired upon the ground he was a non-resident, the chancellor had power to adjudge the transfer of the lumber to appellant fraudulent and void, and subject to appellees' debts; and as the lot, including the improvements, was, by the same judgment, made subject and directed sold to satisfy the debt due for purchase money, the holder and owner of which was a party to the action, it was not error on part of the court, nor would it be prejudicial to appellant, to satisfy appellees' debt in the same way and at the same time.

Judgment affirmed.

THOMPSON V. SAWYER, WALLACE & CO.

(*Filed Dec.* 9, 1890—*Not to be reported.*)

Compromise—Action for new trial—Appellees brought an action against Thompson & Boone, partners, for indebtedness, arising from advancements made by appellees to said partners in handling leaf tobacco, and an attachment, levied on property belonging to the wife of Thompson, to secure said debt. The action was compromised by a judgment being rendered against Thompson for a portion of the debt, and against Boone, who was insolvent, for the remainder, and the attachment was discharged. In this action to set aside the judgment and grant appellants, Thompson and wife, a new trial, on the ground that Thompson, at the time of said compromise, was mentally incapable of giving information concerning his business affairs, *Held*—That as Thompson was able to give some information concerning his business affairs at that time, and his partner was present, and his two competent attorneys were also present, advising their clients in making said compromise, and an arrangement beneficial to their clients, free from fraud or imposition, was made, their interests have been fully protected and no new trial should be granted.

E. E. McKay for appellant.

Dodd & Grubbs for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The object of this action was to vacate a judgment and grant a new trial, that the case might be re-heard on its merits. The claim in the original action was for a sum exceeding $13,000, which was owing the appellees, Sawyer, Wallace & Co., by Thompson, the appellant, and his partner, Boone. Thompson & Boone had been dealing in seed-leaf tobacco, and advances had been made by Sawyer, Wallace & Co., who were tobacco warehousemen in Louisville, and by a branch of that firm then doing business in the city of New York. Attachments had been obtained by Sawyer, Wallace & Co., and levied on real estate belonging to the wife of Thompson, for the purpose of securing their debt, the plaintiffs alleging that the conveyance was in fraud of creditors. Boone, the partner of Thompson, was insolvent, or, at least, it does not appear that he had any estate subject to execution.

The husband of Mrs. Thompson was in bad health when this

original suit was brought, and his mind almost a blank from softening of the brain. He, therefore, knew but little in regard to the business, and was not, perhaps, in a condition to give much information as to the business transactions with the plaintiffs. His wife's property had been attached, and the action would have gone to judgment but for a compromise made by Messrs. Bacon & Stites, the attorneys of Mr. and Mrs. Thompson, by the consent of both and really at their instance. By this compromise Sawyer, Wallace & Co. agreed to look to Boone for $5,000 of the debt, and the appellants assumed the balance, Boone refusing to pay more, as Thompson was indebted to him, and that indebtedness being charged to Thompson, made Thompson's liability greater than Boone's.

On the day the compromise was made the parties were all present, and the proof conduced to show that Thompson was in such mental condition on that day as enabled him to give some information in regard to the business, and all parties understood perfectly what was agreed upon.

The parties, appellants, had faithful and competent attorneys, who assisted in and made the compromise that, in their opinion, was to the interests of their clients, and, from the testimony before us, did what was right and proper under the circumstances. It was such a compromise as ought to have been made, and there is nothing in the record before us showing that a new trial, if granted, would result as beneficially to the appellants. The husband and wife, and both of their attorneys, with all the facts before them, and Boone, a partner, knowing all about the business, were present, and no fact concealed by the plaintiffs when the compromise was made, and in such a state of case, conceding that the husband was an imbecile at the time, the compromise would not be disturbed. Boone has been released by the plaintiffs from that part of the liability assumed by Thompson. The liens created by the attachments have been discharged, and a judgment dismissing the action entered.

We find no fraud or bad faith on the part of either of the plaintiffs in the action, or neglect by the attorneys in the defense. The latter did what was to the interests of their clients, and there is no reason for disturbing the judgment.

Judgment below is affirmed.

GATELY V. WILDER.

(Filed Nov. 15, 1890—Not to be reported.)

1. *Action to quiet title to land—Pleading*—In order to maintain an action to quiet title to land, the petition must allege that plaintiff is at the time in actual possession.

2. *Champerty—Tax sale—Possession*—Appellee having purchased a tract of land at a tax sale, and received the auditor's deed therefor in 1883, was in the actual possession of same, claiming title under said deed, when the original owner in 1887 made a deed of conveyance of same to appellant, under which he now claims. *Held*—That the deed of 1887 was champertous under section 2, chapter 2, General Statutes; besides, the evidence shows that said deed was acquired by fraud.

The court also properly adjudged appellee to be the owner of the land, as the deed from the auditor was not successfully attacked.

Sam. McKee for appellant.

Sam. B. Kirby for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

This being an action in equity to quiet the title of the plaintiff to the lot of land in dispute, it was necessary and indispensable for him to state in his petition that he was at the time in actual possession, which was not done, and the general demurrer ought, therefore, to have been sustained. But, as upon other grounds the action was dismissed, and the plaintiff occupies the attitude here of appellant, the question for immediate consideration is, whether the final judgment was proper.

Two principal defenses to the action are made in the answer. First. That the lot was regularly and legally sold for taxes due by the owner, Peter Wilder, to the State, and in 1883 the auditor of public accounts executed and delivered to appellee, purchaser at the tax sale, a deed for the lot, and that he was in actual adverse possession then of claiming title under that deed, when Peter Wilder, in January, 1887, attempted to convey the same lot to appellant. Second. That the deed of 1887 was made by Peter Wilder without consideration, and for the fraudulent purpose of cheating, hindering and delaying his creditors

We think the evidence shows appellee was in the actual adverse possession of the lot, claiming title under the deed from the auditor in January, 1887, and, consequently, in the plain language of section 2, chapter 2, General Statutes, the conveyance of that date from Peter Wilder to appellant was null and void. It appears the parcel of land in dispute is part of a lot owned originally by Peter Wilder, father of appellee, the other part of it having been conveyed by him to his wife, Bridget A. Wilder, in 1885. But the two parcels continued after Peter Wilder was divested of title, as they had been before within the same inclosure, and, although the dwelling house was situated on the part owned by Bridget A. Wilder, who was divorced from Peter Wilder, and appellant being unmarried, resided then with her, she continuously claimed and exercised acts of ownership, and must, therefore, be regarded, in legal contemplation, as in actual possession of it.

The evidence tends strongly to show that the deed of January, 1887, was made without consideration and in fraud of his creditors; and, furthermore, that Peter Wilder, who was illiterate and almost crazed with drink, was persuaded to make it to appellant, under the belief appellee, his daughter, had not acquired a valid title by the auditor's deed. For the evidence shows he wished her to have the lot, advised the purchase for her benefit at the tax sale, and, in October, 1887, actually made a deed to her for it,

It seems to us, as the deed made to appellant in January, 1887, was not, for the reasons stated, effectual to give any title to the lot, there was no other alternative for the chancellor than to dismiss his petition; and, as armed with a deed from the auditor, the validity of which has not been successfully attacked, and also one from Peter Wilder, and being, moreover, in possession, the title of appellee must be considered superior to all others. Consequently, she was entitled to the affirmative relief asked in her counter-claim, and the chancellor properly adjudged her to be the owner of the lot.

Judgment affirmed.

GERMAN BANK V. BEST, &C.

(Filed Dec. 11, 1890—Not to be reported.)

1. *Judicial sales—Title*—This suit was brought under section 490, Civil Code of Practice, authorizing the sale of land owned by joint tenants, where the same is not susceptible of division without impairing its value. At the sale appellant became purchaser, and objects to the validity of the sale, alleging that there was *no vested estate in possession jointly owned by two or more persons.* In 1878 Christian Best, by his will, gave his widow, Caroline Best, an estate for life in the land in controversy, with the power of disposition, if she deemed it necessary for the support of herself and children. On February 21, 1888, she conveyed to Amelia, one of the adult children, "all her right, title, interest and claim" in the property. By a deed of same date Amelia re-conveyed to her mother "all her right, title, interest and claim" to it. By a deed, subsequently acknowledged, the mother re-conveyed the same to Amelia, and on June 12, 1888, Amelia conveyed to her five sisters a sixth interest each in said property. Amelia, her five sisters and mother are parties to this action. *Held*—That the first conveyance made by the mother passed the fee-simple title to the property, and the re-conveyance to her of the same property did not convert it into a life estate in her again, as previously held under the will.

2. *Description of land*—It is no objection, sufficient to vitiate a sale, that two inches of the property did not pass by the sale for want of proper description, as the purchaser gets all he bid for, being the same property described in the judgment and ordered to be sold.

Barnett, Miller & Barnett for appellant.

Newton G. Rogers for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

This action was brought by the three adult children of Christian Best, deceased, against his three infant children, Caroline Best, as his widow and executrix, uniting as a plaintiff, seeking a sale of a lot in the city of Louisville, under section 490 of the Civil Code, which provides:

"A vested estate in real property, jointly owned by two or more persons, may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant, * * * if the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

The proceedings leading up to the judgment ordering a sale are regular, and the evidence clearly shows that the property can not be divided without material diminution in value. The appellant, the German Bank, having become the purchaser, and failing to comply with the terms of the sale, resists a rule to compel it to do so, upon the ground that there was *no vested estate in possession, jointly owned by two or more persons.* If this be true, then, as it is the condition upon which the sale can be ordered, the judgment below, making the rule absolute, is erroneous.

Christian Best died testate in 1878. His will, as construed by this court in the case of Best v. Best, &c., 11 KY. LAW REP., 74, gave to his widow an estate for life, or during widowhood, in all his property, with the power of disposition, if she deemed it necessary for the support of herself and children.

By a deed, dated February 21, 1888, she conveyed to Amelia, one

of the adult children, "all her right, title, interest and claim" to the lot, which is the subject of this suit. By a deed of the same date Amelia re-conveyed to her mother "all her right, title, interest and claim" to it. By a deed, dated January 12, 1888, but which was not acknowledged or recorded until after the execution of the two deeds already named, the mother conveyed to Amelia, as the appellant claims, only her life estate in the lot. By a deed, dated June 12, 1888, Amelia, for the purpose, as the deed recites, of ending the life estate, which had been held by her mother, and of making each of the children an equal owner in possession of the lot, conveyed to her five sisters a sixth interest each as to the life estate, acquired under the deed from her mother; and the title being in this condition, this action was brought.

It is claimed, first, that the widow, having made a deed to Amelia, had no power to obtain a re-conveyance, and then again convey it. This is upon the idea that an executor, who is invested with a power to sell, can not exercise it, and then re-purchase the property, and again exercise the power given him by the will.

This case, however, is unlike that of Fritsch v. Klausing, 11 KY. REP., 789. There a father executed to his daughter a deed to a tract of land, vesting in her a life estate, remainder to her children, and to go to his heirs upon the death of his daughter and her husband, if she left no descendants. The deed also provided, if she and her husband ever sold the land, the purchase money should be re-invested in other land, and the title to it secured in the same manner as in the original conveyance. They sold it, and re-invested the proceeds as required by the deed from the father. Afterward they sold the property in which the re-investment had been made, and sought to perfect the title by obtaining a decree for a sale and re-investment; and it was held that the deed from the father evidenced a plain intent that the power of sale, by the husband and wife, extended only to one sale and re-investment.

Here, however, the wife did not exercise the power of sale, but merely conveyed to the daughter "all her right, title, interest and claim" in the lot. It is, however, urged that the effect of all the deeds was to vest the remainder estate in the original life tenant, and the life estate in the original remainder men.

The first deed, however, from the widow to Amelia, conveyed all the grantor's right. The deed back from the daughter passed all her right, and then the second deed from the mother to Amelia did not convey merely the widow's life estate, but, in the language of the granting clause, it conveyed "all the right, title, interest and claim she, the said Caroline Best, has, or might have hereafter" in the lot. It conveyed all the interest she had in the property. It was not a conveyance under the power given in the will, but of whatever interest she owned in the lot, and it, together with the deed from Amelia to her sisters, gave to the children a vested estate in possession in the property jointly and equally owned by them. Moreover, the widow is a party to this action, and asks that the property be sold, as it belongs to and is in the possession of the children.

It is also urged that, under the deed from the mother to Amelia, two inches of the front of the lot, and extending that width to the rear of it, did not pass by reason of a misdescription in the deed. It is unnecessary to consider whether it did or not, because the purchaser gets all he bought. The same property described in the judgment, and ordered to be sold, was sold, and for it the appellant bid a certain price. He can not, therefore, complain upon this score.

Judgment affirmed.

WORKMAN V. COMMONWEALTH.

(*Filed Dec.* 11, 1890—*Not to be reported.*)

1. *Criminal Law—Instructions*—This appeal is prosecuted from a judgment of conviction for malicious shooting and wounding, and one of the grounds relied upon by appellant for a reversal is, the refusal of the court to give an instruction on self-defense. *Held*—That such refusal was not error, there being no evidence of self-defense shown in the case.

2. *Evidence*—It was not prejudicial for the court to admit in evidence the statement made by the brother of appellant, that he told the appellant to go and get a pistol, and shoot the prosecuting witness, and that if he (appellant) missed him, he (the brother) would finish him up with a club, as the proof showed that appellant acted on the advice of his brother, and did get a pistol and shoot the person named.

R. K. Smith for appellant.

P. W. Hardin for appellee.

Appeal from Bracken Criminal Court.

Opinion of the court by Judge Bennett.

The appellant, on election day, was drunk, and accused Joe Holly of having assisted to arrest him, at the same time took hold of Holly's arm. Holly jerked loose from him, and at the same time made some hostile demonstration, when he was reminded by some one that the appellant was drunk. Upon this, he walked away and finally went to the court-house pump, to which place the appellant followed him, and accosted him with the declaration, "You can not arrest me." Holly replied he could, if he wished to. Thereupon the appellant took off his coat and threw down his hat, and invited Holly to take off his coat and fight. Holly declined to take off his coat, but kicked the appellant's hat away from him, and put his hands on the breast of his own coat. Thereupon the appellant drew a pistol from his person and shot Holly, not killing him, however.

The jury found the appellant guilty of malicious shooting and wounding, and fixed his punishment at confinement in the penitentiary.

The appellant complains, first, because the court refused to instruct the jury upon the law of self-defense The court did right, for there was no evidence tending to show that the appellant's life was in danger at the hands of Holly, or that he had reasonable grounds to believe that it was in danger at the hands of Holly. Second, the appellant also complains that the court admitted incompetent evidence against him.

The evidence complained of is, the appellant's brother told the appellant to get "the pistol" and shoot Holly, and if appellant missed, he (the brother) would finish Holly with a club. This evidence would be incompetent, unless the appellant accepted the advice either by word or acting upon it. He says that his brother went around the house and returned, saying to him, go and get it; that he did go and found the pistol, with which he, shortly thereafter, shot Holly. Under these circumstances the jury had the right to consider the advice of the brother, acted upon by the appellant, upon the subject of malice.

The judgment is affirmed.

N. N. & M. V. R. R. Co. v. Dentzel's Adm'r.

(*Filed Dec.* 13, 1890.)

1. *Negligence—Damages for suffering before death*—This action was instituted by the administrator of a brakeman, who was injured while in the employ of appellant, resulting in the death of the decedent nine hours after the injury. The petition alleges that the injury occurred through the wilful neglect of those controlling the train for the company, and such damages are asked as would have compensated the deceased for the loss of time and his physical and mental suffering, from the time of the happening of the injury up to his death, as well as exemplary damages. A judgment was rendered for appellee, from which this appeal is prosecuted. *Held*—That said action was properly maintained. By the common law no right of action accrued to any one for personal injuries resulting in instant death: but if there was an appreciable interval of suffering, a right of action did accrue to the person injured, and this right of action survives to his personal representative by chapter 10, General Statutes. Sections 1 and 3 of chapter 57, General Statutes, provide for bringing actions for injuries only which result in *loss of life*. These statutes, authorizing an action for loss of life through wilful negligence, were intended not to restrict, but to enlarge the common law; to give a right of action where none existed before, and not to cut off one which already existed.

2. *Instructions*—After the close of the evidence for appellee, appellant withdrew its answer. It was not error to instruct the jury to find the degree of negligence. While it is the duty of the court to find the degree of negligence, where the facts are admitted, it is proper, in case of doubt, to submit to the jury to find the degree of negligence. Appellant was not prejudiced by the action of the court in this case, as the facts proven show that the conductor, who was in charge of the train, was guilty of wilful neglect of duty.

3. *Excessive damages*—The deceased was unconscious from the time of his injury until his death, and no one can tell the extent of his suffering, but the jury had the right not only to find damages, by way of compensation for the suffering until death, but also to award exemplary damages.

Holmes Cummins, G. W. Stone and P. H. Darby for appellant.

Matt. O'Doherty, R. C. Davis and E. D. Walker for appellees.

Appeal from Grayson Circuit Court.

Opinion of the court by Chief Justice Holt.

John Dentzel, while in the employ of the appellant, the N. N. & M. V. Co., as a brakeman, and when engaged in his duties, as such employe, received injuries which caused his death nine hours after their infliction. A heavily loaded freight train of the appellant, of about seventeen cars, stopped when upon an ascending grade. In endeavoring to move it, a draw-head was torn from its place, but the train soon started again, and, upon doing so, the deceased resumed his proper place, as a brakeman, upon the front part of the train, while the only other brakeman upon the train, and whose place was upon the rear part of it, went into the caboose, which was the rear car, with the conductor.

The train, in some way not disclosed, was soon thereafter broken in two sections, and the engineer, becoming apprised of it, put on additional steam and ran ahead with the front section, the deceased being thereon, to avoid a collision. As soon as he discovered that the train was broken, he whistled for the rear section to put on the brakes, and the evidence shows, if it had been done, a stop would

have been had within a very short distance, say the length of the train. The front section ran on for about two miles and a half, passing one station in the meantime, the engineer repeatedly giving the whistle alarm for a stop of the rear section, so often, indeed, that it alarmed the people living along the road. Supposing that those upon it had stopped it, he then checked the front section, and, almost as soon as he did so, the rear section ran into it, and, in the wreck, the deceased was injured. The testimony shows that the rear brakeman, instead of being at his post, was in the caboose from the time when he went into it, as already stated, until the collision occurred.

While the appellant is not liable to an employe for injury arising from the neglect of a co-laborer, not superior to the one injured, yet, in this instance, the conductor, who was in charge of the train, was a party to the neglect. He not only permitted it, upon the part of the rear brakeman, but also failed to give attention otherwise to the conduct of the train. The rule of *respondeat superior*, therefore, applies, and it is evident the neglect was wilful. It was an intentional failure upon the part of the one in charge of the train, and who represented the company, to perform a known and manifest duty, important to the safety of the deceased.

The averments of the petition show that this action, by the administrator of the deceased, was not brought under section 3 of chapter 57 of the General Statutes, which authorizes suit for the recovery of punitive damages for *the loss of life* against the person, or company, or corporation, through whose wilful neglect it occurs. Such an action can not be maintained in a case like this one, as this court has repeatedly held in Henderson v. R. R. Co., 86 Ky., 389; Jordan's ad'mr v. R. R. Co., 11 KY. LAW REP., 204, and other cases, because the deceased left neither wife nor child. But it was brought, alleging that the injury occurred through the wilful neglect of those controlling the train for the company, and to recover such damages as would have compensated the deceased for the loss of time and his physical and mental suffering, from the time of the happening of the injury up to his death, as well as such exemplary damages as the jury might see proper to award under all the circumstances of the case, not exceeding the amount claimed in the petition.

The demurrer to the third paragraph of the answer, which set up as a defense to any recovery that the deceased left neither wife nor child, was, therefore, properly sustained.

By the common law no right of action accrued to any one for personal injuries, resulting in instant death; but if there was an appreciable interval of suffering, a right of action for it did accrue to the person injured; and this right of action survives to his personal representative by chapter 10 of the General Statutes, which provides: "No right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring, or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action on contract."

The statute authorizing an action for loss of life, through wilful negligence, was intended not to restrict, but to enlarge the common law; to give a right of action where none existed before, and not to

cut off one which already existed. Hansford's adm'r v. Payne & Co., 11 Bush, 380.

It has been suggested, in the consideration of the case, that if the personal representative of an injured employe, who does not die immediately, and who leaves neither wife nor child, can sue for the loss of time and the suffering of the deceased, between the time of the infliction of the injury and his death, then this will, in effect, defeat the construction which has been given to the statute; and that although, by reason of having no wife or child, no action can be maintained for the loss of life, yet the jury will be apt to consider it in estimating the damages, and render a verdict accordingly. This is, however, supposing that the jury will not regard their oaths, and will disregard the instruction of the court. The life of a person may, under the tables of mortality, be estimated in value. When the jury are informed of his age and his ability to labor, they can fix its value; and certainly they will not return damages for its loss, when told, as they were in this case, that they can not do so.

As the law now stands in this State, the personal representative of any person, who was not in the employment of a railroad company, may sue for the loss of his life through the neglect of the company, whatever be the degree of the neglect, and just as the person himself might have done for the injury, if death had not ensued. This is by virtue of the first section of chapter 57 of the General Statutes, and by the third section a recovery may be had for the loss of life of any person, whether a railroad employe or not, if he left a wife or child, and it was caused by the *wilful* neglect of a person, company, or corporation; and the recovery may include punitive damages.

But this statute gives a remedy for *the loss of life*, and it does not abrogate the right, which existed at common law, of one who is injured, whether the injury be inflicted by a railroad company, in whose employ he may be, or not, and who does not die immediately, of either suing before his death for the loss of time and his suffering, or of his personal representative to do so after his death.

In this case, after the testimony for the appellee was closed, the appellant declined to offer any, and by its counsel announced, in open court, that it conceded its liability upon the facts shown, and the only question was the measure of recovery. This was, in effect, a withdrawal of its answer. It was a confession of liability.

It is now urged as grounds for a reversal, first, that the court improperly submitted to the jury the question, whether the appellant had been guilty of wilful neglect; and, second, that the verdict is excessive. It is said that the answer admitted the facts, and, therefore, the court should have determined whether they showed wilful neglect, and that this question should not have been left to the jury. The question of negligence is a mixed one of law and fact. If disputed, it is the province of the jury to find the degree; if undisputed, the court determines it. L. & N. R. R. Co. v. Collins, 2 Duvall, 114. If it be questionable in a case where this duty rests, it should be left to the jury.

In this case, however, the appellant was not prejudiced by leaving the character of the negligence to the jury, because, if the court had determined it, it would have been bound, upon the facts of the case, to have found it to have been wilful.

We do not feel at liberty to disturb the verdict upon the score that it is excessive. The deceased, it is true, was unconscious from the time of the accident until his death. But no person can tell the extent of his physical and mental suffering; it was voiceless, save

in the way of moan. It was the province of the jury to fix the damages. They had a right not only to find damages by way of compensation for the suffering, from the time of the infliction of the injury until death, but to also award such exemplary damages as, under the circumstances, they saw fit. Having the right to award both, we can not undertake to say that the verdict is so excessive as to authorize a reversal.

The judgment is, therefore, affirmed.

MILLER v. SWAN & BROWN, &C.

SWAN & BROWN v. TRUST CO.

SAME v. SAME.

(*Filed Dec.* 13, 1890.)

1. *Jurisdiction—Probate of will—Void judgment*—A testatrix died in Jefferson county at the residence of one M. By her will she devised her estate to D. The will was admitted to probate in the Hardin County Court, and D., the devisee, conveyed certain land in trust for the payment of his creditors, the appellees, S. and B., being among the number. Afterwards a copy of the will was admitted to probate in the Jefferson County Court, and M. asserted claim against the estate for board and care and attention to the testatrix during her last illness. This suit was instituted by the administrator with the will annexed to settle the estate as an insolvent estate, and to sell the land to pay the debts of the testatrix. She left no personal estate, and no debts except the one asserted by M.

The creditors of the devisee resist the suit, alleging want of jurisdiction in the Jefferson County Court to admit the will to probate. *Held*—That the finding of fact by the lower court and the Superior Court that testatrix resided in Jefferson county at the time of her death, will not be disturbed; nor does the judgment of the Hardin County Court, admitting the will to probate, conclude an inquiry in a collateral proceeding as to the jurisdiction of the court. It is a well recognized rule of law, that where a court has no jurisdiction of the subject-matter, its judgment affecting it is void, and a void judgment can be assailed in either a direct or collateral proceeding.

Section 28, chapter 113, General Statutes, provides that a judgment of a County Court, admitting a will to probate, is conclusive of all matters, except as to the question of jurisdiction of the court. The objection that a copy of the will was admitted to probate in the Jefferson County Court, can not be considered on this appeal.

2. *Decedent's estate—Board*—The evidence in the case shows that M. and his family were in humble circumstances, and had for years boarded and cared for the testatrix with marked attention, and that the testatrix had repeatedly expressed her intention to pay her board, and other circumstances showed that M. was furnishing such board and care to the testatrix, under expectation of receiving compensation therefor. M. should be allowed reasonable compensation for same.

3. *Attorney's fee*—The suit having been instituted and carried on for the benefit of M., no attorney's fee should be allowed him to be paid out of the estate.

Fairleigh & Straus for Swan & Brown.

Wilson & Thorn for Trust Co.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

Mrs. Belle Compton died in Jefferson county in February, 1886, at the residence of one T. B. Miller. She left a last will that was admitted to probate in the Hardin County Court, in the same month and year of her death. Her sole devisee was E. P. Ditts, who conveyed certain land devised to him to S. T. Hovey to pay certain debts, that of the appellants, Swan & Brown, being among the number. Thomas B. Miller, an appellant in this case, with whom the testatrix lived at her death, asserted a claim against her for board, caring for her in her illness, and for burial expenses. Miller had the will, or a copy of it, admitted to probate in the Jefferson County Court, and the Fidelity Trust and Safety Vault Company was appointed the administrator, with the will annexed, and then instituted this action to settle the estate as an insolvent estate, and to sell the land to pay the debts of the testatrix. She owned no personal estate, and left no debts except the one asserted by Miller. Ditts, with the trustee, Hovey, and Swan & Brown, the creditors of Ditts, were made defendants, and insist that the County Court of Jefferson county had no jurisdiction of the probate, for the reason that the County Court of Hardin had already admitted the will to probate in that county, and it must, therefore, be affirmed, as county courts have the general jurisdiction in such cases; that the Hardin County Court had jurisdiction of the parties and the subject-matter, and that Hardin county was, in fact, the county of the residence of the testatrix.

The testimony as to her place of residence is certainly conflicting; but, it is sufficient to say that, as both the court below, and the Superior Court, in an appeal to that court, have determined that her residence was in Jefferson county, we are disposed to follow their ruling on this question of fact, and certainly the testimony, we think, warrants such a finding. It is a well recognized rule of law, that where a court has no jurisdiction of the subject-matter, its judgment affecting it is void, and a void judgment can be assailed in either a direct or collateral proceeding. Section 28 of chapter 113, General Statutes, provides that "no will shall be received in evidence until it has been allowed and admitted to record by a county court, and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed or annulled."

It seems to this court that that section of the statute leaves the question of jurisdiction to be made at any time or in any proceeding where it may become necessary to question the validity of the probate, and as to all other questions the probate is conclusive until superseded, annulled or reversed; and this collateral attack as to the validity of the judgment or order of probate by the county court can only be made on the question of jurisdiction. The statute requires, where the testator has a known place of residence in the State, that his will "shall be proved before, and admitted to record by, the county court of the county of the testator's residence. Section 26, chapter 113, General Statutes.

This question was, in effect, determined in this court in the case of Jacobs' administrator v. L. & N. railroad company, 10 Bush, 263. It is said by counsel, however, that the case of Jacobs' administrator has no relation or bearing on a case like this, because the defendant, who was sued by the administrators may, in fact, show that the court had no jurisdiction to appoint him, and that he was seeking a recovery without right or title Here are two orders or judgments of probate—one in Hardin county and one in Jefferson county—and one or the other must be void. The court holds that the ad-

ministrator in the case of Jacobs' administrator v. the railroad, had no right to sue, because the county court in which he qualified had no jurisdiction to appoint him, and the fact that the question of his right to administer might have been raised in that case, did not prevent the defense. If the question had been raised in the Hardin County Court on the probate between parties who had the right to resist it, on the ground that the testatrix resided in Jefferson county, then there might be some reason for holding the judgment final; but there is no such plea in this case. The question was never raised, and the domicile of the testator being a jurisdictional fact as to the probate, the jurisdiction of the County Court of Hardin to admit the papers to probate may be questioned in this collateral proceeding.

The Jefferson County Court, having jurisdiction to probate the will, no inquiry can thus be made in this, a collateral proceeding, as to the manner in which the probate was had. The copy of the will may have been the best evidence that could have been produced at the time the probate was had. The original will should have been produced, as the best evidence, but its production was not necessary to give the court jurisdiction, if the testatrix resided in the county, and its non-production was, no doubt, accounted for. The order of the County Court of Jefferson may be erroneous, but the will, or the copy of record in that court, is an exact copy of the will found in the Hardin County Court. Walters v. Ratcliff, 5 Bush, 575. The probate in Hardin is no evidence of the testamentary act, or that such a paper was ever executed; but its probate in the county of testatrix's residence is conclusive until reversed or set aside by some direct proceeding.

As to the board charged by appellant Miller, while there was no express agreement to pay on the part of the testatrix, it is manifest that from what transpired between Miller's family and the testatrix, she expected to pay, and Miller to receive compensation for her board. The testatrix said, time and again, that she intended to pay board; she received, in her unfortunate condition, the kindest treatment from Miller and his family; was at his house for several years, and with Miller and his family in limited circumstances, and she with no particular claim on; consequently, it is hardly reasonable to suppose that he was taking care of and providing for her from feelings of humanity alone.

The attorney's fee, under the circumstances, should be disallowed against the administrator, as the action was really brought at Miller's instance, and for his benefit. We do not intend to say that no compensation should be allowed the attorney for advice given the administrator, but for bringing this action no allowance should be made, as it was instigated alone by the creditor, and the attorneys in this case were acting for him.

The judgment is reversed on the appeal of Miller, and reversed only on the appeal of Brown as to the attorney's fee. On the return of the case, the court will allow the claim for board reported by the commissioner, in addition to the judgment already rendered.

KENTUCKY SUPERIOR COURT.

LEXINGTON CITY NATIONAL BANK V. RUTHERFORD.

(*Filed Nov.* 12, 1890.)

1. *Plaintiff can not testify against defendant constructively summoned*—No person can testify for himself against a person who is only constructively summoned, but upon the filing of the affidavit, provided for by section 409 of the Code, the allegations of the petition are to be taken as true.

2. *Principal and agent—Ratification by principal*—Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability, the orders of the principal can not be executed at all, or not so well executed, if a loss occur to the agent, he can look to the principal for indemnity.

In this case the principal, by accepting property purchased by the agent for him, ratified the contract the agent had made, and became liable to him for the amount he had assumed to pay for that property.

3. *Promise to pay debt of another*—Where goods are sold to one person, upon the faith of another's promise to pay for them, and credit is given to such other person alone, it is not necessary that his promise should be in writing in order to bind him.

Watts Parker for appellant.

Ben. P. Campbell for appellee.

Appeal from Jessamine Circuit Court.

Opinion of the court by Judge Young.

Rutherford was Baker's agent in purchasing hogs; and, as such, purchased two lots, one from John, and the other from Wm. Hurhaugh, at the price of $390. At the time Baker bought the hogs, he informed Hurhaugh that he was purchasing them for Baker. Baker was in the habit of signing checks in blank and giving them to Rutherford to fill up when he made a purchase. On this occasion, Rutherford informed the Hurhaughs that he did not have any checks, and if they would wait until he could see Baker, he would get the checks and pay them. John replied to him that it did not make any difference, that he would look to him for the money, if he was doing business for a man that was not good, and that he looked to Rutherford for the payment of his money when he delivered his hogs to him.

Wm. Hurhaugh says he sold his hogs to Rutherford, and looked to him for the pay for them. When the hogs were weighed, Rutherford asked him to wait a few days, that he did not have any checks of Baker's with him, that he could get them in a few days. William told him all right, that he looked to him for the money. Rutherford said he would pay it, if Baker did not.

Rutherford afterwards delivered the checks of Baker to the Hurhaughs, and they were duly presented and payment refused. Rutherford paid the Hurhaughs and brought suit against Baker, alleging that Baker was indebted to him for money paid by him for Baker at the instance and and request of Baker. Rutherford sued out an attachment and had it levied on a debt due from Ogden to Baker. The Lexington City National Bank filed its petition in the action,

alleged that in another action brought by it against Baker, it had attached the funds in Ogden's hands, and denied the claim of Rutherford v. Baker; it asked to have the money in Ogden's hands subjected to its debt. Rutherford's attachment had been levied first. Ogden owed Baker about $———, which was insufficient to pay either creditor in full. The question was, which attaching creditor was entitled to the fund. The court below adjudged that Rutherford had a valid claim against Baker, and directed Ogden to pay the money into court, to be applied on Rutherford's debt.

From this judgment appellant prosecutes this appeal. Counsel for appellant urges two reasons against the correctness of the judgment of the court below: First. That, as Baker had been only constructively summoned, the evidence of Rutherford was incompetent, and that his case was not made out independently of it. Under section 606, Civil Code, no person shall testify against a person who is only constructively summoned. Baker was constructively summoned. But, under section 409, upon the filing of the affidavit therein provided, the allegations of the petition are to be taken as true. This affidavit was filed by Rutherford. Besides, the evidence of the two Hurhaughs, independently of his evidence, makes out his case. The most serious and only important point in the case is the second reason urged against the judgment by appellant, viz: "Admitting all the facts claimed by Rutherford to have been properly proved, yet they do not constitute a cause of action against Baker." From the evidence it is clear that the Hurhaughs sold and delivered the hogs to Rutherford upon the credit of Rutherford; that the acceptance of the checks of Baker, afterwards, were not taken by them with the intention of releasing Rutherford's liability to them, but was intended merely as an accommodation to Rutherford; and, in effect, saying to him, if they are paid, all right; but, if they are dishonored, we look to you for the payment for our hogs, as we sold them to you, and upon your credit. Rutherford was liable to the Hurhaughs for the price of the hogs sold and delivered to him. They looked to him for the payment of their respective debts, and could have maintained an action against him to recover their debts.

Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal can not be executed at all, or not so well executed, if a loss occur to the agent it is most clear that he can look to the principal for indemnity for the damage sustained by him. American Leading Cases, 873.

Cases may, indeed, occur, of such peculiar exigency as will justify an agent in making advances or incurring expenses beyond what ordinarily appertain to the regular course of business, for which, nevertheless, the principal will be bound to make him a full reimbursement. Story on Agency, 335.

If there be any relation between the parties, a payment without authority may be binding on the person for whose use it was made, if it be made under the pressure of a situation in which one party was involved by the other's breach of faith. 2 Kent's Com., 617.

Rutherford had purchased the hogs for Baker, in which purchase he obligated himself to pay for them. He delivered the hogs thus bought to Baker, and he received them, knowing at the time that his agent had personally obligated himself to pay for them. Baker, by the act of receiving the hogs, thus ratified the contract that Rutherford had made, and became liable to him for the amount that

he, Rutherford, had assumed to the Hurhaughs for him. This rests upon principles of common sense, and natural justice in the transaction of business. The law furnishes protection to the agent when he suffers loss through fidelity to his employer, and gives redress to the principal who sustains an injury from a breach of orders, or neglect of duty, by the agent.

Counsel for appellant also insist that the promise of Rutheford was only a collateral undertaking to pay the subsisting debt of Baker; and, therefore, there being no written evidence of it, this action can not be maintained.

We do not think so. Rutherford's promise to the Hurhaughs was the consideration for the sale and the delivery of the hogs; and his promise was a promise to pay his own debt as between him and the Hurhaughs. The statute of frauds does not apply to such contracts. 1 Bush, 227.

When goods are sold to one person, upon the faith of another's promise to pay for them, and credit is given to such other person alone, it is not necessary that his promise should be in writing in order to bind him. And in this State he is bound, even though the person to whom the goods are sold be jointly liable with him for the debt. 9 KY. LAW REP., 811.

The judgment of the lower court is affirmed.

SUPERIOR COURT ABSTRACTS.

MENDEL & CO. v. KINNIMOUTH BROS.

Filed November 19, 1890. Appeal from Butler Circuit Court. Opinion of the court by Judge Young, dismissing.

Appeals—Time for filing transcript—An order of the lower court extending the time in which to file bill of exceptions does not operate to extend the time in which to file the transcript. Notwithstanding such an order the transcript must be filed twenty days before the second term of this court after the granting of the appeal, unless the time be extended by this court.

B. L. D. Guffy for appellants; W. A. Helm and Edward W. Hines for appellees.

TURNER-LOOKER CO. v. TAYLOR & WILLIAMS.

Filed November 19, 1890. Appeal from Whitley Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, reversing.

Debtor and creditor—Fraudulent preference—Although an act of an insolvent debtor may have the effect of preferring one creditor to the exclusion of others, the transaction will be held valid unless attacked under the statute against preferences by insolvent debtors. Therefore, where property, which had been transferred by an insolvent debtor in payment of a debt, was attached by one of his creditors as his property, it should have been adjudged to be the property of the preferred creditor, who asserted his claim, the transfer not being attacked as a preference under the statute.

Frank Chinn for appellants; Crawford & Mason for appellees.

RED RIVER LUMBER CO. v. NEWKIRK.

Filed November 19, 1890. Appeal from Clark Court of Common Pleas. Opinion of the court by Judge Young, reversing.

1. *Master and servant*—As between two servants in a saw-mill, the sawyer is superior to the off-bearer, and the master is responsible for an injury to the off-bearer caused by the gross neglect of the sawyer.

2. *Contributory negligence*—Where the defendant has wilfully committed an injury, the rule of contributory negligence does not apply. But when the proof shows gross neglect, or a less degree of neglect, the law of contributory negligence should be given to the jury, if there be any evidence upon which to base it. The law, however, does not relieve the party charged with gross neglect from responsibility on account of the contributory negligence of the injured party, if he had actual notice of the injured party's fault in time to protect him.

W. M. Beckner for appellant; Wood & Day for appellee.

THE CONTRACTING AND BUILDING CO. v. BIGGS.

Filed November 26, 1890. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Railroads—Presumption of negligence overcome*—The statutory presumption of negligence on the part of a railroad company, arising from the killing of stock by its cars, is overcome, and the law is for the company, when either the employes of the company in charge of the train, or disinterested eye-witnesses, testify to the facts, and show by their testimony that there was no negligence.

2. *Paramount duty to passengers*—The paramount duty of those in charge of a train is to prevent injury to the train and its contents, and, although injury to stock on or near the track can not be averted without stopping the train, it is the duty of those in charge of the train not to stop it, if it can not be stopped with safety to passengers.

3. *Duty as to stock near track*—It is only where stock are on the track, or in close proximity to it, that those in charge of a train are required to stop it or even lessen the speed, in order to prevent injury to the stock.

B. F. Bennett for appellant; T. H. Paynter for appellee.

CAIN, ADM'R, &C. v. CAIN, ADM'R, &C.

Filed November 26, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Young, affirming.

1. *Bills of exceptions*—The time for filing a bill of exceptions in the Jefferson Court of Common Pleas, or in the Louisville Law and Equity Court, can not be extended beyond one hundred and twenty days after the order overruling the motion for a new trial. As the motion for new trial in this case was overruled on the 3d day of October, 1885, and the bill of exceptions was not signed or allowed until the 13th of February, 1886, one hundred and thirty days after the new trial was refused, the bill can not be considered, although the time was extended by successive orders, no excuse for the delay appearing in the record.

2. *Transfer to ordinary docket*—In this action against an administratrix on a note, in which the plaintiff sought to have defendant settle her accounts as administratrix, a plea of payment by defendant formed an issue of fact which defendant was entitled to have tried by a jury, and, therefore, the action, on defendant's motion, was properly transferred from the Louisville Chancery Court to the Jefferson Court of Common Pleas.

John R. M. Polk for appellant; A. A. Hagan for appellee.

SMITHERS, &c. v. COMMONWEALTH.

Filed November 6, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge Young, reversing.

1. *An indictment for keeping a tippling house for three months at one time* need not allege the particular three months during which the offense was committed; it is sufficient that there was a selling for three consecutive months and that it was before the finding of the indictment.

2. *Where an indictment is dismissed and the case again referred to the grand jury* and a new indictment found, the prosecution is to be regarded as having been instituted at the date of the first indictment, and testimony as to acts of the defendant subsequent to that date is incompetent, but as such testimony was not objected to in this case there can be no reversal on account of its admission. But it was error in instructing the jury not to require them to find, in order to convict, that the defendant had kept a tippling house for three months at one time prior to the date of the first indictment.

Thomas A. Martin and J. A. Dean for appellant; P. W. Hardin for appellee.

GIBSON v. GIBSON.

Filed November 26, 1890. Appeal from Allen Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Gifts by husband to children in fraud of wife's rights*—If a husband makes a gift of all or a greater part of his property to his children by a former marriage without the knowledge or consent of his wife, a *prima facie* case of fraud arises, and it rests upon the beneficiaries to explain away such presumption.

2. *Same*—Where a husband gives to his children the whole of his estate with intent to defraud his wife of her interest therein, the gift will be set aside upon the complaint of the widow so far as it affects her right.

In this case gifts made by the husband to his children by a former marriage during his last illness, with the fixed intention of depriving his wife of sharing in his estate, are set aside at the instance of the widow.

3. *Joint judgment*—It was error to render a joint judgment in favor of the widow against the children. A separate judgment should have been rendered against each in proportion to the amount he had received.

W. P. D. Bush and W. H. Botts for appellant; W. L. Porter for appellee.

DONAHUE v. MCDONALD.

Filed November 26, 1890. Appeal from Bourbon Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

Action against stakeholder—Where one who has staked money on a bet or wager sues the stakeholder to recover the money, the fact that the plaintiff is not the real owner of the money, but in making the wager and the stake acted merely as the agent of another, whose name is disclosed, constitutes a good defense, as it shows that the plaintiff is not the real party in interest, and has no right to prosecute the action in his own name. While it is the duty of the stakeholder under the statute to return the money to the person making the stake, when notified, the right of action to recover the money is given to the "party aggrieved," who is the real owner of the fund.

John L. Scott, Jas. D. Mitchell and George C. Lockhart for appellant; Haggard & Benton for appellee.

LOESER v. AXTIN.

Filed December 3, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Exemplary damages—Excessive verdict*—Where one who had been bitten by a vicious dog pursued the dog into the house of its owner, and in the

presence of the owner's wife and daughter and against their protest, shot at the dog repeatedly until he had killed it, in an action against him by the owner of the dog the jury were authorized to find exemplary damages; and a verdict for $300 was not excessive.

2. *Instructions to the jury*—An instruction telling the jury that if they found for the plaintiff they should find such damages as he actually sustained and such additional sum by way of exemplary damages as they might deem proper in their sound discretion, did not require the jury to find exemplary damages, but left that matter to their discretion.

Sweeney, Ellis & Sweeney for appellant; Haycroft & Martin for appellee.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. KING.

Filed December 3, 1890. Appeal from Whitley Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Compromise—Mistake as to extent of injuries—Where one whose horse had been injured by a train of cars compromised with the railroad company and accepted a certain sum in settlement of his claim against the company, the mere fact that he underestimated the extent of the horse's injuries can not annul the settlement so as to entitle him to recover an additional sum.

Hill & Denman for appellant; H. C. King for appellee.

PEARSON v. CAMPBELL & SONS.

Filed December 3, 1890. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Yost, reversing.

Agency—Partnership—The patentee of a machine sold to the defendant an interest in his invention, binding himself to construct at his own expense one machine and deliver it to defendant, complete and ready for work. After he had constructed the machine he carried it to an exposition, without defendant's knowledge or consent, and while there the plaintiff, at the instance of the patentee, did certain work in repairing the machine, and to recover the value of his services he brings this action against defendant. *Held*—That it was error to instruct the jury that they must find for plaintiff if they believed defendant held himself out as a partner in the machine, and that plaintiff gave credit by reason of such partnership. As there was neither allegation nor proof of partnership, such an instruction was misleading. But even if a partnership had existed, the defendant would not have been responsible for the repairs unless they were done by his authority, expressly given, or implied, because it was recognized as proper and and necessary in the usual course of the business.

R. J. Elliott for appellant; Sibley & Gaither for appellee.

RIGGS, &C. v STEPHENS.

Filed December 3, 1890. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Elections*—The strict rules which govern elections for public officers can not always be applied to a vote of the people upon the question of appropriating money in aid of internal improvements or of imposing a tax in aid of schools. And where an act providing for such a vote makes no provision for ascertaining whether or not a majority of the legal voters have voted in favor of a tax, an ex parte examination of the board of examiners is not final. The validity of the election and of every vote cast remains an open question which may be tried by any court of competent jurisdiction.

2. *Mistake in officer's certificate—Pleading*—In attacking the certificate of an officer, it is not necessary to allege in terms that he has made a mistake. It is sufficient to allege facts showing the mistake.

Where the question of imposing a tax was submitted to a vote of the people of a school district and the board of examiners of the election returns

certified that a majority of the legal voters entitled to vote at said election had voted in favor of the tax, an allegation that there were sixty-nine legal voters in the district and that only thirty-three of them voted in favor of the tax, was sufficient to show a mistake in the certificate of the board.

Hallam & Meyers for appellant; William Goebel for appellee.

Wagner v. Wetmore.

Filed December 10, 1890. Appeal from Campbell Circuit Court. Opinion of the court by Judge Yost, reversing.

Fellow servants—The master is not liable for injuries sustained by his servant through the negligence of a fellow servant while engaged in the same common employment, unless such injuries were brought about by the gross negligence of the fellow servant. And any person in the employment of the same master and under his control, whether his position is equal, inferior or superior to that of the injured servant, so long as he is not intrusted with the power of control over that servant, is a fellow servant.

One who was employed in shoveling coke from a barge into a bucket which was hoisted to the bank by a crane operated by an engine, was a fellow servant with the engineer, and the common master is not liable for an injury to one of said servants by the negligence of the other, unless the negligence was gross.

Nelson & Desha for appellant; C. L. Raisin for appellee.

Winchester and Muddy Creek Turnpike Co. v. Grant.

Filed December 10, 1890. Appeal from Clark Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Recovery of tolls illegally collected*—Where money has been paid without consideration under a mistake either of law or fact, it may be recovered back.

The plaintiff in this case is entitled to recover of defendant, a turnpike company, tolls which have been collected from him by defendant in excess of the legal rate.

2. *Same*—It was error to render judgment against defendant for tolls illegally collected by its lessee.

W. M. Beckner for appellant; Joseph T. Tucker for appellee.

Buck v. Buck.

Filed December 11, 1890. Appeal from Henderson Circuit Court. Opinion of the court by Judge Young, affirming.

Separate estate of married women in bank stock—Section 15 of act 4, chapter 52, General Statutes, which excludes the husband from any interest in stock "in any of the banks of this State" which has been taken for or transferred to the wife, and expressed on the face of the certificate or the transfer book of such stock to be for her use, applies to the stock of all banks located and doing business in this State, and therefore applies as well to stock of national banks as to that of banks chartered by this State.

John Young Brown and Simrall & Bodley for appellant; E. G. Sebree and Montgomery Merritt for appellee.

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KENTUCKY COURT OF APPEALS.

TREADWAY v. PHARRIS, &c.

(*Filed Dec.* 6, 1890.)

Fraudulent Conveyance—Limitation—In an action by the children of decedent by his first wife, to set aside a deed for land, executed to decedent in 1848, alleging that said land was purchased by decedent with money received from his first wife, under a promise to convey said land to her, but which decedent fraudulently procured to be conveyed to himself, the second wife and her children interposed the plea of the statute of limitation as a bar to said recovery. The reply alleged that no cause of action accrued to plaintiffs until the death of their father, who was a tenant by the curtesy. *Held*—That the action is barred by appellant's failure to institute said action within five or ten years after the death of their mother. While they could not then have recovered the possession of the land held by their father as tenant by the curtesy, they could have maintained their action to set aside said deed and change the nature of their father's claim and possession.

J. F. Winn and W. M. Beckner for appellant.

Leland Hathaway for appellees.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Lewis.

Appellant's children and heirs at law of W. M. Pharris, by his first wife, brought this action against his children and heirs by his second wife, Hester C. Pharris, also made defendant, for a division of his lands fairly, but in such manner as to exclude a tract of about fifty-eight acres conveyed to the decedent in 1848, by one Tarlton Embry, which they pray may be adjudged to belong to them, to the exclusion of the defendants.

The ground upon which appellants place their exclusive right to

that tract of land is, that the consideration was paid to Embry out of the estate of their mother, and that, though there was an agreement between her and their father the deed therefor was to be made to her, he fraudulently, and without her knowledge or consent, procured same to be conveyed to himself.

The only inquiry we need to make is, whether the recovery sought by appellant is barred by the statute of limitation, inasmuch as the demurrer sustained to the reply precluded any issue of fact.

Notwithstanding about forty years elapsed from execution of that deed to institution of this action, appellant contends, and avoidance of the statute of thirty years was pleaded in the reply, upon the ground their father was tenant by curtesy, and no action to recover the land could have been maintained until his death. But, without considering or deciding as to sufficiency of the reply in that aspect, it seems to us they are barred by section 6, if not by section 2, article 3, chapter 71, General Statutes. For, as the ground of relief is the alleged fraud of their father in causing the deed made to himself instead of their mother, they had a cause of action, if ever, upon her death, and not having sued within either five or ten years thereafter, they can not now maintain an action to set aside the deed, which has to be done before they can recover the land. While they could not recover the land during the life-time of their father, there was nothing to prevent institution of an action to set aside the deed, and thereby change the character of his claim and possession from that of absolute ownership to a tenancy by curtesy.

Judgment affirmed.

THOMAS V. BLAND.

(*Filed Dec.* 6, 1890.)

1. *Judicial sales—Warranty of title*—The purchaser of land at a judicial sale may recover for a breach of warranty of title, against a vendor who may have conveyed the same to the vendee whose title was sold at such judicial sale. While it is true that such sale was made without warranty of title, still the purchaser had a right to look to the warranty previously given, as an assurance of title; and, as the warranty was a covenant running with the land, it formed part of the title, and the conveyance, under the judicial sale, passed to the purchaser all the title of the defendant; consequently, the right to the warranty passed as an incident to such title.

2. *Res adjudicata—Pleading*—A general demurrer having been sustained to a petition to recover damages for a breach of warranty, because the facts alleged were insufficient to constitute a cause of action, and that ruling affirmed by the Court of Appeals, and the action dismissed, that judgment was not a bar to the recovery sought by a second action upon a petition alleging sufficient facts.

The same weight is to be given to the finding of facts by the court on demurrer as should be given to the finding of the same facts by a jury, and no second action can be maintained on the same facts; but, if the action on demurrer is dismissed on account of the omission of an essential allegation which the second petition supplies, the judgment on the allegations of the first petition is no bar to the second action.

3. *Limitation*—An action to recover damages for breach of covenant of warranty of title to land is not barred until fifteen years after the cause of action accrued.

N. W. Halstead and Jno. D. Wickliffe for appellant.

Jno. A. Fulton and C. T. Atkinson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as the purchaser at decretal sale of the tract of land that the appellant sold to V. R. Stiles, with covenant of warranty of title, said land having been sold at said decretal sale as the property of V. R. Stiles, instituted this action on the appellant's covenant of warranty to said Stiles, to recover damages for the loss of said land by eviction, after said purchase at decretal sale, under a paramount adverse title.

The first question that the appellant makes is, that appellee can not recover on said covenant of warranty, because his purchase at decretal sale was without warranty of title, therefore, he is not in privity with the appellant's covenant of warranty to said Stiles, and can not recover on the same.

This is error. A covenant of warranty of title runs with the land, to which the vendee looks as security against any defect in the title, and which is transmitted to each successive purchaser; and the fact that a purchaser, with this covenant, sells the land to another person without his covenant of warranty, does not restrict the latter's right, so far as the previous warranty is concerned, to his immediate vendor. If the immediate vendor has a covenant of warranty, as it runs with the land, it is included in the sale of his title, notwithstanding the fact that he declines to warrant the title thus conveyed. This covenant of warranty is not conveyed by a succeeding covenant of warranty, but by the words of conveyance; and any words that conveys the title, conveys the warranty that the vendor holds, because, as said, it runs with the land, and is transmitted by the conveyance. Comins v. Kennedy, 3 Litt., 121; Young v. Triplett, 5 Litt., 246; Hunt v. Oswig, 17 B. M., 83; Perkins, &c. v. Coleman &c., 12 KY. LAW REP., 501.

It is true that the purchaser of land at decretal sale does not acquire a title with covenant of warranty; but he does acquire all the title that the owner has, and the covenant of warranty runs with this title, which is included in the sale of it. As said, the title is passed by words of conveyance, and not by the covenant of warranty; the latter runs with the title, and is passed to the vendee by the words of conveyance, and not by the covenant of warranty; and, as all of Stiles' title was sold at decretal sale, the covenant of warranty passed with the sale. To the former action to recover damages for a breach of this covenant, a demurrer was sustained by the lower court, which decision was affirmed by this court upon the distinct grounds that the petition was defective, and the action was dismissed. Thereafter this action was instituted, which, by additional allegations, cured the objection to the former action, and said allegations present a cause of action. But the appellant contends that the former action, having been dismissed upon demurrer, said dismissal bars another action for the same cause.

It is true, that a judgment sustaining a demurrer to a petition alleging a given state of fact is as conclusive as a verdict finding the same state of fact would be. The facts found to be true on the demurrer, as well as the facts found to be true by the jury, are both solemn adjudications upon said facts, and are *res adjudicata*. No other action can be maintained for the same cause upon the same grounds

that were set up in the first petition. The demurrer was an adjudication upon the merits of those facts, and they were found insufficient to sustain a cause of action. It, therefore, may be truly said that there has been a decision upon the merits of those facts. But, if the action on demurrer is dismissed on account of the omission of an essential allegation, which the second petition supplies, the judgment on the allegations of the first petition is no bar to the second action. It is true, that both actions were brought to enforce the same right, but the merits of the allegations in the second action being essentially different from the merits of the allegations in the first action, although the allegations in both were to enforce the same right, have not been adjudicated in the second action. In the second action a cause of action is presented; in the first the allegations have been weighed and found wanting. Gould v. Evansville, &c., 91 U. S., 534. The case of Wooley, &c. v. The Bank of Louisville, &c., 81 Ky., 527, is in perfect accord with the foregoing views See, also, Yanty v. Sweeney, 8 KY. LAW REP., 139; Timberlake v. City of Newport, 10 KY. LAW REP., 140.

It is next contended by the appellant that the limitation of five years bars the appellee's right of action upon said covenant. This, as we think, is a mistake. We think that the limitation of fifteen years controls. The statute appertaining to that matter is: That an action "upon a bond or obligation for the payment of money or property, or for the *performance of any* undertaking, shall be commenced within fifteen years after the cause of action first accrued." The obligation here, upon the written covenant of warranty of title, as said, runs with the land and passes to any subsequent vendee of the title, as though he was the assignee thereof, and upon which he can sue for a breach thereof, as though he was the assignee. Indeed, the sale of the title transfers the covenant to him, and his right to it is as complete as was that of his vendor, to whom the covenantor had sold the land. It is true that recovery for the breach sounds in damages; but the action is on the written covenant, the breach of which is compensated for in damages. If the obligation was to pay property, the vendee's right of action for a breach would not be limited to five years after breach, but to fifteen years. So here, the obligation was to compensate any person, entitled to the benefit of the obligation the value of the land lost by reason of the breach. The only difference in the two cases is, that in the latter case the covenant lasts and runs with the land until the breach, for which the right of action lasts fifteen years; in former case, the parties usually agree on the time of the performance of the obligation, else the law fixes a reasonable time in which it must be performed. In either the former or latter case, however, the beneficiary of the obligation is entitled to fifteen years after breach in which to bring his action.

The judgment is affirmed.

CARTER V. STRANGE, &C.

(*Filed Dec.* 6, 1890—*Not to be reported.*)

Husband and wife—Loan of money to husband—In an action by a creditor of the husband to subject land held for the benefit of the husband to the payment of his debt, the wife will not be permitted to set up a prior equity for the repayment to her of money alleged to have been loaned to her husband twenty years before suit by the creditor, of which there was no written evidence of a promise to repay.

Sandidge & Sandidge and J. E. McMurtry for appellant.

Allen & Williams for appellees.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, the creditor of the husband, is seeking to subject a house and lot to the payment of his debt, that he alleges was conveyed to the father of the debtor's wife for the latter's benefit, in fraud of creditors. The case has been heretofore in this court, and the judgment reversed because of the refusal of the chancellor to subject the property, the record showing that the conveyance for the benefit of the wife was based on no other consideration than that of love and affection.

On the return of the case, the wife filed her petition to be made a party defendant, and set up her claim to the property on the ground that she had loaned her husband $1,000 some twenty years prior to the judgment in this case, and that he promised to repay it from time to time, holding it as her separate estate. The wife is the only witness to the transaction, and, while the court is not disposed to question the truth of her statement, a loan by the wife to the husband of money for a period of more than twenty years, or of a much less period, with no written evidence of the agreement by the husband to hold it for the wife, ought not to be given priority over intervening creditors of the husband, at least without some notice prior to the creation of the debt of the wife's equity. However meritorious the claim of the wife may be against her husband, and the helpless condition of her family, the sympathy of the chancellor will not justify him in protecting the wife in a case like this against the claims of creditors.

The judgment is reversed, and remanded with directions to subject the property to the payment of the debt, and, if the entire property has to be sold, the proceeds, after paying the debt, should be secured to the wife.

EDEN V. RATCLIFF, &C.

(*Filed Dec.* 9, 1890—*Not to be reported.*)

Question of fact—Location of corner of survey—The lower court having decided the location of a corner called for in a survey, on appeal that finding will not be disturbed, as it is not flagrantly against the weight of the evidence.

W. J. Price for appellant.

R. D. Davis for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Bennett.

The question at issue in this case is: Is the corner of the Swim two hundred acre survey, at the black letter "B" on the north side of the road, or is it at blue letter "B" one hundred poles north of said road? The question was submitted to the decision of the court,

and the corner was decided to be at black letter "B." This question was decided upon the authority of several witnesses, who swore to the fact, and, from what they say, they knew whereof they spoke. The appellant also introduced proof tending to establish the corner at blue letter "B." But the court, upon the question of fact, having found in favor of black letter "B" as the true corner, and, as we can not say the finding is against the weight of evidence, the judgment is affirmed.

BAILEY V. FANNING ORPHAN SCHOOL.

(*Filed Dec.* 9, 1890—*Not to be reported.*)

1. *Judicial sale—Exceptions to commissioner's report of sale—Identification of note by mortgage*—An exception to a commissioner's report of sale of land to satisfy a note secured by mortgage, on the ground that the mortgage does not identify the note secured by it, was insufficient to avoid the sale, as the note and mortgage are executed to the same party, on the same date and for the same sum, $1,000, and the mortgage states that it was given to secure $1,000.

2. *Same—Location of mortgaged land*—An exception, on the ground that neither the mortgage nor petition states the county in which the land is situated, was properly overruled, as the mortgage was recorded in Christian county, and the petition states that fact, and the record shows that the mortgagor died in that county.

3. *Same—Description of land*—The mortgaged land is sufficiently described, where the number of acres of each parcel, the persons from whom each parcel was purchased are given, and the deed of each person is referred to as recorded.

4. *Same—Exhibits*—A mortgage not indorsed as filed by the clerk of the court, having been treated as an exhibit by the court, was sufficient.

5. *Same—Service of process on infants*—The failure of the sheriff to state in his return of service of summons on infant defendants, that the person to whom a copy of the summons was delivered was the mother and custodian of the infants, did not avoid the proceedings for sale, as the petition shows appellant was the mother and custodian of the infants; besides, it is presumed that the officer followed the direction of the petition as to the proper person to be served.

6. *Judgments, void and erroneous*—The purchaser at a judicial sale, which is not void, but merely erroneous, acquires title to the land purchased; and, as appellant admits that the land mortgaged was the land purchased by her, she acquired title to the land purchased.

W. R. Littell for the appellant.

W. P. Winfrie for appellee.

Appeal from Christian Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellant was the purchaser, at decretal sale, of the land sold to satisfy a mortgage executed by her husband, since deceased, to the appellee, to secure the payment of $1,000, borrowed money. She excepted to the report of sale upon the following grounds: First. Because, as the mortgage contains no promise to pay $1,000, nor refers to the note as evidence of that fact, there is not sufficient evidence, as against infants, that the mortgage was given to secure the note sued on. In answer to this contention, it is only necessary to

say that the note and mortgage are executed to the same party, and bear the same date, and the mortgage says that it was given to secure the payment of $1,000, &c. The inference from these allegations is sufficient to authorize the conclusion that the note sued on is secured by said mortgage. Besides, the guardian *ad litem* states in his report that he has investigated the case, and that the infant defendants have no defense, &c. This dispenses with the necessity of proof that would otherwise be required. Second. Because neither the petition nor mortgage shows in what county or State the land is located. The mortgage was recorded in Christian county, and the petition states that fact. As to the residence of Mr. Bailey, we think that there is enough in the record to show that he resided in Christian county at the time of his death. Third. Because the land is not identified. The number of acres in each parcel of land mortgaged is given, the person from whom each parcel was purchased is given and the deed of each person is referred to as recorded, &c.; and, lastly, the land is fully identified and described in the judgment. Fourth. Because the mortgage is not endorsed filed by the clerk. It is evident that the court considered the mortgage as an exhibit in the case, which ends all controversy in regard to that matter. Fifth. Because it is not stated in the service of the summons served on the appellant, as the mother and custodian of the infant defendants, that she was their mother and custodian. The petition shows that she was their mother and custodian; and, we must presume, in the absence of any thing to the contrary, that the officer followed the direction of the petition as to the proper person to serve, &c. Besides, it is clear that she was the proper person to be served.

If the judgment is not void, but simply erroneous, in consequence of the alleged defects, the purchaser takes a title to the land, notwithstanding judgment may be reversed on account of these defects. But the judgment is not void in consequence of said defects. The judgment cures them, at least so far as the appellant is concerned. The only question upon which she takes any risk, is the fact, is the land sold the same land that was mortgaged, and she admits that it is.

The judgment is affirmed.

HIGGINS V. PRATER, SHERIFF, &C.

HILL V. HAMILTON, SHERIFF, &C.

(*Filed Dec.* 9, 1890.)

Constitutional law—Tax in aid of Agricultural and Mechanical College—The act of the Legislature of 1880, imposing a tax of one-half cent on all taxable property in the State, in aid of the Agricultural and Mechanical College, an educational institution under the control of the State, is not in violation of article 11 of the constitution.

While it is clear that this institution is not a part of the common school system, the tax should be held as constitutional if there is any doubt as to its constitutionality, as all doubts of the constitutionality of an act of the Legislature must be resolved in its favor.

Construing article 11 in the light of the past history of the school fund, and the intention of the framers of the constitution relative to that fund, it is clear that aid by the Legislature to institutions of learning, other than common schools, was not forbidden by that article.

A. P. Humphrey, A. H. Howard, Wm. Lindsay and Young & Trabue fo appellants.

Breckinridge & Shelby, Simrall & Bodley and H. S. Barker for appellees.

Appeal from Magoffin Circuit Court.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

The question presented in these cases is not only an important, but a delicate one. Delicate, because we must determine whether a legislative act is constitutional; and important, because it relates to education, which has been said to be the birthright of every child born in a republic.

Its consideration has been delayed because of repeated legislative agitation upon the subject; but, as a convention is now in session, framing a proposed organic law for the State, it is proper that it should be decided.

Our Legislature, in 1880, passed a statute imposing a tax of one-half a cent on each $100 in value of taxable property in the State, for that year, and for each subsequent year, for the benefit of the Agricultural and Mechanical College of Kentucky, which is an educational institution incorporated by the law of the State, and under its control.

The tax is a small one. The owner of $10,000 worth of property pays but fifty cents a year. If unconstitutional, however, then it is oppression, however small. The tax upon the British tea, which was thrown overboard in Boston harbor, was but three pence per pound. It is urged that it is so, under article eleven of our constitution, which provides:

"The capital of the fund called and known as the 'Common School Fund,' consisting of $1,225,768.42, for which bonds have been executed by the State to the board of education, and $73,500 of stock in the Bank of Kentucky; also the sum of $51,223.29, balance of interest on the school fund for the year 1848, unexpended, together with any sum which may hereafter be raised in the State by taxation, or otherwise, for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools. The interest and dividends of said funds, together with any sum which may be produced for that purpose by taxation or otherwise, may be appropriated in aid of common schools, but for no other purpose. The General Assembly shall invest said $51,223.29 in some safe and profitable manner; and any portion of the interest and dividends of said school fund, or other money or property raised for school purposes, which may not be needed in sustaining common schools, shall be invested in like manner. The General Assembly shall make provision by law, for the payment of the interest of said school fund: *Provided*, That each county shall be entitled to its proportion of the income of said fund, and if not called for for common school purposes, it shall be re-invested from time to time for the benefit of such county."

If the college can fairly be considered a part of our common school system, then this is an end of the controversy.

It is unsectarian in character. Its design is to furnish at a cheap rate of tuition a practical and liberal education to the rich and poor alike; a place for the education of the boy of the millionaire, the

mechanic and the farmer; one where the children of the mass of our people, whether they come from the mountains or the valleys, can prepare themselves for proper citizenship. It has a normal department, and is subject to the control of a State board of trustees. Each legislative district of the State can send one student per year, who may take the entire collegiate course free of charge for tuition; and it may in like manner send for one year not more than four persons, in the discretion of the board of control, who are, or intend to be teachers.

Notwithstanding all this, however, we think it clear, in the light of the proceedings of the convention which framed our constitution, and legislation, prior and subsequent thereto, as well as from the opinions of this court in the case of Halbert v. Sparks, 9 Bush 259, and Collins v. Henderson, &c., 11 Bush, 74, that this institution can not be regarded as a part of our common school system. In fact, this is virtually conceded in argument. This tax was, therefore, not levied in aid of the common school system; and this brings us to the consideration of the highly important question, which is *res integra*, whether the Legislature can constitutionally aid, by taxation, any educational institution whatever, other than common schools. It is plain that it is not expressly forbidden by the article of the constitution above cited. An implied prohibition is, however, claimed. Any doubt as to the constitutionality of the statute must be resolved in its favor by the courts; and, while a legislature ought not to exercise a doubtful power, yet, if it has done so, and it be claimed that the power is constitutionally denied to it by implication, then such implication should be clear, inasmuch as in its absence, in a case like this one, the Legislature has full power over the subject. It is urged that the words, "together with any sum which may be hereafter raised in the State by taxation, or otherwise, *for purposes of education*, shall be held inviolate, for the purpose of sustaining a system of common schools," are so plain that there is no room for construction. In other words, that the organic law has confined the use of any money raised by taxation to the support of common schools. In determining this question, this court can not consider whether the result may cripple rival institutions, or possibly affect the future prosperity of our common school system. These are matters of expediency that address themselves to the law maker, and not to the courts. If the words of a statute or a constitution be within themselves perfectly plain as to the purpose of the maker, then they must be followed by the courts. The true intention of the provision is to be ascertained. In doing so, we look first to the words. If they clearly express *the thought*, and there be no ambiguity, then there is nothing left for construction. They are in such a case to be accepted literally, because, by doing so, the spirit of the law is ascertained. In such a case, the courts can not add to or take away by construction. If, however, after considering the language, doubt remains as to the purpose of the law, then courts may resort to extrinsic aids to ascertain it, such as the purpose that was in view, or the mischief to be remedied; and in case of a constitutional provision of the proceedings of the convention that framed it.

Even penal statutes, which are to be construed strictly, are not to be construed so far in that direction as to defeat the purpose of their enactment. It seems evident to us that the words of this constitutional provision are not beyond the need of construction. It says: "Together with any sum which may be hereafter raised in the State by taxation, *or otherwise*, for purposes of education, shall be held inviolate, for the purpose of sustaining a system of common schools."

This language, taken literally, includes every dollar raised in the State for purposes of education, whether by taxation, private subscription, or donation. Evidently, however, the intention was to include only *public* money, raised by *public* authority for public education.

Again, it was decided by this court in Auditor v. Holland, &c., 14 Bush, 147, that the Legislature could not abdicate its authority over the common school fund, made sacred for that purpose by the constitution, in favor of any authority; and that the common school system must be uniform and common to the whole State. Now, local school taxation is by the authority of the State, and for "purposes of education." It falls within the letter of this article of the constitution. But, evidently, it was not intended to prevent it; and the article, properly construed, refers to money raised by the State for the purposes of general public education.

Thus, we see, the entire article can not be taken literally. The term "school fund," occurs several times in it, and undoubtedly means common school fund. Are the words, "purposes of education" to be taken literally, then, and construed to mean that all public money raised for any and all educational purposes must become a part of the common school fund? In other words, does the constitution impliedly forbid the raising of any public money by taxation for any educational purposes, save the general common school fund of the State? Common school education is the subject of the article. No other sort of education is named, and the very next clause after the words, "together with any sum which may be hereafter raised in the State by taxation, or otherwise, for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools," is: "The interest and dividends of said funds, together with any sum which may be produced for *that* purpose by taxation, or otherwise, may be appropriated in aid of common schools, but for no other purpose." What is the meaning of the words, "together with any sum which may be produced for *that* purpose by taxation, or otherwise," unless it be a sum produced by taxation for the purpose of supporting the common schools? "*That purpose*" means a single purpose, already in the mind of the reader. The only single purpose in contemplation is common school education; and it, therefore, seems to us that the words "for purposes of education" in the first clause are defined and limited in meaning to the subject they refer to; that they are confined by the wording of the second clause to a singular meaning, and should be understood as if they read, "purposes of common school education." The words, "*that* purpose," express the scope and limit of the taxation referred to, and if it had been intended to prohibit taxation for any kind of education, save common school education, it is likely it would have been done in positive terms.

If the above view be incorrect, then the wording of the constitution leaves the question at least in doubt, and we turn to the extrinsic aids for construction. They demonstrate the correctness of our view.

The original of the school fund named in the constitution came from the general government. In 1836, it distributed among the States a large surplus of money, this State's portion being nearly $1,500,000. It should, perhaps, in view of the understanding with which the donation was made, have set apart the entire sum for the support of a general system of education. It did so, however, in 1837, to the extent of $1,000,000. In 1838, the Legislature reduced the sum to $850,000, for which sum State bonds, bearing interest

payable semi-annually, were issued to the board of education. Those in authority regarded this as a debt due by the State to itself; therefore, the payment of interest was neglected, to which default the Legislature, by its action, was a party. The money thus donated to the State was, in the main, used in the construction of internal improvements. In 1845 the Legislature directed the board of education to surrender the bonds that had been executed to it to the Governor, with directions that he burn them, lists thereof being kept, and this was done. The friends of common school education became alarmed.

In 1848 the Legislature passed an act which recognized the sacredness of the original debt directed the execution of a bond to the board of education for its unpaid interest, amounting then to nearly $300,000, but made it payable *at the pleasure of the Legislature*, and ordered a vote of the people as to whether a tax of two cents on the $100 of taxable property should be levied "for the purpose of establishing more permanently a common school system in the State." It carried by a very large majority.

The convention that framed our present constitution met the following year. The public mind was still excited in regard to the then recent invasion of the common school fund. This was the mischief to be remedied, and it was to be done by placing the bond beyond the caprice of future Legislatures. It then existed only by legislative sufferance, as neither of the two first constitutions of the State contained any provision as to education. Prior to 1849, we do not think, in the light of all historical information at hand, it can fairly be said there was any conflict between the friends of higher and lower education. If so, it is likely it would have been carried into the convention of that year, and there is no trace of it. The debates in that body show that this was not the question before it. It was never named. This silence is significant, in the consideration of this case. The purpose was, in the language of one of the leading members of the convention, "to place the common school fund beyond legislative control." Its integrity in the future was the object in view. Some favored a future tax for it by constitutional guarantee, while others, although in favor of making the then fund inviolate, desired to leave future taxation to the legislation. This was the main ground of difference. The last view prevailed, and it clearly appears from the debates that not only the members generally, but especially the author (Mr. Wickliffe) of this article of our constitution, used the terms, "educational purposes," and "common school purposes" as synonymous terms. While a constitution derives its force from its adoption by the people, and the debate in the convention which framed it is by no means conclusive of its meaning, as some members may have accepted it in one sense and some in another, yet, in the language of Judge Cooley, "When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory." Cooley's Con. Lim., 66.

It can not be presumed that the people, when they accepted the constitution, were ignorant of the events which led to the adoption of this provision. They were then a part of the history of the State. The people were aware of the mischief to be remedied, and of the real purpose and meaning of this provision.

It has received this construction for so long by the other depart-

ments of the State government, that the argument *ab inconvenienti* has force.

Other institutions of an educational character, and which do not constitute a part of our common school system, have for years been supported by general taxation. It is said they are of a charitable character, and are so supported upon this ground, education being merely incidental and not primary in their existence. Grant that this is true as to some of them; but it can hardly be so said of the "Institution for the *Education* of the Blind," where, as the act of incorporation, and the subsequent acts in support of it show, the primary purpose is to educate the inmates of the institution.

If a county, or city, or a town, may levy a tax to support a school other than a common school, while the State can not do so, then an arm or sub-division may do what it can not do, and thus defeat this provision of the constitution, if it, in fact, inhibits such a tax.

If it be true that the framers of our constitution intended to forbid any public aid to any educational institution, save our common schools, then they did that, which, so far as we have been able to examine, has been done in no other State in the Union; and to-day, in many of them, as in Illinois, Virginia and Michigan, higher institutions of learning than their common schools are liberally supported by general taxation, reflecting credit upon them and drawing many of our youth there for liberal education.

In our opinion, this article of the constitution, when all of it is considered, and especially when read in the light of its history, the mischief intended to be remedied, and the practical construction which has been given to it, does not forbid aid by the State to an educational institution other than a common school, if the Legislature, in its wisdom, sees fit to extend it. The framers of it, and the people adopting it, were moved, not by a fear of too much education, but of too little, by a future diversion of the school fund to other purposes.

The judgments, holding the statute in question to be constitutional, are affirmed, Judge Lewis dissenting.

BODINE'S ADM'R V. MATTINGLY, &C.

(*Filed Dec.* 18, 1890.)

Conveyance—Life estate—The granting clause of a deed is as follows, viz: "*Have this day given, granted, bargained and sold to Hettie E. Bodine.*" The habendum clause is as follows, viz: "*To have and to hold unto the said Hettie E. Beane, wife of the said R. W. Bodine, and to her children by him begotten, forever.*" This appeal involves the question as to whether or not a fee simple, or only a life estate, passes to Hettie E. Bodine, under said deed. *Held*—That she is entitled to a life estate, with remainder to her children by R. W. Bodine. The rule giving preference to the granting clause of a deed, rather than to the habendum, where an inconsistency between them exists, admits of exceptions. The court will consider the whole instrument, and give some meaning to every part, if possible.

Montgomery Merritt and Hughes & Hughes for appellant.

Prentice & Davis and H. D. Allen for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge Bennett.

The conveyancing clause of the deed from Dr. Harding and wife to Mrs. Bodine, is as follows: "Have this day given, granted, bargained and sold to Hettie E. Bodine." The habendum is as follows: "To have and to hold unto the said Hettie E. Bodine, wife of the said R. W. Bodine, and to her children by him begotten, forever."

It is contended that the conveyancing clause and the habendum are repugnant to each other; consequently, the latter must yield to the former. It is undoubtedly true, that in case of repugnancy between the two, and it can not be determined from the whole instrument and attendant circumstances, with reasonable certainty, that the grantor intended that the habendum should control, the conveyancing clause must, in that case, control, for the reason that words of conveyance are necessary to the passage of the title, and the habendum is not, ordinarily, an indispensable part of a deed. Hence, in the case above indicated, the conveyancing clause must control. But where it appears from the whole conveyance and attendant circumstances that the grantor intended the habendum to enlarge, restrict, or repugn the conveyancing clause, the habendum must control. It is, in such case, to be considered as an addenda, or proviso, to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause, or premises, even to the extent of destroying the effect of the same. This is so, because it is the last expression of the grantor as to the conveyance, which must control the preceding expression. Henderson v. Mack, 82 Ky., 379; Ratcliff v. Marrs, 10 KY. LAW REP., 134.

It is clear, judging from the whole conveyance and attendant circumstances, that the grantors intended the habendum to operate as an addenda or proviso to the conveyancing clause, and to control the same to the extent of limiting the estate conveyed to Mrs. Bodine, to a life estate, remainder to her children begotten by R. W. Bodine; for, according to the uniform decisions of this State, such conveyances give to the named vendee a life estate, remainder to the children. This construction grows out of the fact that, as there must be parties, vendors and vendees, in order to make a valid conveyance, none but parties, vendees, can take a present estate. Such parties may be designated by their proper names, or by such other designation as will identify the particular persons meant as vendees. In this case the expression, "her children by R. W. Bodine begotten," does not identify the particular individuals who are to take, because they, or some of them, may hereafter be born. Hence, they can not be deemed parties, vendees, in the sense of taking an immediate estate, but they can take an estate in remainder. Foster v. Shreve, 6 Bush, 522. Such conveyances, thus construed, are effective; otherwise, not; and as it must be presumed that the grantor intended all the parts of the deed to have the effect that the law gives to the language used, consequently, it must also be presumed that he intended to grant a life estate, with remainder, unless, as intimated, the contrary intention appears.

But it is contended by the appellant that the language of the habendum, if it has any effect, creates an estate-tail in Mrs. Bodine, which, under our statute, is converted into a fee-simple title; but, as said, the estate conveyed to Mrs. Bodine was a life estate, remainder to her children begotten by R. W. Bodine; and to construe the statute as raising this life estate to the dignity of a fee-simple estate, would be absurd, and would wholly defeat the object of the grantor. We have no hesitation in saying that the estate granted to Mrs. Bodine is not an estate-tail, for an estate-tail is an estate of

inheritance, and descends to particular heirs, but the estate granted is a life estate, with remainder, &c., which is not an estate-tail. Hence, the statute has no application.

The judgment, setting aside the sale to the appellee, is affirmed.

LUCAS V. KENTUCKY CENTRAL R. R. CO.

(*Filed Dec.* 18, 1890—*Not to be reported.*)

Constitutional law—Limitation of actions for damages against a railroad company—In an action against appellee, a railroad company, to recover damages for negligent killing of a horse belonging to appellant, appellee, in its answer, pleaded the statute of limitation in its charter of six months, as a bar to such action. *Held*—That such answer presented a defense to the action, as the special provision in its charter, limiting the time for bringing such actions to six months, does not violate the constitution. It is within the legislative power to fix a limitation to any cause of action that it creates.

Collins & Fenley for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

This case originated in a magistrate's court in Covington, and involves the value of a horse killed, as is alleged, by the negligence of the employes of the railroad company. A constitutional question has been raised as to that clause of appellee's charter fixing the limitation of actions for killing stock on its track at six months. This plea of limitation defeated the recovery. We perceive no reason why the act is in violation of the constitution. Various causes of action exist by reason of legislation against railroad companies, that can not be maintained against a natural person. The rules of evidence have been changed, as applied to this class of companies, by placing the burden on the company to relieve itself of a *prima facie* case arising from the act of killing, although the stock is trespassing on the road of the appellee. These provisions have been held constitutional, and it seems to us there is nothing in the objection made. The original road, brought into existence by the act of incorporation, was sold with all its rights, franchises, immunities, &c., and passing to the purchaser, he became invested with the rights of the old corporation, including the right to interpose the plea of limitation as a bar to the recovery O'Bannon v. L. C. & L. R. R. Co., 8 Bush, 348.

Judgment affirmed.

MARRETT, JR., V. BABB'S EX'OR.

(*Filed Jan.* 8, 1891.)

Executors and administrators—Power of executor to sell land of testator—Qualification of foreign executor—In 1889 a testator died resident in the State of Massachusetts, and his will was probated and executor qualified in the proper court of that State. The will provides as follows:

"Should I die before I am able to sell out my property and settle my

debts, I do appoint my good, kind brother-in-law, E. F. Moore, as my administrator, * * * and would also ask my dear friend, Mr. Henry Farnum, to assist him, in selling my place, all he can. * * * I wish my Oakland farm and land opposite sold, with such personal property as may be necessary, to pay all my debts, which are as follows: * * * My three and a half acres, out of Louisville, is now rented to Geo. Thompson & Co., for $20 per year. If I have sufficient property to pay all my debts without selling that, I would advise to hold it a few years; when sold, to be equally divided between my nieces and nephews, and Minnie's two dear boys, Robbie and Eddie Morrison. * * * I would advise you to get my dear friend, H. W. Barrett, to act as agent in disposing of the land in Kentucky."

After selling all the land and other property of the testator, except the three and a half acres near Louisville, the executor, by executory contract, sold that tract to appellant, who, refusing to comply with his contract of purchase, the executor, without having qualified in Kentucky, as required by section 43, article 2, chapter 39, General Statutes, brought this action to enforce said contract. *Held*—That upon the death of the owner his real estate at once passes to his heirs or devisees, in the absence of testamentary counter-direction from him. The personal representative, whether he be administrator or executor, has no interest, authority over, or title to it, by virtue of his appointment merely. In case he be executor, such power or right does not exist, unless it be conferred by the will. To enable him to sell it, the power must either be expressly given, or arise by implication. If the avails are to pass through his hands, in the execution of his office, as for the payment of debts or legacies, then the power to sell will be implied. If the will directs a sale of the real estate, either for the payment of debts, or the payment of the proceeds to legatees, as the proceeds must pass through the hands of the executor, he is, by implication, vested with the power to sell, although not named as the donee of the power; otherwise, he could not execute his trust. If the management of the funds, so to arise, be confided to him, either by the will or by law, then he has the power of sale. The executor, in this case, had vested in him by the will full power to sell the realty of his testator, but, not having qualified as such in this State, he could not maintain the action to enforce the contract of sale.

F. Hagan for appellant.

Dodd & Dodd for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

William Babb died testate in August, 1889. His will was probated, and his executor, E. R. Moore, who is styled "administrator" in the will, qualified in the proper court, in the State of Massachusetts, where the testator resided at the time of his death. This action was brought to compel the specific execution of a contract of sale, made by the executor, of a lot of about three and a half acres of land in Jefferson county, Ky., the will having been first proven and admitted to record in the proper court of that county, as a valid one in this State, of both real and personal property. The demurrer to the petition by the appellant, A. H. Marrett, who was the purchaser, having been overruled, and he declining to plead further, a judgment was rendered enforcing the contract.

It is now contended, first, that the executor had no power under the will to make the sale, and this is the principal question; second, that if he had, yet he has no power to sue, because, so far as the rec-

ord shows, he has never qualified as executor in this State. The will provides:

"Should I die before I am able to sell out my property and settle my debts, I do appoint my good, kind brother-in-law, E. F. Moore, as my administrator, * * and would also ask my dear friend, Mr. Henry Farnum, to assist him, in selling my place, all he can. * * * I wish my Oakland farm and land opposite sold, with such personal property as may be necessary to pay all my debts, which are as follows: * * * My three and a half acres out of Louisville is now rented to George Thompson & Co., for $20 per year. If I have sufficient property to pay all my debts without selling that, I would advise to hold it a few years; when sold, to be equally divided between my nieces and nephews, and Minnie's two dear boys, Robbie and Eddie Morrison. * * * I would advise you to get my dear friend, H. W. Barrett, to act as agent in disposing of the land in Kentucky."

The petition shows that the Oakland place, which is in Massachusetts, has been sold, and that after exhausting all the property other than that in contest, the estate is still largely in debt.

Upon the death of the owner, his real estate at once passes to his heirs or devisees, in the absence of testamentary counter-direction from him. The personal representative, whether he be administrator or executor, has no inherent authority over, or title to it, by virtue of his appointment merely. In case he be executor, such power or right does not exist, unless it be conferred by the will. To enable him to sell it, the power must either be expressly given, or arise by implication. If the avails are to pass through his hands in the execution of his office, as for the payment of debts or legacies, then the power to sell will be implied. If the will directs a sale, but does not name the donee of the power, and the proceeds must, either by its provisions or by the rules of law, be distributed by the executor, then he, by necessary implication, is invested with the power of sale, unless some other intention, upon the part of the testator, be shown by his will. If this were not so, the executor could not execute his trust. The payment of debts and legacies is one of the functions of his office, and, therefore, if the will directs a sale of the real estate, either for the payment of debts or the payment of the proceeds to legatees, as the proceeds must pass through the hands of the executor, he is, by implication, vested with the power to sell, although not named as the donee of the power. If the management of the fund, so to arise, be confided to him either by the will or by law, then he has the power of sale.

Section 9, article 1, chapter 39, of our General Statutes, recognizes, at least in part, this general rule, by declaring: "The executors, or such of them as shall undertake the execution of the will, or if all, or more than one, undertake, and part die or vacate the office, the residue or survivor may sell and convey the land which the will directs or devises to the executor, or to another person, to be sold, or gives a discretionary power to sell, if no other person be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it." In this instance the will discloses a controlling purpose, upon the part of the testator, to constitute the land in contest, as well as all his other property, a trust fund for the payment of his debts. This was evidently the purpose uppermost in his mind. The will even sets forth minutely his indebtedness, which was considerable, and there can be no doubt, from all of its provisions, that he intended to confer upon his executor the power to sell all his real

estate. He does not expressly make him the donee of this power, but it vested in him by clear implication.

The will says: "*If I have sufficient property to pay all my debts, without selling that* (the land in contest), I would advise to hold it a few years; *and when sold*, to be divided equally between my nieces and nephews, and Minnie's two dear boys, Robbie and Eddie Morrison." He provides, first, that it is to be sold for the payment of debts, if necessary; and if not, yet it is to be sold, and the proceeds to be divided among certain parties, and he advises his executor, probably because he was a non-resident, to get his friend, H. W. Barrett, to act as agent in disposing of it. Agent for whom? Clearly for the executor.

The property is to be considered as of that species into which it is directed to be converted, and the fund thus to arise passes through the executor's hands by virtue of his office. An executor has the power to sell the land of the testator, where the testator directs the sale, and a distribution of the proceeds among certain persons, although the will does not say by whom the sale is to be made. Such a disposition is regarded as a bequest of a fund distributable to the legatees by the executor, and he, therefore, by implication, takes the power to sell and convert the real estate into money, without a decree of court. If the testator directs the sale for certain purposes, and the proceeds are, either by the terms of the will or the provisions of law, distributable by the executor, the power of sale vests in him by implication. Rankin v. Rankin, 87 Am. Dec., 205.

It is said in Williams on Executors, volume 1, page 549: "It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributed by the executor*, he shall have the power by implication. Thus a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies." In our opinion the executor clearly had the power, in this instance, to make the sale.

There is, however, nothing in this record showing that he has ever qualified as executor in this State, or taken the steps required by our statute to enable him to even sue for debt. The petition does not so aver, nor is it so shown in any way. He appears only as a foreign executor. As such, he has no power to sue here. His existence is not recognized.

Section 43, article 2, chapter 39 of our General Statutes, provides: "By giving bond, with surety resident of the county in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of the Commonwealth, may prosecute actions for the recovery of debts due to such decedents."

Thus we see that a non-resident executor can not even sue to collect a debt of the testator, unless he first complies with this statutory provision, the conditions upon which he is allowed to do so being, as the law as originally practiced plainly shows, intended for the protection of residents of this State. His qualification as executor in a sister State does not authorize him to administer the assets here, or act otherwise in our courts as such representative. Jackson v. Jeffries, 1 Mar., 65; Jackson v. Jeffries, 3 Mar., 310; Rutherford's heirs v. Clark's heirs, 4 Bush, 27.

He must take out letters testamentary from the proper court, in

this State, or comply with the provisions of the statute, *supra*, if merely the collection of a debt due the decedent is sought.

Upon this ground the judgment is reversed, with directions to sustain the demurrer to the petition, and for further proper proceedings.

PARKER V. RICHARDSON.

(*Filed Dec.* 18, 1890—*Not to be reported.*)

Boundary—The lower court having heard all the proof, which showed clearly appellee's right to have the boundary between the tracts of land fixed where the judgment of the court located it, that finding of fact will not be disturbed.

A. Duvall and Sampson & King for appellant.

N. A. Richardson and R. D. Hill for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

This is a controversy about a boundary to a tract of land. The court found the true boundary to be at the place contended for by the appellee. The proof clearly sustains the judgment. The appellee swears that the line, as he contends for, was pointed out to him by the owners of each tract, many years ago, as the correct line; that he saw the surveyor, in the presence of the owners of each tract, the appellant also being present, run the line at said place, as the correct place; that those under whom he claims and himself have held the tract claimed by him in actual adverse possession and occupancy for at least thirty years. This evidence is sustained by that of two other witnesses. The court gave preference to this evidence over that of the appellant, and we think it is in accordance with the weight of the evidence. Besides, the proof shows that said land was thus held at the time the appellant purchased it; hence, the law of champerty applies.

The judgment is affirmed.

GARRARD V. WHITE, &C.

(*Filed Dec.* 18, 1890—*Not to be reported.*)

Caveat—Title—Survey—In 1826 appellees' ancestor obtained a patent for 500 acres of land, and it was occupied and claimed by him and his descendants continually for more than fifty years, when appellant had a survey made under a county court warrant for 200 acres, all of which, excepting about fifteen acres, lying within the survey of 1826. Whereupon appellee filed his caveat with the register, to prevent the issue to appellant of a patent on his survey, until the rights of the parties were determined. The litigation settling the rights of the parties has resulted in a judgment, in the Clay Circuit Court, in favor of appellee. The judgment of the lower court, being in accordance therewith, is affirmed.

Wm. Lindsay for appellant.

L. A. Byron and White & Harrison for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Pryor.

The ancestor of the appellee obtained a patent for 500 acres of land, defined by metes and bounds, in the year 1826. The land descended to the children of Hugh White, the patentee, and has been divided between them, with a continued possession for many years.

The appellant, not long before the bringing of this action, had a survey made, under a county court warrant, for 200 acres of land, all of it, except ten or fifteen acres, being within the boundary patented, in 1826, to White. The appellee, to prevent a patent from issuing to the appellant, filed with the register his caveat, showing the reasons why the patent should not issue until the rights of the parties were determined. The rights of the parties have been settled in a litigation in the Clay Circuit Court, by a judgment in favor of the appellee. The case was tried by a jury, under instructions that were not objected to, and a verdict for the appellee upon facts that establish in White's heirs a clear title.

Judgment affirmed.

MADDUX V. CITY OF NEWPORT.

SAME V. SAME.

(*Filed Dec.* 16, 1890—*Not to be reported.*)

Construction of statutes—Streets and sewerage improvements—This appeal questions the validity of two acts of the Legislature of 1890; one that provides for the improvement of the streets of Neport, and the other providing for a system of sewerage in said city. *Held*—That the act directing that the city be laid off into districts, and authorizing the councilmen, on the vote of two-thirds of its members, or on the petition of tax-payers, in any district representing more than one-half the taxable value of property in said district, to construct sewers in said district, does not confer upon the board more power than it possessed under the original charter.

The act providing for street improvements has been ratified by a popular vote of the city, and the council has decided upon a general system of street improvements, the city to pay one-half of the cost of said improvements, and the abutting owners of property the remainder of said cost. The fact that the council has only ordered the improvement of streets in prominent portions of the city, is no objection to the validity of said act, they having general discretionary power as to such improvements.

Charles J. Helm for appellant.

John S. Ducker for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

In April, 1890, the Legislature passed two acts amending the charter of Newport; one, entitled an act to provide a system of sewerage for the city, and the other, an act authorizing the reconstruction of streets, and the payment to be made in the bonds of the city, not to exceed $250,000. The act in relation to the improvement of streets was to receive the sanction of the voters in a popular vote,

that seems to have been cast in favor of the measure, as provided by the act.

The tax-payer, Maddux, has appealed each case, the one in reference to the sewers and that in reference to the reconstruction of the streets, the chancellor below having decided adversely to him in both cases.

The city, by amendment in reference to sewerage, is to be laid off into districts, and the improvements to be made, provided the owners of property in the district, the assessment of which is more than half of the total assessment, shall petition the council to pass the ordinance, or the council may order the improvement without such petition, if two-thirds of the members of the board of councilmen, on a call of the yeas and nays, favor it. The whole matter is left to the board of councilmen, and confers no more power than could have been exercised under the original charter, except that the sewerage is paid for in a different mode, and the amount to be paid is limited to the cost of the improvement. We perceive no objection constitutionally, or otherwise, to the assessment and levy to satisfy bonds that may be issued in accordance with the act, or any reason why, under the charter, as amended by the present act, the improvement should not be made.

As to the reconstruction of the streets, this court held, in the case of Broadway Church v. McAtee, 9 Bush, 508, that the owner of property bordering on a street could be taxed for reconstruction as well as for the original improvement; and while the amount to be expended may not be sufficient to improve all the streets, it can be expended on such streets as are the most useful and require the repairs. The plan for reconstruction being general in its character, the city of Newport assumes to pay one-half the cost, the property abutting on the street, in the manner provided by the charter, to pay the remaining half. It is to be presumed that the general council will make the improvements in such a manner as will result in the most good to the entire city population, and if the amount to be expended is insufficient to improve every street, it can not affect the right to improve the principal thoroughfares, or such as will prove of the most benefit to the city. This court has no authority to say what streets shall, and what not, be improved. The council must determine such matters, and the mode adopted for the improvement being a proper exercise of legislative power, we see no reason to question the validity of either act.

The judgment of the chancellor below is, therefore, affirmed.

STEVENSON'S EX'ORS v. STEVENSON.

(*Filed Dec.* 18, 1890.)

Wills—Life estates—John W. Stevenson, by his last will and testament, directed the payment by his executors to his wife of an annuity during her life, and other annuities to two daughters and a son, during their lives, with provision for the succession of their heirs, or the survivors to the interests of any of those dying. In one clause of his will he provided as follows: "I direct that $700 *per annum* be paid to my daughter, Sallie Coles Stevenson, during each and every year of my wife's life."

By a subsequent provision in his will he directed a division of his estate, at the death of his wife, among his children and their descendants.

Sallie Coles Stevenson married Colston, and died during the life of the testator's wife, leaving surviving her two children. Their right to the annuity

of their mother is the question involved in this action. *Held*—That it was evidently the expectation of the testator that his daughter, Sallie, would survive her mother, and the benefit of his estate be enjoyed by his daughter, Sallie, and her descendants, without interruption by the death of the daughter prior to her mother's death. This construction is consistent with the subsequent provision of the will, which directs a division of the estate at the death of the widow.

Wm. Goebel for appellants.

M. L. Harbeson for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

John W. Stevenson died testate on August 10, 1886. As a lawyer, he was highly distinguished. As a public servant, filled many places of trust, discharging the duties with marked fidelity and distinction. His life is a part of the history of our State, indeed, of our country. It was a most useful one, full of honors deservedly bestowed upon him by his fellow men, who recognized his great mental ability, his sterling worth and his grand nobility of character.

Aside from a few special bequests, he devised all his estate upon certain trusts to his executors. Among them he directed the payment by them to his wife, quarterly and in advance, during her life, the sum of $750, it to be increased to $1,000 should any of his children reside with her; and to his daughters, Mary and Judith, each quarterly and in advance, $300; but, if either of them should die unmarried, and without children, the portion of the one so dying to go to the surviving single daughter; and if both should die unmarried, and without children, the bequest to go to his daughter, Sallie, and, in the event of her death, to go to her children, and the descendant of any deceased child, equally.

The will then provides: "I direct that $700 *per annum* be paid to my daughter, Sallie Coles Stevenson, during each and every year of my wife's life."

The question before us arises upon this clause. The donee, under it, although called by the testator by her maiden name, had married Edward Colston. She is dead, leaving two infant children. The widow of the testator yet survives, and we are asked to determine whether the two children are entitled to the bequest until the death of their grandmother, or whether the right to the payment was personal to Mrs. Colston, and ceased at her death.

The will also directed the payment of $250 quarterly, during the life of the widow, to John W. Stevenson, a son of the testator, and provided for an equal distribution of his estate, at his wife's death, among his daughters and his son, John W. Stevenson, if living; and, if any of them should be dead, leaving children, the portion of the deceased one to go equally to such children; and if unmarried and no children, then to go equally to John and the surviving sisters, or children of any one of them that might be dead.

This distribution was to be subject, of course, to provision for any legacy, the continued payment of which was directed by the will.

There is not much in the will to guide us to a correct solution of the question presented. The testator, however, undoubtedly supposed that his daughter, Mrs. Colston, would survive her mother. This was but natural; and looking to the bequests named above, to others of his children, and the direction as to the legacies to his un-

married daughters in case of death, leaving no children, as well as the fact that the will directs the division of the estate to take place at the death of his widow, it seems to us the testator expected and intended the payment of the $700 *per annum* to be a charge upon his estate until the death of his widow, payable to Mrs. Colston, or to her children in the event of her death prior to that of her mother. If it be said, the fact of providing how the legacy to two of his daughters shall go, in the event of their dying childless, tends to show the testator would have provided the children of Mrs. Colston should take the legacy provided for her until the death of the grandmother, in the event of the mother dying first, if he had so intended, yet it must be remembered the two daughters were single and childless, and might never marry.

The intention of a testator is his testament. If it can be gathered from the entire instrument, it must govern; and that the purpose of this testator was, as we have indicated, seems reasonably certain, from all the provisions of his will.

The judgment is, therefore, reversed, with directions to enter one in conformity to this opinion.

HELTON V. COMMONWEALTH.

(Filed Dec. 11, 1890—*Not to be reported.)*

Criminal law—Forgery—Continuance—This appeal is prosecuted from a judgment of conviction for forgery and one of the errors complained of is the refusal of the court to grant appellant a continuance. The bill of exceptions shows that appellant was not tried until the third term after the finding of the indictment, and that ample opportunity was afforded him to have his witness present at the trial, but no subpœna had been issued for him. *Held*—That the court did not prejudice appellant by its refusal to grant a continuance.

2. *Instructions*—The instructions requiring that the jury should not only believe from the evidence, beyond a reasonable doubt, that appellant forged the check or caused it to be done with intent to defraud, but that he also used it and received value thereon, was more favorable to the accused than the law required, as the offense was complete without appellant receiving any thing of value on said check.

Dishman & French for appellant.

P. W. Hardin for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, E. H. Helton, has been convicted to the penitentiary for two years for forging a check.

No attorney has appeared for him in this court, but we have considered every exception upon his part shown by the record.

The principal objection seems to have been to the refusal of the trial court to grant him a continuance. It did not, however, abuse its discretion in this respect. The trial did not take place at the term when the indictment was found.

The appellant did not appear in discharge of his bond at the term of court next previous to the one when he was tried.

Therefore, a warrant issued, under which he was arrested, but he

gave bond for his appearance at the term when he was tried. He again failed to appear, and was again arrested, brought into court and tried.

No process for any witness had been asked for or issued, nor had any witness been recognized. True the affidavit for a continuance states that the appellant was not present at the former term of court, because of his illness; and that he told his attorneys to have his witnesses, who were present at that term, recognized for the next term, and they promised to have it done. He recovered, however, in a short time, and the record fails to disclose that he took any steps looking to a trial at the next term, or that he ever made inquiry if his witnesses had been recognized or summoned. The affidavit also states that he was not present when the case was called at the term when it was tried, because of the illness of his child; but it was developed upon the trial that when last arrested he was out in the woods, and his children playing about his house, no one being sick so far as the officer arresting him saw or heard.

The court, however, upon the showing that was made, postponed the case to another day of the term to enable him to get his witnesses. There is nothing in the record showing any effort to do so.

When the day arrived to which the case had been postponed, a continuance was again asked upon an affidavit, filed, as the bill of exceptions recites, but none appears to have ever, in fact, been filed.

No diligence in preparing for trial is, therefore, shown, and the motion for a continuance was properly overruled.

The instructions were as favorable, if not more, to the accused than he had a right to ask.

The jury were required to not only believe from the evidence, beyond a reasonable doubt, that the accused forged the check or caused it to be done with intent to defraud, but that he also used it and received value therefrom. That he did use it is clearly shown, but this was requiring them to find more than was necessary to complete the offense charged.

Forgery is the fraudulent making or altering, *malo animo*, of any written instrument for the purposes of fraud or deceit.

The uttering of it is not necessary to the consummation of the crime.

Judgment affirmed.

TRIPLETT, JR. V. SEELBACH, &C.

(*Filed Dec.* 11, 1890.)

Recovery of money lost at gaming—Appellant instituted this action under the provisions of sections 2 and 9 of chapter 47 General Statutes, to recover of appellees, Seelbach & White, $1,905 which he alleges they as partners won from him at games of cards, called "poker," played in two houses in the city of Louisville, one on the corner of Sixth and Market streets and the other on the corner of Sixth and Main streets. The proof does not show that appellees ever won any money from the appellant by playing with him, but it shows that the appellees as partners owned and run the poker-room on the corner of Sixth and Market streets, at which appellant played poker with divers persons, assembled for that purpose, and at each game a certain per cent. of the winnings was taken by the appellees, this per cent. representing a part of the loss of the loser. *Held*—That as appellees were jointly interested as wrong-doers in the losses received from appellant, they are responsible to him for them, although they did not have

the cards in their hands, the agreement or arrangement by which they were to receive a part of the losses being sufficient to charge them, and the extent is immaterial.

They are also responsible, under section 9, which prescribes a penalty against them if they shall "invite, persuade or otherwise induce another to visit any place where gaming is carried on" as well as renders them responsible to the loser for his losses. The proof shows that appellees fitted up the room for a club-room to which a number of gentlemen, who were patrons of Seelbach's hotel could go and play poker, and to which they did resort for that purpose, and that appellant was among the number. As to the place it is not necessary that it should be a gambling place in the largest sense of the term, it is sufficient if it is a place in which gaming is carried on, and that the person knowing it is such a place invites, &c.

It is not understood that the person inviting, persuading or inducing should make personal application to the person invited. If a person fixes up a place for the purpose of having others to visit it and game, and one is induced thereby to visit said place while gaming is going on, he is liable to the statutory penalty, and also for the visitor's losses, if any.

B. W. Duke and A. C. Rucker for appellant.

Kohn, Baird & Speckert for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellant sued the appellees under the provisions of the 2d and 9th sections of chapter 47 of the General Statutes, to recover from them $1,905, which he alleges that they as partners won from him at games of cards, called poker, played in two houses in the city of Louisville, one house at the corner of Sixth and Market streets and the other at the corner of Sixth and Main streets.

The said section 2 is as follows: "If any person shall lose to another at one time, or within any twenty-four hours, $5 or more, or property or other thing of value, and shall pay or transfer or deliver the same, such loser or any creditor of his may recover the same or the value thereof from the winner," &c.

It is not satisfactorily proven that either of the appellees ever won any money from the appellant by playing with him; but it does satisfactorily appear from the evidence that the appellees, as partners, owned and run the poker-room on the corner of Sixth and Market streets, at which the appellant played poker with divers gentlemen, assembled there for that purpose, and at each game a certain per cent. of the winnings was taken by the appellees, out of which was defrayed the expenses of the players for suppers, cigars, &c., and the balance of the per cent., sometimes amounting to as much as fifty dollars a night, went to the appellees, as partners, as profits. This per cent. or "take out," as it is called, is a part of the loser's losses.

So the question is, does the taking of this per cent. make the appellees jointly interested in the winnings as wrong-doers so as to make them winners of the appellant's money, in the sense of the statute, *supra*. We do not understand that the winner, in the sense of said statute, must be one of the players with cards in his hand; but if he is to receive a per cent. of the winnings by the actual player, he is, in the sense of the statute, a winner. He, according to arrangement with the players and himself, is to receive a part of the winnings as his profits. Why should he not be regarded as a winner in the sense of the statute? He certainly has a community

of interest in the stakes with whoever wins, and this interest is the result of an arrangement with all the players, and this arrangement and division makes him a joint wrong-doer with the winner, it makes no difference which one it may be.

If by an arrangement the winning was divided between the actual player and another, there is no doubt that the latter would be responsible as a joint wrong-doer for the whole sum won as a winner. Here the arrangement does not make him a partner with any particular player as against the others, but it does make him jointly interested with the winner in the stakes. It is true that he may be indifferent as to which will be the winner, but as soon as one or the other has won the arrangement gives him a joint interest in the winning with the actual player, which makes him, in the sense of the statute, a winner. It is not to be understood that the actual winner can not recover from him said per cent. of his own stakes, but this is so because the statute gives the remedy against him in the sense that he is winner, even from the successful player; but, nevertheless, he is jointly interested with the winner in the loser's losses, which makes him responsible for them as a joint wrong-doer. It is not the extent but the community of interest that makes wrong-doers responsible for the whole wrong. If each is to receive a certain amount of the result of the unlawful enterprise, this gives them such a community of interest as to render each responsible for the whole amount received.

The 9th section of said statute reads as follows: "Whoever shall invite, persuade or otherwise induce another to visit any place where gaming is carried on, shall be fined from $50 to $500, and, moreover, be responsible to such other and his creditors for whatever he may lose in gaming at such place."

Mr. Seelbach, one of the appellees, states that he and the other appellees fitted up the room on Sixth and Market for a club-room, to which a number of gentlemen, who were patrons of the witness' hotel, could go and play poker, and to which they did resort for that purpose, and the proof shows that appellant was among the persons that resorted there for that purpose, and that he did play there often.

As to the place, it is not necessary that it should be a gambling place in the largest sense of the term. It is sufficient, if it is a place in which gaming is carried on, and the person knowing that it is a place in which gaming is carried on, invites, persuades or otherwise induces the other to visit such place, he shall be fined, &c., and if such person lose any thing by gaming, while at such place, the person inviting him, &c., is responsible to him for whatever he loses at such game. Now it is the inviting, persuading or inducing another person to visit the place of gaming, knowing it to be such, that is the gravamen of the offense, and makes him responsible for any of such person's losses at gaming while there. It is not understood that the person inviting or persuading or inducing should make personal application to the person invited, &c., in order to render himself amenable for the fine or to such person, but any conduct of his that induces such person to visit such places is sufficient. If a person fixes up a place for the purpose of having others to visit it and game, and any one is induced thereby to visit said place while gaming is going on, the person thus fixing up the place, &c., is liable for the statutory penalty. And he is, also, liable for any sum that the said person may lose at gaming while visiting said place.

Tested by the foregoing principles, the appellees are liable to the appellant for the amount that the appellant lost at the corner of

Sixth and Market streets within five years next before the beginning of this suit. But, according to the proof, the decision of the chancellor must stand as to the matter of the appellees' liability for the appellant's losses at Sixth and Main streets.

The judgment is reversed as to the appellees' liability to the appellant for said losses at Sixth and Market streets within five years next before bringing this suit, which amount the chancellor will ascertain, for which purpose the proof may be taken, and for which he will render judgment against the appellee.

THOMPSON V. MOORE.

(*Filed Jan.* 8, 1891.)

1. *Process—Sheriff's amending return—Special bailiff—Void judgment*—On appeal from a judgment enforcing a lien on land, it is sought to reverse the judgment for the want of service of process upon defendants. The sheriff had, by indorsement on a summons, authorized a special bailiff to execute it. The process was returned *not found*, and subsequently an alias summons was issued, and returned executed by the same special bailiff, but the sheriff had failed to indorse on said summons the authority to such bailiff to execute it. The sheriff was permitted, after judgment, to amend the return by indorsing said authority on the summons. *Held*—That such amendment to the return added no validity to it. The indorsement of authority to the bailiff, before its delivery to him, as required by section 2, chapter 2, Civil Code of Practice, was exhausted by the return.

The authority of the special bailiff, as indorsed on the original summons, was exhausted by its return, and it was necessary for a renewal of such authority to be indorsed on the alias.

2. *Parol authority to special bailiff*—No parol authority ought to be held sufficient to authorize a special bailiff to execute a summons. The Code, directing the written authority of appointment of a special bailiff, must be followed strictly.

J. H. Power and E. W. Hines for appellant.

R. Gudgell for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Pryor.

This was an action to enforce a lien upon land, that resulted in a judgment by default that is now sought to be set aside for the want of service of process on the defendant. On the motion to set aside the judgment, the officer was allowed to amend his return as to the mode of service on the infant defendants, and it appearing by the amended return that he had delivered a copy to each one of the infants (they being over fourteen years of age), in time for judgment, that error in the proceeding was cured. As to the appellant, Thompson, it appears that the sheriff had, by an indorsement on the summons, authorized a special bailiff to execute it, as provided by section 2 of chapter 2, Civil Code (Carroll's); that summons had been returned by special bailiff *not found* as to Sherman Thompson, when an alias summons issued and was served by the same bailiff, without any indorsement by the sheriff, giving this special deputy the power to execute it. The power to serve had been exhausted by the deputy after his return on the original summons *not found* as to

Sherman Thompson, and a new power had to be given authorizing him to serve the alias summons. This was not done, and yet the sheriff was permitted to amend what is called his return, by making the indorsement on the alias summons after the judgment had been rendered. The sheriff was not in fact amending his return, but was attempting, after judgment, to confer the power, in order that it might relate back, so as to make an illegal service effectual. If the special deputy, acting under a parol authority, had no right to serve the summons, no subsequent authority by the sheriff could make such a service valid. The Code, in this regard, must be followed; and no parol authority ought to be held sufficient to authorize a special bailiff to execute the summons.

It is insisted by counsel for the appellee that the record shows the loss of an alias summons on which the indorsement was made and service had, and that the indorsement on the alias is but a copy of that lost summons that was, in fact, served. The record shows that this is not the true state of case, as is apparent from the certificate of the clerk, on the return of the certiorari.

The judgment is reversed and remanded, with directions to set aside the judgment, and for proceedings consistent with this opinion. The parties must now be regarded as before the court without additional summons.

Judge Pryor delivered the following response to petition for rehearing:

A re-examination of the record makes it manifest that the former opinion was in accordance with the facts, and that no authority was given to serve the process, except by parol. The sheriff, or deputy, is allowed to amend, and says: "By leave of court, I now indorse on this copy the same authority indorsed on the original alias summons against Sherman Thompson." Now, this indorsement, or amendment is on the original alias summons itself, and the sheriff is allowed to amend as if it was a copy. The clerk certifies that it is the original alias summons, and if the indorsement was made upon it when handed to the deputy, it ought still to be there. The paper itself contradicts what the sheriff now says about it.

Petition overruled.

FORD V. MAYO.

(*Filed Jan.* 8, 1891.)

Instructions—Estoppel—Allegation and proof—A purchaser of a lot, described as lot No. 40, at judicial sale, after confirmation of the sale and deed made, was chosen as appraiser of a lot ordered to be sold as lot No 8, in the same proceeding, and acted as such appraiser, not knowing that the lot he was appraising was the same lot that he had purchased, which proved eventually to be the case. In an action of ejectment, afterwards instituted by him to recover his lot from appellee, the purchaser at the last sale, who had entered and improved the same, appellee pleaded as a defense the conduct of appellant as an estoppel, alleging that appellant was present at the sale, and, knowing that the lot being sold belonged to him, failed to object to the sale. On the trial of the case the proof failed to sustain this plea of estoppel, but appellee was permitted to prove, as a further ground of estoppel, that appellant, knowing the lot he was appraising belonged to him, failed to object to the appraisement or sale. While, on the other

hand, appellant, denied that he knew the lot he was appraising was the same lot he had previously purchased, and he is corroborated in this statement by other facts in the record.

The court gave to the jury an instruction permitting them to find for appellee upon the facts proven by him. *Held*—That this instruction was unauthorized by the pleadings, as they contained no allegation relying upon the fraudulent actions of appellant in appraising said property. Besides, such a plea of estoppel was not supported by the facts proven. It is a well settled principle of law, applicable to the doctrine of estoppel, that, in order to maintain such a plea, it must appear that the conduct of appellant, in failing to claim that the property was his own, worked a fraud upon appellee. It is not sufficient to show that appellant failed to claim said property, but it must also appear, that at the time he appraised it, he knew that it belonged to him, and that he remained silent when he should have claimed it.

G. N. Brown and L. T. Moore for appellant.

R. C. Burns for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, in 1876, purchased at decretal sale a lot described as No. 40, in square 4, in the town of Catlettsburg. After said sale was confirmed, and deed made, R. B. McCall purchased, at another decretal sale in the same suit, a lot described as No. 8, in square 4. After the confirmation of said sale, McCall sold said lot to the appellee, who improved the same. Thereafter the appellant instituted this action of ejectment to recover the possession of said lot. He contends that the lot that he purchased as No. 40, is really lot No. 8 that was, thereafter, purchased by McCall. The appellee, besides the general issue, relied on the plea of estoppel, the facts of which he confines to the conduct of appellant on the occasion of the sale of lot No. 8, which conduct, it is alleged, consists in the fact of the appellant, being present at the sale, and knowing that said lot was his, and was being sold, never objected to the sale, &c.

There is no positive proof that appellant was present at said sale. McCall merely gives it as his impression that the appellant was present. The appellant swears positively that he was not present, but he does show that he was one of the appraisers that appraised said lot; but he says that he did not know that it was the same lot that he had purchased. It is not believed that the jury believed that the appellant was present at said sale, for the reason that his evidence upon that subject is, clearly, the weight of evidence. However, if that were the only issue to be passed upon by the jury, we would not disturb the verdict; but, as the court's instruction authorized the jury to find in favor of the plea of estoppel, upon other grounds than the fact of the presence of the appellant at the sale, we must presume that they decided upon those grounds; so the question arises, did the pleading and proof authorize an instruction upon those grounds? Said instruction is as follows: "Although the jury may believe, from all the evidence in this case, that the deed to Ford, of date the 12th of June, 1878, and read in evidence, covers the lot in dispute; yet, if the jury believe, from all the evidence, that the plaintiff, Ford, knew of his purchase of said lot at the sale made by John M. Rice, as commissioner, and afterwards, by words or acts, induced McCall to purchase the same lot at the sale made of same by commissioner, Eastham, in the same suit, or acted at or be-

fore the sale of said lot so as to induce the belief, in a reasonably prudent man, that he had no title or claim to the lot, and that McCall purchased the same at the sale made of said lot by commissioner, Eastham, and that Ford knew of McCall's purchase, and set up no claim to the property, and did not object to the said sale or give notice of his claim at the time, he is now estopped to set up title to said lot," &c.

The jury are told in this instruction that, if the appellant, "at or before the sale acted," &c., they must find for the appellee. The instruction, in this respect, clearly refers to the fact that the appellant had assisted to appraise said property before it was sold. The first objection to this part of the instruction is, that the appellee's plea of estoppel does not authorize it; for it is well settled that proof, without an allegation, is not admissible, and that it is error to instruct upon it. However, if there is no objection to the proof and instruction until after verdict, the court will not disturb it. Here there was objection to the instruction, and it should not have been given.

But there is another objection to the instruction, as regards the appraisement, which is, that the facts as to said appraisement do not constitute an estoppel. The appellant distinctly states he did not know that the lot was the one that he purchased, and he is in no wise contradicted in reference to that matter. The lot that he purchased was sold as lot No. 40, and the same was appraised as lot No. 8; and there is no fact or circumstance shown in the record that would indicate to the appellant that said lot was the same that he had purchased; on the contrary, the inference would be strong to person not knowing, that the lot appraised was different from lot No. 40. So the instruction should not have been given, had the pleading made an issue on that subject. There is no doubt that if a person stands by and suffers his property sold to an innocent purchaser, without objection, knowing that it is his property, he is estopped, upon the ground of fraud, to thereafter set up his title to said property. So, also, if he, knowing said property belonged to him, appraised it for public sale, and at such sale it was purchased by an innocent purchaser, he would be estopped upon the same grounds thereafter to set up his title. This estoppel, as said, is upon the grounds of fraud upon an innocent purchaser; and it is essential, in order to constitute such fraud, that the person should know that the property belonged to him, or have such information or facts at hand as would, in law, amount to such knowledge; otherwise, he has not defrauded the purchaser. It would be a harsh rule that would estop the owner of property from asserting his right to it simply because he was present at the public sale of it, but did not know that it was his property that was being sold, or that he appraised it without knowing that it was his property, he not directing the sale of it. The property, doubtless, would be sold without the concurrence of either act on his part. To say, therefore, that his doing either act, though never so innocent, would deprive him of his property, would be to convert the equitable doctrine of estoppel into an engine of oppression. It is fraud that the law abhors, and it says to a person that when he knows that his property is being sold as the property of another, it is his duty to make the fact known that he is the owner of it, and his failure to do so, and a subsequent assertion of his title, is a fraud upon the innocent purchaser of it; consequently, doctrine of estoppel is applied to him; so, also, if it be sold by his direction, as the property of another, although he does not know that it is his, and it is purchased by an innocent purchaser, it would be a fraud upon the latter to allow him to assert

his title. The ground of fraud in such case is, that the one who directs the doing of the act must suffer, in case of conflict of right, rather than an innocent party.

The judgment is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

KENT'S ADM'R V. DEPOSIT BANK OF OWENSBORO.

(*Filed Dec.* 20, 1890.)

1. *Married women—Separate estate in bank stock—Descent and Distribution*—A married woman owning bank stock as her separate estate, died childless and intestate. After her death her husband brought this action to recover a dividend that had been declared upon the stock. Her heirs made themselves parties to the suit, and resist the recovery by the husband. *Held*—That under section 15, article 4, chapter 52, General Statutes, the stock passes to the heirs-at-law of the wife, free from any control of the husband, and that the dividends accruing after the wife's death pass to them as an incident to the stock. The husband, by his pleadings, fails to show that this dividend was declared prior to his wife's death, and can not recover same.

2. *Pleadings*—The court will always construe pleadings most strongly against the pleader, and as the petition of the husband fails to show when the dividend claimed was declared, it will be presumed that it was declared after his wife's death, and, consequently, belonged to her heirs.

Sweeney & Son for appellant.

Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Holt.

Belle W. Kent died childless and intestate. She owned $5,000 of bank stock; it was her separate estate. The husband, W. P. Kent, became her administrator, and, after demand and refusal of payment, he brought this action to recover a dividend that had been declared upon the stock. Her heirs-at-law made themselves parties to the suit and disputed his claim to it. This dispute involves the right to the stock, as between the husband and the heirs-at-law of the deceased wife. The charter of the bank makes its stock personalty.

Section 15, article 4, chapter 52 of the General Statutes, provides: "If any stock in any of the banks, or other corporations of this State, is taken for or transferred to any female, and it is expressed on the face of the certificate or transfer-book of such stock that it is for the use of such female, no husband of hers shall take any interest in such stock or the dividends thereon; and at her death it shall pass to her heirs; but if unmarried, she may dispose of it by will; or if married, so dispose of it with the consent of her husband, or without such consent, if so provided in the deed or will creating the trust. She may receive the dividends and give acquittances therefor, though married; but she shall not, in any way, anticipate the same; nor shall any dividend be paid upon an order or power given by her before the same is declared."

It is urged with ingenuity and ability that this statute does not change the succession to a deceased wife's separate estate in bank

stock from the course her separate estate in other personalty takes upon her death, where the instrument creating it has not directed to whom it shall pass, or she has not disposed of it.

The right of a wife to a separate estate is of comparatively modern origin. By the common law the existence of the wife for most legal purposes, and especially as to personal property, became merged in that of the husband. Her title to it, however absolute, vested in him, if the thing was in possession; and if in action at her death, it passed to him as her administrator, or as survivor. The separate estate of a feme covert in it, is a creature of equity. It does not, *ipso facto*, exclude the rights of the husband, except during coverture; and, in case of its non-disposal by her, or his exclusion as to it after her death, by the terms of its creation, his right as to it, upon her death, is the same as if it had not been separate estate. In other words, the right of the husband is suspended during coverture by the existence of the separate estate; but if he survives the wife, it attaches to the property just as if there had been no separate estate, unless she has in some way disposed of it, or unless, by the terms of its creation, he is excluded from all interest in it after her death.

The mere creation of a separate estate in personalty in her, without any manifest intention to exclude his right from attaching at her death, will not prevent it from springing up when that event takes place. If her interest in the personalty endures beyond her death, the right of the husband attaches to it just as if there had been no separate estate, provided it has not been otherwise disposed of by her in the exercise of a power, or by the terms of the creation of the separate estate. Brown, &c. v. Alden, &c., 14 B. M., 114

This is the general rule, and it is said that the statutory provision, cited above, was only intended to impress upon bank stock, held by the wife for her separate use, the character of separate estate pending the coverture; that it merely suspends the marital rights of the husband while that relation exists, and does not terminate them. If, however, this be so, why was the statute enacted? What need was there of it? The existing equitable rule accomplished all this; it recognized and enforced the right of the wife to hold and use bank stock of separate estate, and there was no necessity for the statute, unless the Legislature intended to change this rule as to the separate estate of the wife in bank and corporation stocks, and exclude the husband's right to them as her administrator, or as survivor. He could have been so excluded by the terms of creation of the separate estate; but the Legislature saw proper to say that this should result, although not so provided by the instrument or terms of creation, whenever the subject of the separate estate is bank or corporation stocks.

Let us see if both the language of the statute and the previous legislation upon the subject are confirmatory of this view. The Legislature, on February 16, 1838, enacted a statute, which provided as follows:

"SEC. 1. That it shall be lawful for any person who may desire to make an annual provision for a resident female friend, relative or connection, in such manner that the provision will be for the exclusive use of the female, and not transferable, nor liable to vest in the husband, nor be subject to his debts, to transfer, or cause to be transferred, to such female, stock in any of the banks, or other corporations created by this Commonwealth, and have it expressed on the face of the certificate of stock, and on the transfer-book of the bank or corporation, that such stock is for the exclusive use of such

female, and as annual provision for her support. And no such stock shall be transferable during the life of the female, nor liable to the debts contracted by her, nor shall it vest in her husband, nor be liable to his debts, nor shall he be entitled to it as her administrator, but it shall pass to the same persons who would take her real estate as heirs-at-law: Provided, that if she be a feme sole, she may dispose of it by last will and testament, and if a feme covert, may devise it, with the consent of her husband.

"SEC. 2. That the dividends, from time to time, as declared, shall be paid over to the female, and shall not be paid on any power of attorney executed before the same is declared, nor in which there is not express authority to draw the same; and the receipt of the female, whether married or sole, shall be an acquittance for the dividend, and she shall also, whether married or sole, have authority to execute a power of attorney to draw the same; and feme coverts shall have the right to take such stock without the consent of their husbands."

This law remained in force until the adoption of our Revised Statutes, in 1852, chapter 47, article 4, and section 16 of which reads thus:

"If any stock in any of the banks, or other corporations of this State, is taken for or transferred to any female, and it is expressed on the face of the certificate or transfer-book of such stock that it is for the exclusive use of such female for her annual support, no husband she then has, or may thereafter have, shall take any interest in such stock or the dividends thereon; and the same, at her death, shall pass to her heirs; but, if unmarried, she may dispose of it by will, or, if married, so dispose of it with the consent of her husband, or without such consent, if so provided in the deed or will creating the trust.

"She may also receive the dividends, and give acquittances therefor, though married; but she shall not in any way anticipate the same; nor shall any dividend be paid upon an order or power given by her before the same is declared."

This provision continued in force until the adoption of our present statute in 1873, which, so far as it bears upon the question now under consideration, is in substance the same as the law of 1838 and that of 1852. That of 1838 vested the stock in the wife for her exclusive use, and provided: "*Nor shall he* (the husband) *be entitled to it as her administrator, but it shall pass to the same persons who would take her real estate as heirs-at-law.*" Undoubtedly, under this statute, no right upon the part of the husband sprang up, phœnix-like, at the death of the wife, investing him either as her administrator or as survivor, with title to the property.

The language was condensed in the revision of the statute in 1852, and made to read: "*and the same, at her death, shall pass to her heirs;*" while in the present statute it is: "and at her death it shall pass to her heirs."

In our opinion there is no material difference between these provisions, nor was any intended. The history of the legislation, as well as the language of the present law, show that the Legislature intended to keep in force the law of 1838, and to change the equitable rule as to separate estate in this species of property, so that the husband would not take it upon the death of the wife.

The statute uses the term "heirs." Technically, this means those upon whom the law casts the inheritance; and while the statute may make those heirs, who otherwise would not be so, because the law-making power regulates the descent of property, yet the hus-

band, as to the wife's property, is a distributee, and, generally speaking, not an heir; and the previous legislation shows that it was not intended to embrace him by the use of the word "heirs" in our present statute.

Our law provides: "A husband shall have the whole surplus of a deceased wife's personal estate." General Statutes, chapter 31, section 11. This, however, is a statute relating generally to the distribution of the wife's personal estate, in case of intestacy, she having the power, under our law, to will her separate estate, or to make a will in the exercise of a written power; but it is not applicable where an exception as to any particular kind of property has been made by special statute. As to bank stock, for instance, held by her as separate estate, another statute has specially directed how it shall pass upon her dying intestate, and it excludes the husband as survivor. If it had been merely declaratory of the existing law, or if it had been intended to embrace him, it doubtless would have said, in express terms, that if the *feme* died intestate, leaving a husband, he should take the stock, or else have said nothing as to how it should pass, thus leaving it to pass to him under the general law.

The cases of Payne v. Payne, 11 B. M., 138; Allen v. Everett, 12 B. M., 375, and Brown v. Alden, *supra*, where it was held that the husband, either as administrator or survivor, was entitled to the separate personal estate of the wife upon her death, were determined upon the equitable rule to which we have referred, and not upon any special statute applicable to a particular character of property, save in the last named case, where a slave, some furniture, notes and money were involved, it was held that, by virtue of a special existing statute, the husband had only an estate for life in the slave, whereas, before the passage of the act, his interest became absolute upon the death of the wife. As in that case a special statute controlled the succession to the wife's slave, so here it does to her bank stock, it having been shown upon the face of the certificate that it was her separate estate.

Even if the husband, as administrator, could recover a dividend declared, during the life of the wife, upon this stock, yet he must aver in his petition that it was so declared. This he has not done. It does not appear in any way when the dividend sued for was declared. Certainly dividends declared since her death, being but incidents of the stock, pass with it to the heir.

The pleading is to be most strongly construed against the pleader, and, in the absence of an averment that the dividend was declared during the life of the wife, we must presume it was declared after her death.

Judgment affirmed.

WARD V. BEALE, &C.

(*Filed Dec.* 20, 1890.)

1. *Taxation—State Board of Equalization—County Court*—After the State Board of Equalization had fixed the value of real and personal property in the county of appellant's residence, and after the adjournment of the County Board of Supervisors, appellant, under the provisions of section 3, article 8, chapter 92, General Statutes, applied to the county court for a correction of the assessment made against him. Said court reduced the valuation of said list $5,000, but appellee, the sheriff, refusing to recognize

said action of the county court, sold appellant's mule to satisfy said taxes. Appellant, in this action of trespass against the sheriff, insists that said sale was illegal and without authority. *Held*—That the sheriff was fully authorized to make said sale, as the county court had no jurisdiction to alter an assessment that had been fixed by the State Board of Equalization or the County Board of Supervisors. Section 3, article 8, chapter 92, General Statutes, confers upon the county court jurisdiction to reduce an assessment only where the same has been made *after* the County Board of Supervisors has adjourned, or where the assessment was made too late for it to be considered by said board.

2. *Construction of statutes—Punctuation*—Section 3, article 8, chapter 92, as printed in the General Statutes, reads and is punctuated as follows:

"A person claiming to be improperly assessed after the meeting of the Board of Supervisors may, at any time not later than the next regular court after he has received notice of the same * * * may offer evidence in support of said complaint to the county court," &c.

There is a comma after the word *assessed* in the enrolled bill, which would change the meaning of the section. But, as the printed section was adopted by the Legislature after the enrolled bill, the printed section governs the meaning of it.

A. H. Ward and J. I. Blanton for appellant.

O'Hara & Bryan for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Bennett.

The appellant gave the list of his property and its value to the assessor of the county in which the same was situated. The value of the property given in by the appellant and accepted by the assessor, including realty, personalty, &c., amounted to $46,740. Thereafter the County Board of Supervisors for said county, of their own motion, reduced the assessment that the appellant had placed upon his real estate by the sum of $5,000. Thereafter the State Board of Equalization increased the assessment on real estate, excluding town lots in said county, fifteen per cent., and of personal property, excluding money or evidences of debt, forty-one per cent., which sums were, in common with other like property of the county, added to the taxable value of the appellant's property, as fixed by the Board of Supervisors. Thereafter the appellant applied to the county court for a reduction of the assessment on his land, complaining of the increase by the Board of Equalization, and the county court did reduce said assessment by the sum of $5,000. But the sheriff of the county, disregarding the action of the county court, collected the revenue on the assessment as increased by said board, and seized and sold the appellant's mule to satisfy the same, for which the appellant sued the sheriff for trespass, and the lower court, having dismissed his petition, he has appealed. The appellant's claim of authority to thus proceed is based upon section 3, article 8, of the General Statutes, its punctuation being corrected so as to correspond with that of the enrolled bill. Said section, as punctuated, is as follows:

"A person claiming to be improperly charged with any tax assessed after the meeting of the Board of Supervisors may, at any time not later than the next regular county court after he has received notice of the same by demand being made upon him to pay the tax, offer evidence in support of said complaint to the county court of the county," &c., and if said court finds, upon the evidence,

that said property has been assessed at more than its fair cash value, &c., it may correct the same.

The appellant claims that, as the enrolled bill is punctuated with a comma after the word "assessed," the section, *supra*, should be read and interpreted as though a comma was placed immediately after said word, which being done, would authorize the county court to hear evidence and reduce the assessments upon all the property situated in the county, without regard to the time of assessment, although the Board of Supervisors had met and adjourned; in other words, the county court has jurisdiction to correct any erroneous assessment after the meeting or action of the Board of Supervisors, provided the application is made at the next regular term of said court.

It is true that the enrolled bill is punctuated in the manner that is claimed by the appellant; but if it were true that the punctuation would have the effect contended for by the appellant, we, nevertheless, are confronted with the section, *supra*, which changes that punctuation and gives the section a different meaning; and as the statutes containing said section as punctuated, were adopted by the Legislature after the enrolling of said bill, they, as to any and all changes, supersede said bill. Besides, the meaning of said section, as thus punctuated, accords with said chapter, which takes from the county court all supervisory jurisdiction over assessments, except as therein specified. This is shown by sections 14, 22, 23 and 25, article 6. Section 14 provides that the assessor shall report to the county court clerk all persons refusing to give him a list of their property, &c., and the clerk shall notify the supervisors of the justice's district in which such persons live, and if such supervisors fail to get a full and complete list of the property of such persons, they shall notify the clerk, and then the court, after giving as many as five days' notice, &c., shall ascertain whether said property is subject to assessment, and whether the owner has been wilfully delinquent, and if so, to fix a triple tax upon the same, and fine the owner $100, as a penalty for such delinquency.

Section 22 provides that when it shall be known to the sheriff that any person has refused to list his property, the same proceedings shall be had as in the case of delinquents reported by the assessor. Of course it is not this action of the court that it is authorized to correct, because that tribunal has already rendered judgment, and it would be folly to allow an appeal to it; but, if the court finds that the property is subject to taxation, and its owner has not been wilfully delinquent, it is the duty of the clerk to make the assessment as in other cases provided, with which the court has nothing to do (see Commonwealth for the use of Marion county v. L. & N. R. R. Co., 12 KY. LAW REP., 1), and to report the same to the County Board of Supervisors, if they have not met for that year; if they have, then the owner has the right to apply to the county court, &c.

Section 23 provides that if any person has failed to list his property because not called upon by the assessor, it is his duty, after the assessor has returned his tax-book, to list the same with the county clerk, whose duty it is to receive the same and to be governed by the law regulating the duty of the assessor, &c. If it is listed before the meeting of the Board of Supervisors, it is the duty of the clerk to report the list to them, upon which they will pass as in case of other assessments; but, if not listed in time to be reported to said board and passed upon by it, then the person thus assessed may apply to the county judge to have said assessment corrected.

Section 25 also provides that the sheriff shall report to the county

clerk any list of property that has, for any year or years, been omitted by the assessor, &c.; and it shall be the duty of the clerk to place the same upon the assessor's books, &c. If such lists are placed upon the assessor's books before the next meeting of the county board, it must hear complaints as to improper listing, valuation, &c., and correct the same; if placed upon said books after said meeting, then the county court may make said correction.

So it is in these instances alone the county court has the power to revise the assessments of property made after the meeting of the county board, or, if too late for it to act thereon, the county court is authorized to revise. It is to this assessment that section 3, article 8, refers. Prior to the 17th of May, 1886, the county courts assumed to exercise the revisory jurisdiction claimed, which power, in many instances, was not wisely used; but as said act, as has been construed by this court, contains all the law upon the subject of revenue and taxation, and which does not authorize the county court to revise the assessments; except in the instances mentioned; and as the county court has no revisory power in that regard, unless the same is conferred by the statute, it must be held that the Legislature, for the reasons indicated, intended to and did take away the revisory power of said court in reference to said assessments, and confined the same to the County Board of Supervisors, except in the instances indicated.

Besides, as has been decided by this court, the equalization of assessments among the several counties by the Board of Equalization is paramount and final, and to allow such corrections as is sought here would defeat the equalization, because, if appellant's correction is permitted, it would increase the burden of other taxpayers of his county. If all citizens could avail themselves of the same privilege, the action of said board would be wholly defeated, a thing that we can not do by construction.

The judgment is affirmed.

BELL V. HENSHAW'S EX'ORS.

(*Filed Jan.* 8, 1891—*Not to be reported.*)

1. *Appeals—Surcharging settlements of executors*—A settlement made in the county court by an executor, which none of the parties in interest appear and contest, is *prima facie* evidence of its correctness, and may be surcharged in an action in a court of equity; but, if a contest is made in the county court, on the approval of said settlement, the proper method of reviewing said settlement is by an appeal to the circuit court. If exceptions have been filed in the county court to a settlement by an executor, and subsequently withdrawn by consent, an action to surcharge said settlement may be maintained in equity, as the consent order withdrawing the exceptions left the settlement as if no exceptions had been filed to it.

2. *Chancellor's finding of facts*—A settlement having been made by a father and son, in which the son executed his note to his father in settlement of the balance found due to him after the death of the father, the settlement made during his life will be presumed conclusive of all matters of account between them prior to that settlement, and the chancellor's finding of fact sustaining said settlement in a controversy seeking to invalidate said settlement for fraud, and to charge the son with a larger sum, will not be disturbed.

Yeaman & Lockett and Geiger, Haynes & Chapeze for appellant.

Cromwell Adair for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge Pryor.

By virtue of the provisions of the act of May 5, 1880, appeals are allowed from the settlements made by fiduciaries in the county court, to the circuit court; and, while a settlement made is only *prima facie* evidence of its correctness, this is only so when the parties in interest fail to appear and contest the validity of the settlement, or some part of it, made by the fiduciary. In this case, it appears that the devisees of Henshaw came into court and filed exceptions to the report of the fiduciary, in the settlement made by him. These exceptions were subsequently withdrawn by consent, and not to prejudice the rights of the parties. The devisee then filed this petition in equity, surcharging the settlement on the ground of fraud, and the various vouchers of credit for the want of the proper proof to sustain them. It is clear that a devisee, or distributee, can not, as the law now stands, contest the settlement by the fiduciary in both the county and circuit court, and when he contests its validity in a county court, his remedy is by an appeal. Cases may arise that would authorize a review of the settlement, such as could entitle the party to a bill of review; but, in settlements, as they usually take place, where the party is before the court contesting the right of the fiduciary to credits, he is precluded from surcharging the settlements in another tribunal. We shall treat this case, in view of the consent order in the county court withdrawing the exceptions, as if the parties were not before that court, and proceed to consider the grounds relied on for surcharging the settlement made by the executors. It appears that the testator was a man of wealth, advanced in life, and had for years confided the management of his whole estate to the appellee, who was his son. The father and son had a settlement of the accounts of his son, as agent, on the 16th of June, in the year 1880, and there was an indebtedness by the son on this general settlement of $8,704.27, for which the son executed his note to the father on that day. The settlement was made by, or in the presence of, an attorney, who testified as to what transpired; and there can be no question but that every thing in the way of an indebtedness was settled on that day by the parties, and for that reason no claim, existing prior to that date by the father against the son, should have been charged in the present settlement with his son as executor. The execution of the note closed the accounts between them, and must, in the absence of fraud, be regarded as final. Fraud has been charged, but none proven. It is alleged that no such note was given, and that the son was really indebted to his father in the sum of $40,000. We find nothing upon which to base this charge. It is claimed that no interest was allowed on the note by the county judge. This appears to be true; but, on the other hand, it appears that, by an express agreement between the father and the son, interest on the note was to go as compensation to the son for boarding his father. We see no reason why this agreement was not binding. It was separate and apart from the obligation, being an independent agreement to pay the interest in a particular way.

It also appears that shortly after the death of the testator, the money was distributed as directed by the will, and we see no reason for disturbing the settlement by reason of this exception; and, if interest should be charged, it is manifest that the executor

has been charged with rents, when no such claim is made in the petition, and with the $1,000 suit of the Farley note, when it is apparent that the settlement of June, 1880, between the testator and his son embraced it; and, on the entire case, we are disposed to adjudge that the judgment below was proper, and certainly no error exists as to the appellant. The petition was evidently framed with a view of showing a much larger estate than that reported by the executor, and that he had concealed the evidence of his liability by attempting to show a settlement with his father, and the execution of a note that was a fraud, and, in fact, never existed. The testimony as to its e 'ecution, and the settlement between the parties is satisfactorily shown.

The judgment below is affirmed on the original and the cross appeal.

CITY OF BOWLING GREEN V. BARCLAY, POTTER & CO.

(*Filed Dec.* 20, 1890.)

Municipal taxation—Private banks—Section 1, article 2, chapter 92, General Statutes, providing a taxation of seventy-five cents on each share of stock worth $100, in lieu of all other taxation for all "*State and national banks and other institutions* of loan and discount," does not include private banks within its provisions, but such banks are subject to such taxes for State, county and municipal purposes as other property.

John E. DuBose and E. W. Hines for appellant.

Dulaney & Mitchell for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

Section 1 of article 2 of chapter 92, General Statutes, provides: "That shares of stock in State and national banks, and *other institutions* of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to $100, or on each $100 of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each $100 of so much of their surplus, individual surplus, individual profits, or individual accumulations as exceed an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real es ate, which shall be in full of all tax, State, county and municipal," &c.

As the rate of taxation had been fixed by some of the charters of the State banks, and to avoid the question that might arise as to the legislative power with reference to these banks, section 4 of the act provided "that each of the banks, institutions or corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of stockholders at a regular or called meeting, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent to and with the State of Kentucky, shall be evidenced by writing, under the seal of such bank, and delivered to the Governor of this Commonwealth; and, upon such agreement and consent being de-

livered, and in consideration thereof, *such bank and its shares* of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid *during the corporate existence of such bank.*"

Barclay, Potter & Co., in the town of Bowling Green, have a private institution, or, it may be termed a private bank, to distinguish it from an incorporated institution, in which they receive deposits of money, loan and discount paper. It has a large capital stock, and has, in financial circles, a higher position as a moneyed institution than that controlled or owned by the ordinary broker. They have been paying taxes, State, county and municipal, until the auditor demanded payment into the treasury, as required by the act in question, and the appellees having elected to pay the tax as provided, claim that they are, therefore, exempt from all other taxation, State, county and municipal. The appellant, the city of Bowling Green, contends that such private banks or institutions were not embraced by the provisions of the act, and that such was not the legislative purpose. The court below held that, having paid to the auditor the amount of tax required by the statute applicable to banks, who had accepted its provisions, the bank was not, therefore, liable to pay city taxes. It seems to us the court below placed a construction on the provisions of the act contrary to the legislative meaning; and, while there may be trouble in ascertaining what meaning the Legislature intended to be given the words *and other institutions of loan or discount*, having already designated banks, State and national, still it is apparent the law-making power was dealing with institutions invested by law with corporate rights and privileges, and among them the right to loan and discount notes and bills, and fearing that such privileges may have been given and were being exercised by institutions not known as banks, it was intended to embrace all such, but not to apply to a private bank.

A private bank may be owned and its business conducted by one man, with his own capital, without cashier or book-keeper other than himself; or, it may be conducted by two or more in the same way, without shares of stock making up its capital, or it may have shares of stock, and is more in the nature of a partnership than the ordinary bank with its stockholders. If the appellees are exempt from this taxation of the city, we see no reason why the exemption should not apply to the broker in his office, if he styled his place of business as an institution for the loan of money and discount of paper; and, while the one may be of a higher grade than the other with financial men, if one is exempt, all should be. *All other institutions*, if given a comprehensive meaning, would embrace the street corner broker as well as the private banker, if he styled his business *a banking institution.*

The second section of the act imposing this tax on banks makes the cashier and his sureties liable for the amount of tax, and twenty per cent. on the amount upon the failure to pay. A private bank seldom has a cashier who executes a bond with surety, because it is generally run or owned by a few men of capital, who either run the bank themselves, or are willing to confide in others without this bond. There are generally no stockholders to protect in such an institution. The business is conducted as that of the merchant, the tradesman, with no special privileges or immunities, having their property rights protected and enforced under the general law of the land.

The Legislature was endeavoring to place what they conceived a taxation upon corporate institutions with the power to do business emanating from the sovereign, and not to interfere with the private

business affairs of the citizen, or to charge the rate of taxation on what would be termed private property. The public good induced the Legislature, in the first place, to create these corporate institutions, and for the public good they undertook to make this arrangement with them; and whether termed banks, institutions, or under some other name, the law applies to institutions with corporate privileges, whose business is to loan money and discount paper. The appellees are liable for the tax.

Judgment reversed, and remanded for proceedings consistent with this opinion.

LOUDEN, &C. V. YAGER.

(*Filed Dec.* 20, 1890.)

Homestead—Setting aside appraiser's allotment for fraud or mistake.—A debtor had set apart to him as a homestead, by appraisers appointed by the sheriff who held an execution thereon, a tract of land supposed to be worth $1,000, and to contain 70 acres, including the dwelling. Afterwards another creditor, having obtained a judgment against the debtor, and a return of no property found, instituted an equitable action to subject so much of the homestead as exceeded $1,000 in value to his debt, and to set aside a deed made by the debtor and his wife of the homestead to one C., who held it under agreement to convey it to the wife of the debtor. The appraisers appointed by the court in this action, reported that the tract contained ninety-eight acres instead of seventy acres, and that forty acres of it, with the dwelling-house, was worth $1,000. From a judgment subjecting the residue of said tract to the satisfaction of appellee's debt, and cancelling the deed to C., this appeal is prosecuted. *Held*—That no exceptions having been filed to the report of the appraisers, it was properly approved by the court. They properly set apart the forty acres, including the dwelling as a homestead, the debtor failing to select the portion of the tract to be set apart, as was his privilege to do.

If appraisers, appointed by either the sheriff or the court, have, by fraud or mistake, underestimated the value of land set apart to the debtor as a homestead, a creditor who was not a party to the former proceeding may, on application to a court, have said allotment corrected, and the overplus subjected to the payment of his debt.

The court properly canceled the deed made to C., as it did not appear, from the evidence, that he had paid any thing therefor.

J. T. Bashaw and Wm. Carroll for appellants.

John D. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Lewis.

In 1885 Brannin, Brand & Glover, having judgment against appellant, caused execution issued and levied on a tract of land containing 196 acres; but there was set apart to him, as a homestead, what was supposed and reported by the appraisers to be seventy acres of the tract, including a dwelling-house and appurtenances, of the value of $1,000.

Afterwards appellee, having a judgment against appellant, upon which an execution was issued and returned no property found, instituted this action in equity, praying judgment subjecting to satisfaction of his debt so much of the land so previously set apart as a

homestead, as exceeded in value $1,000. The ground upon which he asked relief is, that the appraisers mentioned had made a mistake in both the quantity and value of land, so set apart to appellant as a homestead, there being 107, instead of seventy acres, worth $2,000 instead of $1,000.

It appears that before this action was commenced, appellant had conveyed the homestead to one Collins, for the recited consideration of $2,000, for the purpose of having the title conveyed to his (appellant's) wife, which had not, however, been done, and judgment was asked cancelling the deed to him. By the judgment appealed from, forty acres of the land, estimated by the first appraisers as seventy acres, was set apart to appellant as a homestead, and the residue subjected to satisfaction of appellee's debt, and the deed to Collins cancelled, as prayed for in the petition.

By actual survey, the tract was found and reported by the appraisers to court to contain ninety-eight acres, and the forty acres, including the dwelling-house and appurtenances to be of the value of $1,000. No exception was taken to the report of the appraisers made to court, nor does it appear appellant exercised or claimed the right given by sections 10 and 13, chapter 38, General Statutes, to select the part of the ninety-eight acres which he desired set apart as a homestead; and, consequently, the appraisers were bound, as provided in section 9, to set apart the land on which were the dwelling-house and appurtenances.

We think the evidence is not sufficient to show the appraisers made an error in the value put upon the forty acres, but tends to sustain their report.

Collins does not state he paid any thing for the land, or has any interest in it, and does not now complain of the judgment divesting him of the legal title.

The policy and purpose of the statute, as indicated by the language used in section 9, is to exempt from coercive sale so much land as shall not exceed in value $1,000; and, whenever it is made to appear that appraisers, whether selected for the purpose by a sheriff, having an execution in his hands levied on land, or appointed by the court, have, by either fraud or mistake, undervalued the land set apart to a debtor as a homestead, a subsequent creditor, no party to the former proceeding, has the right to have such undervaluation corrected, and by judgment of a court of equity, so much of the land as exceeds $1,000 in value, subjected to his debt. Whether in any case a previous allotment of land as a homestead can be disturbed on any other ground, it is not necessary to now decide.

Judgment affirmed.

LEWIS V. COMMONWEALTH.

(*Filed Dec.* 20, 1890—*Not to be reported.*)

Criminal law—Continuance—On appeal from second conviction of accused, charged with others of the crime of murder, the evidence was purely circumstantial, and the jury having decided it sufficient to authorize a conviction, their verdict will not be disturbed.

The court did not err in refusing appellant a continuance because of the absence of a witness whose testimony could not have been beneficial to appellant.

John T. Hazelrigg for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted with others for the murder of Joseph Lewis, and this is the second conviction. The evidence is all circumstantial; and, when the case was heretofore in this court, the judgment was reversed, in order that the appellant might, if possible, break the chain of testimony that led to establishing his guilt beyond a reasonable doubt.

The deceased was related to the appellant, and on intimate and friendly relations with him; and the only motive for committing the inhuman murder, originated from another murder in which it was said the appellant and the deceased participated—that was the killing of a girl called Auxier. It seems, from the testimony, that the appellant conceived that the deceased would, as a witness, disclose what he knew about that crime, and expressed his purpose to several as to the necessity of getting the deceased out of the country. The deceased was thrown over a cliff about forty feet high, and his body covered with logs and stones. He was evidently murdered before his body was thrown from the cliff, as there was evidence of its being dragged some distance before reaching the edge of the precipice. It was in a secluded spot, and where but few ever passed, and it is manifest that there was more than one engaged in the murder. One witness testified that on the morning of the day the deceased was murdered, the appellant was with Amos and Aliene Lewis, and the *talk* then was of getting Joe, the deceased, out of the country. They were all at the *house* of Amos Lewis, and a man by the name of Branham was also there. Amos Lewis wanted to get rid of Branham, and said to Cogswell: "When you leave, take Branham with you; we want to get Joe Lewis out of the country." The accused had, a few minutes before, said the same thing to the witness. On that evening Joe Lewis was murdered.

The deceased had on his person a watch when his body was found, and had on that day some money, and, it seems, carried a pistol of a peculiar kind. The money and pistol were not on his person. The pistol had been taken from the belt, and in a few days after the deceased disappeared, the accused was seen with a pistol resembling in every respect the pistol owned by the deceased. There are many other circumstances connecting the accused with the killing, but it is unnecessary to give them in detail, as the evidence warranted the conviction. The continuance asked for was properly refused.

The case had been continued once since the reversal, and the defense seems to have introduced a number of witnesses, who were familiar with the parties and their surroundings, and every opportunity afforded the accused to show his innocence.

The refusal to continue the case on account of a witness who saw the deceased on the day of the killing (as the affidavit states), with two men he never saw or heard of before, affords no ground for a reversal. It rather indicates guilt than innocence, and, in the light of the evidence in this case, must be false; and, we think, could have made no impression on the court or jury if it had gone to the jury as evidence.

The accused has had a fair trial; the instructions were proper, and the judgment is now affirmed.

ROBERTS v. COMMONWEALTH.

(*Filed Dec.* 4, 1890.)

Criminal law—correcting instruction after verdict announced—Appellant prosecutes this appeal from a judgment of conviction for manslaughter, by which his punishment was fixed at confinement in the penitentiary for four years.

The court had, by inadvertance, instructed the jury that if they found appellant guilty of manslaughter, they should fix his punishment at not less than ten, and not more than twenty-one years' confinement in the penitentiary. After the jury had found a verdict, and it had been announced, fixing the punishment at ten years' confinement in the penitentiary, and while the jury was being polled, it was suggested that the instruction was erroneous; whereupon the court corrected it, instructing the jury that the punishment was not less than two, nor more than twenty-one years' confinement in the penitentiary, and directed them to retire, which they did, and returned the verdict appealed from. *Held*—That the action of the court, in correcting the instruction after a verdict had been announced, was an error prejudicial to defendant, and a practice that will not be sanctioned by this court.

The lower court should have entered the first verdict returned, and then granted appellant a new trial.

Nelms Bros., Bazil W. Duke and Z. Gibbons for appellant.

P. W. Hardin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Roberts, was indicted in the Fayette Circuit Court for the murder of John McCarthy. The jury brought in a verdict of manslaughter, fixing his punishment by confinement in the penitentiary for four years.

There is only one question in the case neceessary to be considered: After the evidence had closed for the State and the defense, the court, through inadvertance, instructed the jury that if the accused was guilty of manslaughter, his punishment was confinement in the State prison for a period of not less than ten, nor more than twenty-one years. The jury, under this instruction, after fully considering the case, returned into court with a verdict, fixing the punishment at ten years' confinement in prison. The verdict had been announced and the jury was being polled, when it was suggested that the instruction given was erroneous, because it fixed the minimum punishment at ten, instead of two years. The court then gave another instruction, or modified the one given, and required the jury to return to the jury room, that they might further consider the case. A verdict had been returned, correct in form and substance, by twelve men, whose minds had concurred as to the punishment to be inflicted, and, while a lesser punishment was imposed by the last finding, we know of no rule of law, or precedent, particularly in a criminal case, that will authorize a correction of an erroneous instruction after the verdict has been announced. If this can be done, the jury might have made the punishment, when considering the case for the second time, at fifteen years, instead of four, and, in this way, the accused subjected to two findings as to the punishment. It has been argued that no injustice has been done the accused; but, on the contrary, the punishment having been lessened, he was, in fact, benefited by the error committed. We think this

court ought not to inquire as to the effect of the second finding, as such a practice can not be sanctioned, when the life or liberty of the citizen is involved. The action of the court may also have been prejudicial to the rights of the accused. The jury, as the record shows, had deliberated on the issue many hours before returning into court with their first verdict fixing the punishment at the shortest period of time. They evidently saw what they considered some mitigating facts connected with the homicide, as, on the second finding, the verdict was for four years. Having first agreed on ten years, they might have been reluctant in so far reducing their verdict as to make the punishment two instead of ten years. What circumstances connected with the case operated on the minds of the jury, causing the verdict to be lessened, would be merely speculative on the part of this court; and, therefore, it is not necessary to review testimony, particularly where there must be a retrial, but it is sufficient to say that the jury might have returned a different verdict from either of the findings made if they had been properly instructed in the first instance. The court, finding the instruction first given erroneous, should have permitted it entered, and then set it aside, granting the appellant a new trial.

The judgment is reversed, and remanded for a new trial consistent with this opinion.

KENTUCKY SUPERIOR COURT.

BOARD V. MOORE.

(*Filed Feb.* 25, 1891.)

Claim and delivery—Liability of surety on bond for delivery of property—Plaintiff in action to recover the possession of personal property, valued in the aggregate at $578.65, sued out an order of delivery for same, under which the sheriff seized articles worth $181.50, and other articles, valued at $250, he left in the possession of the defendant, upon his executing the bond provided for by section 188, Civil Code of Practice, with appellant as surety for $510, double the amount of property retained, conditioned that the defendant would "*perform the judgment in the action.*" On the trial it was adjudged that the plaintiff recover of the defendant the property named in the petition, if to be had, and if not, its value, $578.65, and $150 in damages for its unlawful detention, subject to a credit of $181.50, amount of property seized and delivered.

An execution was issued, and defendant delivered to the officer property of the value of $147.50, and the writ was returned unsatisfied as to the residue of the property and the damages. Action was then instituted on the bond against the surety, seeking to hold him responsible for the whole amount of property and damages embraced in the judgment. *Held*—That the just and reasonable construction of section 188, Civil Code, would make the surety responsible for only the amount of property that the execution of the bond enabled the defendant to retain, and the proportionate amount of damages resulting from the detention of that amount of property. It would be unreasonable to suppose that the surety could be held responsible for the value of property which defendant may never have had possession of.

W. W. Thum and A. E. Wilson for appellant.

J. C. Hemingray for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Yost.

Belle Zora Moore instituted an action in the Louisville Law and Equity Court against G. W. Moore, seeking to recover the possession of certain articles of furniture, valued in the aggregate at $578.65, and sued out an order for its immediate delivery to her, which was placed in the hands of the sheriff of Jefferson county for execution. This officer found certain articles of the furniture worth $181.50, in the hands of a stranger, Hall, which he took possession of and delivered to the plaintiff. Certain other articles, to the amount and value of $255, he found in the possession of the defendant, Moore, who thereupon executed a bond for their retention, with Buckner Board as his surety, by the terms of which they bound themselves to the plaintiff in the sum of $510, double the value of the property retained, that the defendant would perform the judgment of the court in the action. The balance of the property, amounting in value to $142.15, was not found.

On a trial of this action, the court adjudged that the plaintiff recover of the defendant the property named in her petition, if to be had, and if not, its value, $578.65, and $150 in damages for its detention. This judgment was credited by $181.50, the value of the property which the sheriff had taken from Hall and delivered to the plaintiff. An execution was issued and placed in the hands of an officer, to whom the defendant delivered certain of the articles which he had retained, worth $147.50, and the writ was then returned unsatisfied as to the balance of the property, and the damages awarded the plaintiff. She then instituted this action against the appellant, Board, the surety on the bond, in which she sought to recover of him the balance due her on her judgment against Moore, amounting to $426.45, which included the value of the property which was never found by the sheriff, worth $142.15, that which Moore had retained and failed to deliver to the sheriff, worth $108, the damages awarded, and her costs about the first action expended.

The appellant filed an answer setting up these facts, and denying any liability under the bond for any amount except the value of the property which Moore had retained and failed to deliver, and the damages for its detention. The court sustained a demurrer to this answer, refused to permit the appellant to file an amended pleading setting up, in a measure, the same defense, and rendered a judgment against him for the amount sued for, from which judgment he prosecutes this appeal.

This involves a construction of the 188th section of the Civil Code, which provides that, in a claim for the recovery of personal property, where an order is issued for its delivery, the defendant may retain the property by executing a bond to the plaintiff, in double its value, to the effect that he will perform the judgment of the court. The sheriff found in Moore's possession $255 worth of the property sued for, who, in order to retain it, executed the bond sued on in double its value, that he would perform the judgment in the action.

The question is: What did the expression "perform the judgment in the action" mean? Did it bind the surety in the bond to see that Moore performed the judgment concerning all of the property sued for, or only so far as it related to the property which Moore was

enabled to retain by reason of its execution? This law was enacted in order to enable the defendant to retain possession of property sued for; and manifestly, the surety in a bond taken, according to its provisions, can not be held responsible for property which the defendant had not retained. Looking to the substantial justice of the case, rather than to the letter of the bond, we are of the opinion that such a literal and technical construction is not admissible.

What effect did the bond have on the litigation? What did it restore to the defendant? What did it restrain the plaintiff from taking possession of? Only the property which the sheriff found in Moore's possession. Then upon what theory can the surety in the bond for its retention be made responsible for property which the officer never found, and which the plaintiff was never restrained from taking?

If the appellee secures a judgment on the bond for the full value of the property, which it prevented her from seizing, and damages for its detention, what more can she ask? To what greater relief is she entitled?

The appellant bound himself in a sum, double the value of the property, that Moore would perform the judgment in the action. Double the value of what property? Not all of the property sued for, nor any part of it, except such as his undertaking enabled Moore to retain. Then can the bond be stretched so as to include any other property? We do not think it is so elastic.

The true question in the case is: What amount has the appellee been injured by the failure of Moore to return the property, which the bond enabled him to keep (and to determine this it is only necessary to know the value of the furniture retained, which he failed to deliver to the sheriff under the execution), and the proper proportion of the damages due the appellee for the detention of all of it.

She should be limited in her recovery to the actual damages which she sustained by reason of the execution of the bond, and surely nothing beyond the right to have delivered to her the property bonded, or its value, and damages for its detention, can be considered as the fair, legal and natural result of the act complained of.

The court erred in sustaining the demurrer, and the judgment is, therefore, reversed, and the cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

MALLORY'S ADMINISTRATOR v. MALLORY'S ADMINISTRATOR.

Filed December 3, 1890. Appeal from Todd Circuit Court. Opinion of the court by Judge Young, reversing.

1. *An ante-nuptial contract*, by which the husband and wife agreed that neither should have any thing to do with the property of the other, was intended to operate only during the existence of the marriage, and, therefore, upon the death of the husband, the contract does not deprive the widow of her distributable interest in his estate.

2. *Same—Statute of frauds*—Such a contract is in consideration of marriage, and, therefore, within the statute of frauds.

3. *It must be presumed that such a contract was not in writing*, where it is relied on as a defense, and it is not alleged that it was in writing.

4. *Death of widow before exempt property set apart by appraisers*—The property exempt from distribution vests in the widow upon the death of the husband, and if she dies before the property is set apart to her by the appraisers, or even before an administrator is appointed, those who take after her are entitled to receive what she would have received had the appraisers acted in her life-time. If the property remains in kind, it should be set apart; but if not, those entitled may recover just as the widow could have done.

Ben T. Perkins and E. W. Hines for appellant; W. B. Reeves and H. G. Petrie for appellee.

ROTHSCHILD v. WALD & CO., &c.

Filed December 3, 1890. Appeal from Daviess Circuit Court. Opinion of the court by Judge Young, reversing.

1. *A devastavit* is a mismanagement and waste by an executor, administrator or other trustee of the estate trusted to him as such, whereby loss occurs.

2. *Same—Executors and administrators*—Where the estate is perfectly solvent an administrator is not compelled, at the expense of being charged with a devastavit to file a suit for the settlement of the estate before paying debts, and if the estate in his hands is sufficient to pay all debts, one creditor can not hold him liable on his bond merely because he has paid other creditors, and especially is this true when the debts paid were clearly admitted, and the unpaid debt was one about which a litigation was pending.

3. *Same*—The fact that an administrator distributed a part of the personal estate when some of the debts against the estate were unpaid, did not amount to a devastavit, as the only debts remaining unpaid were in litigation, and the assets still remaining were clearly sufficient to pay them.

4. *Same*—The administrator of a deceased partner had the right to agree with the surviving partners that they should account for the interest of the decedent in the stock of goods at the appraised value on final settlement of the partnership accounts. And certainly creditors have no right to complain when the arrangement secures to them the payment of their debts in full.

Sweeney, Ellis & Sweeney for appellant; George W. Williams & Son for appellee.

DAVIS v. LAMB.

Filed December 3, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Landlord and tenant*—When a landlord evicts the tenant from a substantial part of the leased premises, he is precluded from recovering rent accruing subsequent to the eviction, and while it continues, and, therefore, can not maintain a proceeding to remove the tenant for the non-payment of rent.

A landlord tore down a stable on the rented premises, and at a different point on the premises erected a smaller stable, which was not suitable for the tenant's use, and on the site of the old stable erected a dwelling-house, of which he took and retained possession. The tenant refusing to pay rent subsequent to these acts of the landlord, this proceeding was instituted by the landlord to evict him. *Held*—That the proceeding can not be maintained.

2. *Same*—A provision in the lease giving the landlord the privilege of making any improvements and repairs on the rented premises that he might wish, did not give him the right to evict the tenant from any part of the leased premises, or to make such changes in the premises as would render them permanently unfit for the tenant's use, but was intended merely to give him the right to make such reasonable repairs and improvements as

would preserve the property or enhance its value without being liable to complaints from the tenant on account of annoyance or inconvenience.

3. *Forcible detainer—Practice*—A proceeding for forcible detainer, upon the traverse in the circuit court, is to be tried as other cases; and if the law and facts are submitted to the court without the intervention of a jury, there can be no reversal for any error committed in the progress of the trial unless there is both a motion for a new trial and a separation of the conclusions of fact from the conclusions of law.

Samuel McKee for appellant; William Krieger and Lane & Burnett for appellee.

PEOPLE'S BANK v. BARBOUR.

Filed December 10, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Barbour, overruling motion for rule against chancellor.

Appeals from Superior Court to Court of Appeals—An order of the Superior Court granting an appeal to the Court of Appeals annuls the judgment of the Superior Court, and if, before the granting of the appeal, the mandate has been filed in the lower court and judgment entered therein in pursuance of it, that court, upon the facts appearing, should set aside the orders made under the mandate.

Fairleigh & Straus for motion.

HARRELL v. OSBORNE'S EX'OR.

Filed December 10, 1890. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Barbour, affirming.

Construction of devise—Husband not wife's "heir"—Under a devise of money to a married woman for life, to be held as her separate estate, and at her death "to pass to her heirs at law, as if by descent from her," the husband not being the "heir" of the wife, is not entitled to the money upon her death.

E. E. McKay for appellant; C. T. Atkinson for appellee.

BUFORD v. SHINKLE'S ADM'R.

Filed December 10, 1890. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Burden of proof*—In this action by an administrator for a settlement of his intestate's estate, and seeking to recover of appellant certain property which he alleged belonged to the estate, appellant admitted that the property once belonged to the decedent, but alleged that he purchased it from the decedent for a valuable consideration a short time before his death. *Held*—That the burden was on appellant to establish his title as alleged.

2. *Allegation and proof—Variance*—Evidence tending to show a gift of the property by the decedent to defendant's wife, failed altogether to sustain the allegations of the answer.

3. *Fraudulent gift*—As it is admitted that the decedent was largely insolvent at the time of his death, it is reasonable to suppose that he was insolvent when the gift was made, which was only a short time before he died. The gift was, therefore, void as to creditors, and the administrator, representing them, had the right to have it so treated. Therefore, even if the answer had relied upon the gift, appellant could not hold the property.

James P. Tarvin for appellant; Collins & Fenley for appellee.

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KENTUCKY COURT OF APPEALS.

McGRAW v. MINOR.

(*Filed Jan.* 10, 1891—*Not to be reported.*)

Wills—Life estate—Judicial sale—In an action for the sale of land, in which a woman claimed a life estate, with remainder to her children, a judgment for sale and re-investment was rendered, and a sale had, to which the purchaser objects, on the grounds that the will, under which the land is held, vests in the woman the fee simple title, and that the proceeding had can not divest her of title; or, if this is not the case, the will forbids a sale of the life interest of the widow. The clause of the will necessary to be construed to settle this controversy, is as follows, viz: "It is my desire that my said daughter shall have the benefit of the portion of my estate devised her; that she shall not be divested of it during her life-time, and at her death to be equally divided between her children. In a previous clause the testator had expressed an intention to make his children equal in the distribution of his property. *Held*—That under the will a life estate was given to the daughter, with remainder to her children, and the judgment of sale vested in the purchaser the fee-simple title.

Wall & Worthington for appellant.

Cochran & Son and E. W. Hines for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

Under the will of Lucien S. Luttrel, his daughter, Louise Minor, claiming a life estate in the realty devised to her, with remainder to her children, obtained a judgment selling the land, under the provisions of the Code, for purposes of re-investment. It is claimed by the purchaser that the daughter had a fee-simple estate, and, therefore, the chancellor could not divest her of title in such a proceed-

ing; and if not invested with the fee, it is then urged that the will prohibits a sale, either by the wife or the chancellor, of her interest. The clause of the will, under which the several questions are raised, reads:

"It is my desire that my said daughter shall have the benefit of the portion of my estate devised her, and that she shall not be divested of it during her life-time, and at her death to be equally divided between her children."

The testator, in a previous clause of the will, declared his purpose to make his children equal, and proceeded to devise an equal part to each, but then follows the restrictions or limitation placed on the devise to the daughter, by which her children are devised the remainder interest, which, we think, is not inconsistent with his purpose to make the daughter equal in the devise of his estate with the two sons. The daughter, under the will, had a life estate, with remainder to her children. As to the objection that the sale is in contravention of the will, it is apparent that the object of the testator was to secure the estate devised to his daughter for her benefit, and the purpose of thus securing the beneficial interest to the daughter during life was not to prevent a sale, when that interest was still secured to her, but to prevent any such divesting of title as would deprive her of the benefit of the devise.

The daughter being protected in the devise to her, and holding the proceeds for investment as she did the original estate, we see no reason why the purchaser should not be compelled to accept the title.

Judgment affirmed.

DULANEY, &C. v. MURPHY.

(*Filed Jan.* 10, 1891—*Not to be reported.*)

Appeals—Final orders—Injunction—This is an appeal from an order of court refusing to grant a temporary injunction in an action by a tax-payer, seeking to enjoin the listing of a tax bill with the receiver of taxes for the city of Louisville. This order was superseded, and appellee, without objection of appellant, filed the record in the Court of Appeals, and moved to dismiss the appeal. *Held*—That the order refusing a temporary injunction was not a final order, as the court, on a final hearing, might have changed its opinion.

Clemmons, Willis & Dulaney for appellants.

Laf. Joseph for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

This action was brought on November 26, 1890, to enjoin the listing of a tax-bill with the receiver of taxes for the city of Louisville, the owner of the property claiming exemption therefrom.

December 12, 1890, an injunction was asked of the court. After consideration it was refused. The appellant was granted an appeal in the lower court from this order, and superseded what is claimed to be a final judgment.

December 16, 1890, the appellee filed the transcript in this court,

and now moves to dismiss the appeal. His right to file the record and make the motion is not denied. This question, if there be one, is not made. The appellants have consented to the motion being made, and, by brief, say that they desire their right to appeal determined. It is urged in support of it that the relief sought was to enjoin the listing of the tax-bill, whereby a lien would be created on the property, and that the refusal to grant it was tantamount to a dismissal of the action. In other words, this being the relief sought, the refusal of it really put an end to the action, and, in effect, terminated the case

We do not think so. It was an application for a temporary injunction, which, upon the final hearing, the court might or might not have made perpetual. An injunction may be the final judgment, or it may be merely interlocutory.

The Civil Code, section 274, provides: "Injunctions granted before judgment shall be subject to the further order of the court."

In Frederick v. Savings Bank, 106 Ill., 147, it was decided that no appeal or writ of error lies from an order of the circuit court refusing to grant a temporary injunction; that appeals and writs of error are only allowed in cases of a final judgment or decree, and that mere interlocutory orders or decrees entered in the progress of the case are not subject to review until final judgment or decree.

The motion to dismiss the appeal is sustained.

BRIGHT V. DUNN.

(*Filed Jan.* 10, 1891—*Not to be reported.*)

Easement—The sale of land with a private passway through it, which has been used and claimed as a right by others for more than fifteen years, will be construed as conveying the same, subject to said easement, and the persons who have enjoyed same will not be disturbed.

In the present case the agreement to exchange the passway used for a long period for another more accessible, does not evidence a permissive user of the passway, but is persuasive of an intention to surrender one in consideration of another being granted.

H. C Kauffman and Robert Harding for appellant.

W. O. Bradley for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Bennett.

The appellee's father sold or gave the land, which was a part of the tract over which the roadway is claimed, to the appellee, and the law implied a grant of an indispensable right of way through the latter portion of said land. The father testifies that he did grant this right of way, as it is now claimed, to the appellee, Jesse Dunn, who sold the land, as agent, to George Bright, agent of the appellant, swears that the right of way, as it is now claimed by the appellee, was reserved, and, in consideration thereof, the price of the land was reduced $2.50 per acre. In addition to this, the proof shows that the roadway, as it now is, has been used as a right a great many years, appellant and the father of the appellee verbally conceding the right of way, and, it having been used as a right, not merely permissive, for more than fifteen years, certainly creates an

adverse use long enough to protect the appellee in the right of way, as claimed by him.

It is contended that the appellee consented to a change of this way to another place, thereby showing that the way was permissive merely. But it seems that he consented to it with the understanding that the appellant would open as good way, which he did not do, and that he did not consent to it because of the appellant's right, but merely as an accommodation, the appellee agreeing to surrender his right to that particular place for another place as good and convenient.

The lower court, having passed upon the said case, and as the evidence authorized it to come to the conclusions above indicated, the judgment is affirmed.

Judge Bennett delivered the following response to petition for rehearing:

The opinion states that "the father testifies that he did grant this right of way, as it is now claimed, to the appellee." The counsel for the appellant vehemently denies that the father made such statement. Well, let us see. On page 173 of the record the father says: "I owned at one time the land through which the road in controversy now runs; also, I owned the tract now owned by defendant, at the time. There was not at the time I conveyed the land to my son, any thing said about the passway. I supposed it could continue to be a passway, because it had always been."

The appellee says that this passway had been used as a matter of right for years, and he bought the land with this right, &c.; and the father says, when he sold the tract of land to his son, he "supposed the passway" over this piece of land "would continue to be a passway, because it had always been." Now, in view of the fact that both understood that the passway existed as a right, and the appellee was to have the right, we again repeat that the father did "grant" the right to the appellee.

Now as to taking $2.50 per acre less for the land on account of this passway, Jesse Dunn says, on page 179: "Mr. George Bright complained a good deal about the roads running through it, and could not give the price I asked on that account, I finally told him that, if he bought the place, he would buy it just as the roads were —just as he saw it—and we finally traded by me taking less money than I first proposed ($2.50 per acre less.)" Page 180: "I wanted to sell it on account of the roads being there, and took less money for it on that account" So counsel is again mistaken.

We again repeat that it is clearly shown that the said passway was not merely permissive, but the appellee and others have used the same for more than fifteen years as a matter of right. Now, the judge that re-instated the injunction in the case never intimated how the case should be finally decided. The order, in substance, was to re-instate the injunction to await the decision of the case on its merits, and the court decided the case upon its merits, and we think the decision is right.

The petition for a rehearing is overruled.

RIVES v. WOOD.

(*Filed Jan.* 15, 1891—*Not to be reported.*)

1. *Malicious prosecution—Probable cause*—Appellant, having repeatedly traveled over a turnpike, less than a mile one way, was arrested at the instance of appellee, president of said turnpike company, on a charge of evading payment of toll. A trial resulted in acquittal of appellant, who instituted a suit against appellee for malicious prosecution, which resulted in a verdict in favor of appellee, from which this appeal is prosecuted. *Held*—That under section 3, chapter 110, General Statutes, the turnpike company was entitled to charge toll for each way, although the same amounted to less than one cent; and as the proof showed appellant repeatedly offered to pay a sum greater than the toll due, provided the gate keeper would give him a receipt for same, his conduct did not amount to an evasion of the payment of toll; but as appellee had caused the arrest of appellant on information given him by the gate-keeper, that appellant had, on one occasion, slipped through the gate without tender of his toll, and, after consultation with an attorney, his action was based upon probable cause.

2. *New trial*—The refusal to grant a new trial because of the absence of a witness who would contradict the statement made to appellee by the gate-keeper, was not error, as no diligence to procure his attendance at the former trial was shown, besides, the statement of the gate-keeper made to appellee, whether true or false, afforded probable cause to procure the arrest and prosecution.

A. Duvall, Ben Spalding and C. S. Hill, jr., for appellant.

Thompson & McCord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having repeatedly passed through the toll-gate of the Lebanon & Perryville Turnpike Road Company, located next to and about a half mile of the town limits of Lebanon, refusing to pay toll, appellee, president of the company, caused him to be arrested and tried for evading, or attempting to evade, paying toll; and, upon trial before the police judge of Lebanon, the charge having been dismissed, this action for malicious prosecution was brought, and, in pursuance of a verdict of the jury, judgment was for defendant.

It appears that the place to and from which appellant went, in passing through the gate, was on another road that intersected the Lebanon and Perryville road, about 200 yards beyond the toll-gate from Lebanon.

By section 3, chapter 110, General Statutes, the rates of toll on turnpike and gravel roads are fixed, subsection 1 thereof being as follows: "These rates are for gates standing five miles apart, and in that proportion for a less distance; but, when there is a fraction of a road of a mile or more, less than five miles, toll may be charged at the gate next thereto for the fraction, in the proportion that its length bears to five miles."

Going only one way between Lebanon and the place of appellant's destination, he traveled less than one mile on the Lebanon and Perryville road, and there was no way by which the precise amount of toll due could have been actually paid; but the distance traveled by him going and coming was at least one mile, for which the rate of toll is one cent. So, if the company was entitled to charge any thing at all under the statute, appellant was bound to pay at least

one cent. Turnpike companies may, under the statute, make an arrangement for mutual convenience, by which the trouble of making the necessary change each time one passes through the gate may be avoided. But appellant seems to have gone upon the idea that, because the company could not change his nickel, so as to return to him all but a fraction of a cent, he was safe from paying any thing; but it seems to us the statute, fairly and justly construed, entitled the turnpike company to charge appellant toll, in proportion to the distance he traveled over it, whenever, according to the rate, they were entitled to as much as one cent; and as, upon his passing through the gate going as far as the next gate, the company would have been allowed to demand prepayment of as much as five cents, it certainly was entitled to demand, prepaid, as much as one cent, if the whole distance going and coming amounted to as much as one mile. A reasonable construction of the statute, and disposition on part of a turnpike company and persons using its road, to concede and respect relative rights, will always keep such matters out of courts of justice.

Section 10, same chapter, provides that "whoever shall defraud, or attempt to defraud, the company by going around a toll-gate, or otherwise evade, or attempt to evade, the payment of tolls, or to lessen the amount of tolls fairly payable by him, shall, for every such offense, be fined $10."

According to his own testimony, on trial of this case, appellant seemed anxious for the gate-keeper to take from him an amount that would render the company liable for overcharging toll; and, evidently looking to that end, offered to pay as much as one cent, upon condition the gate-keeper would go through the farce of giving him a written receipt therefor, and even offered to write the receipt himself, and, by threatening litigation with the company, he was able to go through the gate free of any toll. His conduct does not, however, amount to evading, or attempting to evade, payment of toll in meaning of the statute. But appellee testified on the trial that the gate-keeper, Hope, who is now dead, informed him that appellant on one occasion came to the gate, and, refusing to pay one cent toll demanded, without a written receipt therefor, slipped through when the poll was raised to allow a man named Langford to pass with his wagon, and, upon that information, he caused appellant to be arrested; and, if such information was given to appellee, whether true or false, he had probable cause for the prosecution. Moreover, the toll was demanded in pursuance of an order of the board of directors of the turnpike company, covering the case of persons going the distance and route appellant traveled; and appellee also consulted an attorney, laying the facts before him. It is, however, proper to say one of the grounds, upon which appellant asked for a new trial, was that the person, Langford, would contradict the statement made by Hope to appellee. But there was not proper diligence shown to procure attendance of Langford as a witness on the trial, and even if he had contradicted the statement of Hope, it was sufficient defense of appellee, if he believed and in good faith acted on it.

The instructions of the court, we think, are not objectionable, for they give the law fully and accurately.

Judgment affirmed.

WILSON V. SCOTT.

(*Filed Jan.* 15, 1891—*Not to be reported.*)

Claim and delivery—Estoppel—Mortgage—Evidence—In a contest between the appellee as owner of two horses, to recover their possession, and appellant, who asserts a mortgage lien on said horses, executed by another person as owner of same, the claim of appellee can not prevail, as he is estopped by his conduct from claiming said horses. Besides, his statement as to transactions between him and the person in whom the ownership of the horses is alleged to be, is incompetent, as said alleged owner was dead when said statements were offered in evidence.

Evan E. Settle and T. R. Gordon for appellant.

Lindsay & Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted by the appellee, Scott, to recover of the appellant, Sams, as administrator of Wilson, two valuable horses that belonged, as is alleged, to the plaintiff. During the progress of the action the appellant, Wilson, came into the case by his petition, and asserted a lien by mortgage executed to him by Jordan, the dead man, to secure him (Wilson) in the sum of $2,086, money loaned the appellant. Sams has dismissed the appeal, in so far as he is concerned, and the case now here is between Wilson, the mortgagee, and Scott.

It seems that Scott was and is a resident of the State of Ohio, and that Jordan, the intestate, during his life had these horses in his possession, at or near New Liberty, in Owen county, claiming to be the owner, and was managing, controlling and receiving the money derived from standing the horses in his own right, advertised them as his own, and, in every respect, seemed to have been the owner.

The appellee, Scott, was in New Liberty several times while Jordan was in the possession of the horses, and never, so far as this record shows, asserted any ownership over them, or interest in the proceeds arising from their serving mares. Scott's testimony as to the transactions with Jordan, upon which he bases the right of recovery, was incompetent, and not only so, but inconsistent with the right of ownership that he is now asserting.

The declaration of Jordan, made while he was in possession of these horses, was competent to show good faith on the part of Wilson, as well as the right of property in Jordan.

It appears from the testimony that Scott's opinion of the honesty and fair dealing on the part of Jordan was not of that character that would justify the confidential relation that is now attempted to be shown existed between them, or such as would have caused a man of ordinary prudence to confide to Jordan the custody and control of such valuable property; that Scott was in Liberty more than once, and with horses of such remarkable blood and of great value, being groomed by Patterson under the employment of Jordan, and the latter seeking patronage for the horses, it seems that Scott took no interest in them, said nothing of their fine breeding, and made no effort to give his horses a reputation or to induce the owners of mares to breed to them, and, in fact, asserted no claim

until after Jordan's death, tending in the least degree to show that he had any interest in them.

That Scott had possession of these horses in Ohio is doubtless true, but that Jordan was, in fact, the owner is fully explained by the letter of J. W. Gayle to him, in reference to these horses. Gayle had entered into an agreement with Jordan, by which he was to handle the two stallions for the season, and wrote to Scott as follows:

"Mr. F. W. Jordan has effected a partnership with me, by which I am to handle *his two stallions* this season. He explained his financial condition at your place, but says you are going to ship the horse, *Dan Campau*, in a few days. Please write," &c. "Whatever the circumstances may be, I assure you that it will be kept secret," &c. Scott answered this letter, and said that he would send the horse as soon as he had the time, and did send him in a few days. This witness states that he stood the horse for two years, and himself and Jordan divided the profits; that Scott was at New Liberty several times during the period he stood the horses, and conversed with the witness; that Scott knew he was keeping the horses, but at no time talked to him about them or set up any claim to them.

Jordan was offering to sell Dan at $10,000, and was offered $7,500 on certain conditions. With such valuable property this claimant is in the town where the horses had been kept for two years, sees Gayle who kept them and was sharing the profits with Jordan, and never even made an inquiry in regard to them.

This judgment must be reversed on both the law and the testimony. First, the conduct of Scott, with reference to the horses, estops him from asserting a claim of ownership as against Wilson; second, the evidence before us shows Jordan to have been the real owner.

Judgment reversed, and remanded with directions to set aside the judgment as to Wilson, and grant a new trial. The legal issue as to ownership may still be tried by a jury, if either party desire it; and if not, the case, as the administrator declines to assert any further claim, will be transferred to equity, and a judgment rendered enforcing Wilson's lien; or, if the verdict should be that Wilson has a lien, the transfer will be made and the property sold to satisfy the lien.

A. W. NAIL CO. v. BAYLESS, &C.

(*Filed Jan.* 15, 1891.)

1. *Transfer of stock on books of corporation—Fraud*—In an action by appellee, B., as the assignee of eighty-nine shares of stock in the appellant company, to compel a transfer on the books of the corporation of said stock, appellant resists the transfer, alleging that same was fraudulently issued, and appellee became a purchaser of same with notice of its invalidity. *Held*—That said stock was issued within the limit of the stock permitted by the charter, and, whether legally or illegally issued, appellee is protected as a *bona fide* holder for value; besides, the officers of the company, by their laches and conduct in recognizing said stock as valid, will not be permitted, after the lapse of several years, to question its validity. A transfer of stock is valid to vest the title to it in an assignee before transfer upon the books of the company, but the chancellor, on application, will compel said transfer to be made.

2. *Evidence—Depositions*—The deposition of one of two joint plaintiffs,

taken after the depositions of others, not parties, is not competent evidence. The rule is the same, even though the plaintiff testifies nominally as a witness for his co-plaintiff, if he is jointly interested in the issue.

Section 606, Civil Code, construed.

3. *Pleading—Demurrer—Costs*—If one of two joint plaintiffs fails to demur to a defective answer, but the court, *sua sponte*, on the trial, raises the demurrer and dismisses the defective answer, the plaintiff so failing to demur does not incur the costs. Section 93, Civil Code, imposes the costs on a party failing to demur at the proper time only where, having pleaded, *he* afterwards raises the objection.

Collins & Fenley for appellant.

W. H. Mackay and J. S. & C. H. Fisk for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

The appellee, D. B. Bayless, brought this action on September 3, 1885, to compel the appellant, the American Wire Nail Co., to transfer to him upon its books eighty-nine shares of its capital stock, of the par value of $100 each, purchased by him of the appellee, J. L. Stephens, on July 30, 1885, and evidenced by two certificates, one for forty-four shares, dated November 7, 1883, and the other for forty-five shares, dated January 14, 1884.

The company, although proper demand for the transfer was made, resisted upon the ground of a fraudulent issue of stock to Stephens, and that Bayless was not an innocent purchaser. It also made its answer a cross-petition against Stephens and the appellee, Mecklenborg, claiming judgment against them for the alleged fraudulent stock issued to them, and that the judgment it might obtain against Stephens be liquidated *pro tanto* by a cancellation of the stock improperly obtained by him, according to its face value.

The appellant corporation was created in 1875. The corporators appear not to have been numerous. The authorized capital stock was $100,000, of which nearly $14,000 was subscribed and paid. The original investment by Stephens was $5,300, and by Mecklenborg, $2,200, or $7,500 by both. They, however, purchased and retired other stock until they became, in 1882, the owners of all the original stock, holding it in proportion to their original investment.

In the meantime they gave their attention to the business, in order to render it profitable and place it upon a sure footing. Additions were made to the plant, and in the spring of 1882 the company had a profitable business. At this time B. H. Gedge proposed to take $10,000 of stock in it, if upon inquiry he became satisfied to do so. He was afforded access to the books of the company, and, at least to some extent, examined them. He then became a stockholder. In a short time thereafter his brother, L. H. Gedge, also became one. He also had opportunity to inform himself as to the condition of the company.

It is claimed that when they entered the company Stephens and Mecklenborg were guilty of misrepresentation and fraud, which resulted in the issue of fraudulent stock to them. Right here the parties differ widely in their versions of what occurred. It is maintained by the Gedges that Stephens and Mecklenborg represented to them that they had paid into the concern $30,000, or that the company had that much paid up capital; that the subscription of B. H. Gedge would increase it to $40,000 and that of L. H. Gedge to $50,000; that each corporator was to have stock according to the

cash paid in by him, and that to carry out this deceit Stephens and Mecklenborg made entries, or had them made, in the new set of books then opened, purporting to show that they had $30,000 in cash in the business.

These entries, which are exhibited, show the original investments of $5,300 by Stephens and $2,200 by Mecklenborg; also an indebtedness, under the heading of "sundries," by the corporation to Stephens of $12,100, to Mecklenborg of $9,400, and to Stephens' wife of $1,000. These various sums amount to exactly $30,000, and stock was issued to Stephens and Mecklenborg upon this basis, and not merely upon their original cash investment, as is claimed should have been done.

It is contended upon the other side, however, that they merely represented to the Gedges they had a business worth $30,000, and if they (the Gedges) became stockholders, a new set of books must be opened; the new stock taken upon the basis that Stephens and Mecklenborg had $30,000 in the business; stock should be issued accordingly, and that the entries in the books were made merely to show this state of case.

The direct evidence upon this issue between the parties is very conflicting. Resort may, therefore, well be had to the conduct of the parties to the transaction, and all the attending circumstances. Thus tested, we think the appellant has failed to sustain its position.

Stock was issued upon the capital as increased by the coming in of the Gedges, upon the basis that Stephens and Mecklenborg had $30,000 in the business, one of them being then the president of the company, and the other its secretary. In 1883 the two Gedges and Stephens bought out Mecklenborg and divided his stock, amounting to $11,600, in certain proportions between them. B. H. Gedge had become a director in the company soon after coming into it in 1882. In August or September, 1883, he became its book-keeper, and, in November following, its secretary. The stock certificates which were issued upon the division of the Mecklenborg stock were attested by him as secretary, and the certificate for the forty-four shares thus obtained by Stephens, and thus issued to him, is one of the two that were assigned to the appellee, Bayless. The other was subsequently issued to Stephens for profits coming to him from, and not drawn out of, the corporation in money, but taken in stock; and this certificate is also attested by B. H. Gedge, as secretary.

The issual of this stock was not, as to the corporation, *ultra vires*. It was not an issue of stock beyond that authorized by its charter. It is only claimed that it was a fraudulent issue, brought about by the fraud of the beneficiary. This being so, if the appellee, Bayless, be an innocent holder, he is in law protected, even if the stock was issued through fraud, because it does not lie in the mouth of a corporation, after issuing stock, to say to a *bona fide* holder that it is void. Public policy forbids it.

Bayless had no actual notice of any infirmity in the stock. It is said, however, that he is in law chargeable with notice, under the circumstances. It is true he was a director of the company from October 8, 1883, to January 1, 1885, but he was scarcely more than nominally so. He was the nominal holder of one share of stock, in order that the company might have the requisite number of directors. He never attended but two meetings of its board of directors, and at one of these one of the certificates of stock assigned to him was issued, and at the other, the other one. The circumstances attending their issue were certainly calculated to cause him to believe that they were not fraudulent.

The fact that he is the brother-in-law of Stephens, and purchased the stock upon advantageous terms, is not sufficient to charge him with notice of any fraud connected with the issue of it. He appears to us to occupy the attitude of a *bona fide* holder for value. If, however, Stephens was in fact entitled to the stock, if there was no fraud connected with it, then the question whether Bayless was an innocent holder does not arise.

The Gedges had an opportunity, when they became stockholders, to examine into the condition of the company's business. One of them, soon after he became a stockholder, was made a director. He afterward became the book-keeper and then the secretary of the company. Both of them united in the purchase of the Mecklenborg stock, and the evidence shows that they have sold the stock thus gotten, or a part of it, since they say they discovered the issue was fraudulent. B. H. Gedges took additional stock iu 1884, and their mother also took stock in the company in the early part of 1884, and after they claim to have discovered the fraud. The record also shows that they knew Stephens had sold portions of his stock to various parties, and had, for a considerable time before the sale to Bayless, been trying to sell all of it. In fact, some of it he had pledged to the company, and some of it to one of the Gedges, to secure debts owing by him; and yet the claim is made, when Bayless asks a transfer of the stock to himself, that there was a fraudulent issue of stock in 1882 to Stephens and Mecklenborg.

The acts and conduct of the Gedges strongly support the view contended for by the other side. Their conduct is consistent only with the idea that the Stephens' stock is valid.

Under section 606 of the Civil Code, the deposition of Mecklenborg was not competent. The depositions of others, not parties to the action, had already been taken in chief. True, it was taken for Stephens, but the witness was also really testifying for himself. He was a party to the action and interested in the result. The issue made by the answer of Stephens was for both, because it was of such an inseparable character that the answer operated for each of them. Disregarding the testimony of this witness, however, the evidence still preponderates in favor of the appellees.

It matters not upon what ground the lower court decided the case. If the result there reached be correct, the judgment will be affirmed.

Complaint is made that, although Mecklenborg did, yet Stephens did not, demur to the answer and cross-petition, and that the court, after the case had been fully prepared, *sua sponte*, raised a demurrer to the pleading, and dismissed it upon the ground that it presented no defense to the action, and authorized no relief against Stephens and Mecklenborg.

If a defendant does not demur to a petition, certainly the court has a right, upon the final hearing, to decide that no cause of action is presented. If it does so, it should not be at the cost of the successful party, because he may have preferred to not object to the pleading, but go to a trial upon the merits.

Section 93 of the Civil Code provides, that a failure of a party to object to a pleading by demurrer, is not a waiver thereof; but a failure to thus make his objection before he pleads further, renders him liable for the costs resulting from such failure. This means where he subsequently seeks to avail himself of the right to demur. The court, in this instance, therefore, did not err in allowing the appellees their cost.

The defense is that the stock was fraudulently issued. The appellant proceeded upon this ground. It sought relief against Stephens

and Mecklenborg for this reason. If it was not fraudulently issued, then, upon its own statement, it was not entitled to any relief against either of them. Their positions were identical. The answer of Stephens put every thing as to both of them in issue. It operated like a plea of payment would for his co-defendant, Mecklenborg, who did not answer.

Not only does the evidence sustain the view asserted by the appellees, but the conduct of the appellant is not calculated to call forth the activity of a court of equity in its behalf. To do so, good faith and diligence must be shown. A court of equity applies the doctrine of laches according to its own ideas of justice and right. Every case is controlled by its own circumstances. They address themselves to the sound discretion of the court. It always discountenances neglect, and certainly where it operates to injure innocent parties. It is a rule founded in experience and sound public policy. Here the parties can not be placed in *statu quo*. The company has not only by delay, but by positive action, ratified the issue of the stock. It has accepted some of it as collateral. It has held it out to the world as valid; and if it were in fact not so, yet the appellant and the Gedges have unreasonably delayed saying so, or taking steps to annul it. It is transferable by delivery of the certificates, so as to pass all the rights of the assignor, and is protected in the hands of an innocent holder, whatever may be its infirmity. Hence, every reason exists for prompt action, if the corporation or a stockholder claims it is invalid. A transfer upon the company's books is merely to protect the company and others who might propose to purchase the stock, as the contract of sale passes the rights of the vendor, and the vendee may, by proper action, compel the transfer upon the records of the company. Wait's Actions and Defenses, volume 4, page 164, and volume 8, page 79; Johnston v. Laflin, 103 U. S., 800; Morawetz on Private Corporations, section 326, *et seq.*

In view, therefore, of the laches of the appellant, its silence and conduct as to this stock, until this suit was brought, were we in doubt upon the evidence as to the right of the case, the inclination would be to the side of the appellees.

The judgment is affirmed.

BODMAN & CO. V. FISHER.

(*Filed Jan.* 13, 1891—*Not to be reported.*)

Mortgage—Conveyance—Question of fact—This is a controversy involving the construction of a contract, appellants claiming that it is a mortgage, while appellee claims that it is a contract of absolute sale of a crop of tobacco. *Held*—That the admission of the appellants, and the conduct of their agents, besides other evidence, clearly establishes that the contract was an absolute sale.

A. Duvall for appellants.

H. P. Willis for appellee.

Appeal from Bracken Chancery Court,

Opinion of the court by Judge Bennett.

The only contention here of the appellant is, that the court erred in not construing the bill of sale marked "B" to be a mortgage of

of the tobacco stored in Holmes' warehouse. The appellants support their contention by the evidence of the agent, Myers, who made the contract, and that of their attorney, and that of the admissions of the appellee. On the other hand, the appellee swears positively that the sale of the tobacco was absolute—not a mortgage of it. Mr. Holmes, the warehouseman, swears that the appellants wrote to him that they had purchased the tobacco. He speaks of the purchase in contradistinction from a mortgage. After the sale of the tobacco to appellants, it was attached by third parties, and Mr. Myers claimed it as belonging to the appellants by purchase, and they executed a claimant's bond as the owners of the tobacco. Besides, several witnesses swear that the appellants refused to let the appellee prepare the tobacco for market, which, under the agreement, they had a right to do; handled and controlled it as though it belonged to them, their agent saying that it was theirs, and the appellee had no right to control it. It seems that when third parties made an effort to subject the tobacco, the appellants claimed it as belonging to them by absolute purchase, which had the desired effect of protecting it; but that effect having been accomplished they wish to treat the transaction as a mortgage. The appellants were operating under the advice of a lawyer who, doubtless, knew that a mortgage would not give the exclusive right to the tobacco as against creditors. Hence, advised an absolute purchase of the tobacco, which would hold as against other creditors, and which did hold as against their claims. So we have a strong and controlling reason for this purchase instead of a mortgage; besides, the evidence amply sustains the court in coming to that conclusion.

The judgment is affirmed.

CHAMBERS & MARSHALL v. BALDWIN.

(*Filed Jan.* 13, 1891.)

Damages—Action for maliciously inducing another to break a contract—Appellants having made a contract with one W. to deliver to them a crop of tobacco at a certain price, appellee procured or induced W. to sell and deliver to him said crop of tobacco, whereupon this action was instituted by appellants against appellees, alleging that appellee wilfully and maliciously procured or induced W. to break his said contract with him, whereby they were damaged. *Held*—That, as W. alone was liable on his contract for the delivery of the tobacco, for a breach of which he could have been held responsible, no action could be maintained against a stranger who might have induced him to break it, although the stranger might derive a benefit from the breach. While there may be a class of cases where a party who would procure one party to a contract to break it, thereby inflicting an injury upon the other party to it, that rule can not apply to this case, for it is lawful, under the rules of trade, for one person to buy whatever another freely offers to sell, competition often becomes sharp, and frequently engenders enmities, such acts are permissible, when done with good intentions, and can not become unlawful, because the party who enters into this competition does so wilfully or maliciously.

Wall & Worthington and Cochran & Son for appellants.

Wadsworth & Son for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Lewis.

The cause of action stated in the petition of appellants is, in substance: That, as partners, doing business under the firm name of Chambers & Marshall, they made a contract with one Wise, whereby he sold and agreed to deliver to them, in good order, during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee, in consideration whereof they promised to pay, on delivery, at the rate of five cents per pound; that they were ready, able and willing to receive and pay for the tobacco, as and at the time agreed on, and demanded of him compliance with the contract, but he had already delivered it to appellee and Newton Cooper, tobacco dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at end; that appellee knew of existence of said contract, but maliciously, on account of his personal ill will to Chambers, one of the appellants, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract, whereby they have been damaged $——; that he, Wise, was at the time known by appellee to be, and now is, insolvent; so, being without other redress, they bring this action.

Appellee is alleged to have been actuated to do the act complained of by ill will to one of the appellants only, which, however, to avoid confusion, we will treat as a malicious intent to injure both, and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus, two questions of law arise on demurrer to the petition: First. Whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it. Second. Whether an act, lawful in itself, can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not nor could himself break it, his wrong, if any, was in advising and procuring Wise to do so. Consequently, while the remedy of appellants against him, Wise, was by action *ex contractu*, recovery being limited to actual damage sustained, their action against appellee is, and could be in no other than form *ex delicto*, recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts, 1, 37, it is said: "Maliciously inducing a party to a contract to break his contract to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which supports an action."

The authority cited in the support of the proposition thus stated, without qualification, is the English case of Lumley v. Gye, 24 Ell. and Bl., 228, decided in 1853, followed by Bowen v. Hall, decided in 1881, Am. Law Rep., 20, 578, though it is proper to say there was a dissenting opinion in each case.

The action of Lumley v. Gye was in tort, the complaint being that the defendant maliciously enticed and procured a person under a binding contract to perform at plaintiff's theater, to refuse to perform, and abandon the contract.

The majority of the judges held, and the case was decided upon, the theory that remedies given by the common law in such cases are not in terms limited to any description of servants or service, and the action could be maintained upon the principle laid down in Comyns' Digest, that "in all cases when a man has a temporal

loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."

The position of Justice Coldridge was to the contrary that, as between master and servant, there was an admitted exception to the general rule of the common law, confining remedies by action to the contracting parties, dating from the Statute of Laborers, passed in 25 Edward III, and both on principle and authority limited by it. And that "the existence of intention, that is, malice, will, in some cases, be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequences." We have been referred to some American cases as being in harmony with the two cases mentioned. In Walker v. Cronin, 107, Mass., 555, it was held that where a contract exists by which a person has a legal right to continuance of services of workmen in business of manufacturing boots and shoes, and another knowingly and intentionally procures it to be violated, he may be held liable for the wrong, although he did it for the purpose of promoting his own business. But it was not alleged the defendant in that case had any such purpose in procuring the persons to leave and abandon the employment of the plaintiff, the real grievance complained of being damage by the wanton and malicious act of defendant and others.

In Haskins v. Royster, 70 N. C., 601, it was held that if a person maliciously entices laborers or croppers on a farm to break their contract, and desert the service of their employer, damages may be recovered against him. But both those cases relate to rights and duties growing out of the relations of employer and persons agreeing to do labor and personal service, and do not apply here, except so far as the decisions rest upon other grounds than the Statute of Laborers. In Jones v. Stanley, 76 N. C., 355, it was, however, held that the same reasons, which controlled the decision rendered in Haskins v. Royster, "cover every case in which one person maliciously persuades another to break *any* contract with a third person; it is not confined to contracts for service." But we have not seen any other case in which the doctrine is stated so broadly. Chesley v. King, 74 Maine, 164, we do not regard as at all decisive, because the court went no further than to say they were inclined to the view that there may be cases where an act, otherwise lawful, when done for the sole purpose of damage to a person, without design to benefit the doer or others, may be an invasion of the legal rights of such person. Cooley on Torts, 497, agreeing with Justice Coldridge, says: "An action can not, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it seems to us that rule harmonizes with both principle and policy, and to it, then, can be safely and consistently made but two classes of exception. For, as to make a contract binding, the parties must be competent to contract, and do so freely, the natural and reasonable presumption is that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English Statute of Laborers to apply where apprentices, menial servants and others, whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this State in virtue of, and as regulated by, our own statutes. The other arises when a person has been procured, against his will, or contrary to his purpose, by coercion or deception of another, to break his contract.

Green v. Button, 2 C. M. and R., 707; Ashley v. Dixon, 48 N. Y., 430.

But, as Wise was not induced, by either force or fraud to break the contract in question, it must be regarded as having been done by his own will and for his own benefit. And his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, can not seek redress elsewhere than from him.

That an action on the case will lie whenever there is concurrence of actual damage to the plaintiff, and wrongful act by the defendant is a truism, yet, unexplained, misleading. The act must not only be the direct cause of the damage, but a legal wrong, else it is *damnum absque injuria*. But, whether a legal wrong has been done for which the law affords reparation in damages, depends upon the nature of the act, and can not be consistently or fitly made to depend upon the motive of the person doing it. For, an act may be tortious, and, consequently actionable, though not malicious nor even wilful. If it was not so, there could be no reparation for an act of pure negligence, though ever so hurtful it its effects. And it is just as plain that an act, which does not, of itself, amount to a legal wrong without, can not be made so by a bad motive accompanying it; for there is no logical process by which a lawful act, done in a lawful way, can be transformed or not into a legal wrong, according to the motive, bad or good, actuating the person doing it.

The proposition is clearly and forcibly stated in Jenkins v. Fowler, 24 Pa. St., 308, as follows: "Malicious motives make a bad case worse, but they can not make that wrong which, in its own essence, is lawful. When a creditor, who has a just debt, brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff, by proclaiming his infamy, will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful, if the parties were friends, can not be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts."

In Frazier v. Brown, 12 Ohio St., 294, the cause of action stated was diversion, with malicious intent by the defendant, of subterranean water on his own land from adjoining land of the plaintiff. But it was held that there could be no recovery, because, as said by the court, "the act done to-wit: The *using* of one's own property, being lawful in itself, the motive with which it is done, whatever it may be as a matter of conscience, is, in law, a matter of indifference."

In Chatfield v. Wilson, 2 Williams, Ver., 219, the action was for the same cause, substantially, and the language of the court was, "an act, legal in itself, and which violates no right, can not be made actionable on account of the motive which induced it."

In Mahan v. Brown, 18 Wend., 261, the complaint was that the defendant wantonly and maliciously erected, on his own premises, a high fence, near to and in front of plaintiff's window, without benefit to himself and for the sole purpose of annoying the plaintiff, thereby rendering her house uninhabitable. But it was held that the action would not lie, because no legal right of the plaintiff having been infringed, the defendant had not so used his property as to

injure another, and, whether his motive was good or bad, she had no legal cause of complaint. To the same effect is the decided weight of authority in the United States. Adler v. Forston, 24 Howard, 412; Phelps v. Narlin, 72 N. Y., 39; Benjamin v. Wheeler, 8 Gray, 410; Glindon Iron Co. v Uhler, 75 Pa. St., 467; Auburn P. R. Co. v. Douglass, 5 Seldon, 444.

Upon neither principle nor authority could this action have been maintained, if the same thing it is complained appellee did, had been done by a person on friendly terms with appellant, Chambers, or by a stranger, though he might have profited by the purchase to the damage of appellants; for competition in every branch of business being not only lawful, but necessary and proper, no person should, or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other; nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser. Competition frequently engenders, not only a spirit of rivalry, but enmity; and, if the motive influencing every business transaction that may result in injury or inconvenience to a business rival, was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered. As pertinently inquired in Auburn P. R. Co. v. Douglass: "Independently of authority, if malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is this principle to stop?" And as correctly said by Lord Coldridge, in Benson v. Hall: "The inquiries to which this view of the law (making an act lawful or not, according to motive) would lead, are dangerous and inexpedient inquiries for courts of justices; judges are not fit for them, and juries are very unfit."

In our opinion no cause of action is stated in the petition, and the demurrer was properly sustained.

Judgment affirmed.

BECKETT, &C. V. SAWYER.

(*Filed Jan.* 15, 1891.)

Fraudulent conveyance—Where a wife gives her general consent to the sale of land to which she has the equitable title, and her husband, upon making the sale, vests the title in a stranger, and converts the proceeds to his own use, the wife and her children can not afterwards claim the land, although the husband committed a fraud on the wife, and the person receiving the title may have had notice of the husband's fraud.

It is necessary, to constitute a fraudulent conveyance, that the grantee should have notice of the fraudulent intent of the grantor, and that the person affected by the conveyance should have been deceived thereby.

Wilson & Rawlins and John L. Scott for appellants.

J. H. Tinsley for appellee.

Appeal from Knox Common Pleas Court.

Opinion of the court by Judge Bennett.

Mrs. Elizabeth Beckett and her children brought this action against the appellee to have the conveyance of the tract of land in controversy, by Mrs. Crain to the appellee, declared a trust for their benefit. Mrs. Elizabeth Beckett having died after the action was commenced, the action was revived in the name of the appellants. It is claimed that the land was purchased by the brother of Mrs. Beckett, and was, in most part, paid for with money belonging to her, and the deed was to be made to her and her children; but her husband, without her knowledge or consent, had the deed made to himself, but before the same was recorded, he sold the land to the appellee, and had the vendor to make a deed to the appellee, in lieu of the one made to himself; that this transaction was made with notice to the appellee that the land belonged to Mrs. Beckett and in fraud of her rights, &c.

The appellant's proof is to the effect that the appellee, before he purchased, had notice that Mrs. Beckett was the equitable owner of the land. He says that he did not have notice of that fact. This was the issue that the lower court had to pass upon, which involved the further issue as to whether the purchase was made without the consent of Mrs. Beckett. If the record shows that the sale was made to the appellee with the consent of Mrs. Beckett, then he is not amenable to the charge of fraud. It is shown by the proof that Mrs. Beckett did not consider the place a desirable residence for herself and family, and she desired to change her residence to some other place; and to that end she desired her husband to sell the place now in controversy; and he intended to do so. This understanding existed at the time the appellee made the purchase. Although there is no proof that the appellee was aware of this consent, yet he committed no fraud upon Mrs. Beckett if the land was sold with her consent. To constitute fraud in such case, there must be the concurrence of notice and want of consent to the sale. To constitute this consent, it need not be given directly to the purchaser; it is sufficient if the sale is made with the party's consent generally, although the purchaser may be ignorant of it. Even if the purchaser designed to defraud the equitable owner, and thought he was defrauding him, yet, if the equitable owner consented to the sale, he could not maintain an action to set the sale aside on the ground of fraud; for, to constitute fraud in fact, the party complaining must be actually or constructively deceived,; and, if he is not thus deceived, although the other party designs to deceive him, he has no grounds of complaint. The deceit, as said, in such case, consists in purchasing the person's equitable title with notice of it and without his consent. The proof is clear that the land was sold with the consent of Mrs. Beckett, although she may not have known of the sale to the appellee. Besides, he swears that he did not have notice of Mrs. Beckett's claim.

The judgment is affirmed.

CHAPMAN V. COMMONWEALTH.

(*Filed Jan.* 17, 1891—*Not to be reported.*)

Criminal law—Manslaughter—Instructions—Protection of property—This appeal is prosecuted from a judgment of conviction for manslaughter.

Appellant had armed himself with a pistol, and placed himself at the gate leading from his house, to prevent deceased from carrying away from the

premises a pot of paint, belonging, as alleged, to appellant. Deceased, on his approach to the gate, set down the paint, and he and appellant indulged in angry words, and a scuffle ensued, which resulted in both parties being thrown to the ground, when appellant shot deceased, which resulted in his death. Appellant complains of the action of the court in giving and refusing instructions. *Held*—That, though two instructions given were erroneous, they were not prejudicial. The instructions refused were based upon the idea that if appellant provided himself with a pistol, not for the purpose of injuring the deceased, or intimidating him, but only to protect himself in case he was assaulted by the deceased, then he had the right to do so; and, if he used it when he believed, and had reasonable grounds to believe, he was in danger, or apparent danger, of great bodily harm at the hands of the deceased, then he should be acquitted. These instructions were properly refused, because there was no evidence to support them. Although the deceased was a trespasser, carrying away property belonging to appellant, appellant could use no force greater than was necessary to retain his property, and was not justified in killing, or inflicting great bodily harm upon deceased, unless deceased first attacked him with such force as to put him in danger of losing his life, or suffering great bodily harm at the hands of deceased, which the evidence fails to show.

John Young Brown and John F. Lockett for appellant.

P. W. Hardin for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Holt.

The testimony in this case shows that the appellant, George W. Chapman, employed the deceased, Dan Jewell, to paint his house at an agreed price, the cost of the paint to be deducted, as the appellant was to buy it.

The deceased became dissatisfied while engaged at the work, probably because he found it was not likely to prove a paying job, and on the day of the tragedy left the work, telling his hand to also quit after he did certain work, and to bring away with him the paints. The appellant refused to let the hand take them. The latter left and reported the refusal to the deceased. He said, with an oath, that he would "go down there and straighten him out."

Arriving there, he went to rear door, where some angry words passed between him and the appellant. Finally, the deceased picked up a small pot of paint, worth not over twenty-five cents, the appellant having put away all but it, and started away, going around the house to the front gate. The appellant ran through the house, getting his pistol as he did so, and, arriving first at the gate, he placed his back to it, thus facing the deceased. As the latter tried to pass him, he told him to put down the paint, and put out his left hand to stop him, holding the pistol in his right hand, and down at his side. The deceased probably tried a second time to pass out, but the appellant stopped him. Angry words passed. The deceased put down the pot of paint and grabbed the appellant. A scuffle followed, resulting in their falling to the ground, and then the appellant shot Jewell. His death resulted. He was unarmed. The appellant was indicted for murder, but convicted of manslaughter, only, and sentenced to the penitentiary for four years. He asks a reversal upon the simple ground that the jury were misinstructed.

Proper instructions were given as to murder, manslaughter and self-defense. The jury were told, in substance, in the fourth instruction, that if the parties got into a dispute about the ownership

of paint which both claimed, and the appellant armed himself with the intention to kill Jewell, if necessary, to prevent him from taking away the paint, and forbade him doing so, and prevented his leaving, thus provoking a difficulty in which he purposely shot Jewell, then they should find him guilty of murder, although he was, at the time of the shooting, in danger of great bodily harm at the hands of Jewell; but guilty of manslaughter only, if he armed himself only to intimidate Jewell to cause him to give up the paint, and provoked the difficulty for this purpose.

The fifth instruction informed them that if the deceased was leaving the premises with the paint, and the appellant ordered him not to do so, under such circumstances, and with such hostile demonstrations that the deceased believed, and had reasonable grounds to believe, he was in immediate danger of great bodily harm, and there was, to him, no other apparent safe means to avert the danger, save to assault and disable the accused, and, in the difficulty thus brought on, the deceased was shot, then the plea of self-defense is not available.

It is claimed that these two instructions were erroneous, also that the court erred in not giving the two asked by the appellant, which are based upon the idea that if the appellant provided himself with a pistol, not for the purpose of injuring the deceased, or intimidating him, but only to protect himself in case he was assaulted by the deceased, then he had the right to do so; and, if he used it when he believed, and had reasonable grounds to believe, he was in danger, or apparent danger, of great bodily harm at the hands of the deceased, then he should be acquitted.

It is sufficient to say that these two instructions were properly refused, because the evidence does not present a state of case authorizing them. Nor is it necessary to determine whether the two given by the court were incorrect, because, in any view of the case, the appellant is guilty of manslaughter, and of this only has he been convicted.

The deceased was leaving the premises of the accused. The latter, with a pistol in his hand, stopped him. True, he was taking away an article, trifling in value, which the appellant claimed; but he had no right to take his life to get it, or to prevent him from carrying it away. One may prevent a trespasser from carrying away his property, using no more force than necessary for that purpose, and then not to the extent of taking life, or inflicting great bodily harm.

The owner can, at most, only use sufficient force to prevent the trespass or the carrying away of his property; and this right does not go so far as to authorize the taking of life, or the infliction of great bodily injury. He is not allowed to sacrifice human life in order to retain the possession. It is only when the owner, in attempting to prevent the trespass or the carrying away of his property is assaulted by the wrong-doer, that he may wound, *if necessary*, in defense of his person.

If it be said that the appellant was assaulted by the deceased when the former tried to prevent the latter from carrying away the paint, yet the extremity was not reached when he had a right to shoot the deceased. The appellant was not being menaced by any weapon. The deceased had none. They were in a scuffle, and had fallen to the ground, when the appellant shot the deceased. His person was not in such danger as authorized him to use a deadly weapon, and take life. If so, then whenever two persons become angry at each other, and one begins a scuffle, the other may, although

not in danger of death or great bodily harm, and without waiting for extremity to arise, take his life. We can not consent to such a doctrine. Such a rule is not necessary to uphold the right of self-defense, in its proper sense, and would be inimical to society, and a proper regard for human life.

The instructions, if erroneous, were, therefore, not prejudicial to the appellant; as, in any view of the case, he is guilty of manslaughter.

Judgment affirmed.

KIRK V. COMMONWEALTH.

(*Filed Jan.* 17, 1891—*Not to be reported.*)

Criminal law—Larceny—Where two sons, having possession of land, had cut and rafted logs and left them in a creek, and afterwards a sheriff, without any notice to the sons, made a sale of the logs, and delivered possession of them to their father, as purchaser, and the father and one of the sons run out the logs, without concealment, the father was not guilty of larceny, although the sale may have been made without due process of law.

P W. Hardin and S. G. Kenner for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Lewis.

The evidence in this case is uncontradicted, and conclusive that the two sons of appellant cut, hauled and rafted the logs he is charged with aiding one of them to steal and carry away from the place near mouth of Wolf creek, where they had moored the raft. Both of his sons testify they owned the land where the logs were cut, and, although the person claiming the logs says he was put in possession of the same land, he does not state with sufficient particularity how he was put in possession, nor whether it was done before or after the logs were cut and removed. The two sons having apparent right to the logs, and in possession of the raft, which they had put in the creek and attached to the bank by a cable, it was incumbent on the Commonwealth to show they had been divested of the title and possession in such manner as to authorize a belief the removal from its place was done with a felonious intent to steal the logs.

But all the evidence on the subject is, that the sheriff of the county sold the raft, and delivered it to the father of the present claimant, who bid for it, by untying the cable and putting it into his hands. But no one states for what purpose, nor under what legal process, if any, the sale was made; nor is there the slightest evidence that appellant, or either of his two sons, had any notice or suspicion a sale had been made, and they each swear, as witnesses, they did not know, or have any information a sale or attempted sale had been made Moreover, the raft was removed when a tide in the river occurred, openly and without any circumstances inducing a suspicion it was done with a felonious intent, and all the agency appellant had was to aid one of his sons, the other being absent, at his request, in getting it out of the creek, and then floating it down the river in full view of those near the river.

It seems to us, there is no evidence in this case which tends to show, or from which a rational inference can be drawn, that the

sons of appellant stole the raft, or that appellant, with any felonious intent whatever, aided them in removing it.

Therefore, the judgment is reversed, and cause remanded for a new trial.

BARNES V. BARNES.

(*Filed Jan.* 17, 1891—*Not to be reported.*)

Mistake—Correction of deed of conveyance—A court of equity, where the evidence shows clearly that a deed of conveyance was, by mistake, so drafted as to express a meaning different from the one intended and understood by all the parties thereto, will correct the deed by ordering the defective deed canceled, and another executed to conform to the intention of the parties.

H. Clay White for appellant.

Appeal from Grant Court of Common Pleas.

Opinion of the court by Judge Pryor.

It is well settled that a court of equity has the power to correct mistakes made in the execution of written instruments, and where it clearly appears from the weight of the testimony that the writing fails to contain that which the parties had agreed upon, and understood as being a part of the writing, the chancellor will correct it.

In this case the testimony is all one way, and shows plainly that the deed failed to express the terms upon which the conveyance was to be made, or rather the manner of passing the title from the father to the son. The parties to this conveyance seem not to know much of business transactions, and the son, who had the deed prepared, would not likely have known what character of title he had if he had studied carefully its contents.

C. W. Barnes was desirous of giving to his son, Jacob, a tract of land, wishing and intending to convey one-half of the land to his son, and one-half to his son's wife. A deed was prepared by a young lawyer, and, doubtless, as he supposed, the father of the vendee wanted it, by which the wife of the son was the only grantee, conveying to her the entire land for life, and, at her death, to her husband for life, and, at his death, to his children. This conveyance was signed by the father, without ever reading it, as the clerk swears, and, and from the entire proof, failed to express the intention and purpose of all the parties. The father, the draftsman and the son all testify as to how the conveyance was to have been made, and the land having been conveyed for love and affection alone, we perceive no reason why the wishes and purposes of the parties should not be carried out. The father should be permitted to give his estate as he pleases, and with the consent of the grantee, and the evidence being conclusive as to the mistake, it should be corrected.

The attorney thought he was drawing a deed, similar in its provisions made by the grantor to another of his children; but, upon an examination of that conveyance, the two are entirely dissimilar. The children of the grantee being before the court, and the case showing a clear and palpable mistake in the execution of the instrument, the relief asked for should have been granted.

The judgment is, therefore, reversed, with directions to cancel the conveyance of C. W. Barnes to Clara J. Barnes, dated on the 5th of January, 1883, signed on the 14th of November, 1885, and ac-

knowledged on the 6th of January, 1886. After cancelling that conveyance, the chancellor will then direct the grantor, if living, to execute a conveyance to his son, and his son's wife, uniting them with a joint interest in fee in the land described in the canceled deed. If the grantor is dead, or refuses or is unable to make the conveyance, a commissioner will make it for him.

COMMONWEALTH V. C. & O. R. R. Co.

(*Filed Jan.* 17, 1891.)

Criminal law—Failure to give bond to receive county subscription—Parties to action—The appellant, as lessee of the E. L. & B. S. R. R. Co., was indicted in the Montgomery Circuit Court for failing to execute bond for the faithful application of the money received from subscription by said county in aid of the lessor company. Appellant, having received no part of the money or bonds issued in aid of said road, claims that it is not liable to said penalty.

The act of April 9, 1873, authorizing the issue of bonds, required the company to execute a bond for the faithful application of said bonds, but prescribed no penalty in case of failure to execute said bond. On April 12, 1873, another act was passed imposing a penalty on all corporations that were in the use of corporate powers and franchises before the use of which bond is required to be executed for failure to execute said bond. *Held*—That the last named act can not be construed as a part of the former act nor can the appellant as lessee, be held liable to any penalty that may have been prescribed against any tortious act or neglect on the part of its lessor. Only the property and franchises of the lessor company remain and it can not commit a criminal act. An offense can only arise from the act of some person.

P. W. Hardin, J. L. Elliston, M. M. Redwine and T. Turner & Son for appellant.

Breckinridge & Shelby for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as the lessee of the Elizabethtown, Lexington and Big Sandy Railroad Co., was indicted in the Montgomery Circuit Court for operating its road, &c., in said county without having given bond for the faithful application of the money arising from the subscription by said county, in aid of the building of said Elizabethtown, Lexington and Big Sandy Railroad, for which sum bonds of the county were issued to said road. But the present appellee received none of said bonds.

The act of the 9th of April, 1873, requires the county judge, or other person authorized to issue county, precinct or city bonds, in aid of any railroad, &c., to execute covenant to such county, precinct, &c., that the said bonds or money shall be faithfully and honestly applied to the object for which they were subscribed, &c.

This act prescribes no penalty whatever for a failure, on the part of the road, to execute this covenant. It is made the duty of the county judge, &c., to require such covenant of the road, &c., before issuing the bonds in its aid; but his failure to require such covenant before issuing said bonds, or the failure of the road to execute the same, does not make it criminally liable for such failure. In such

case, it is simply a failure of official duty on the part of the county judge, &c., for which he is responsible.

On the 12th day of the same month and year, the Legislature passed another act; by the third section of which it is sought to make the appellee liable. Said section is as follows: "That, if any corporation, persons or individuals, who are in the use of corporate powers, franchises or privileges, *before the use of which a bond or bonds is required to be executed, shall attempt to use, or shall hereafter use or exercise, any corporate powers, franchises or privileges so granted him, them or such corporations*, without first giving the bond or bonds, by the laws under which they claim such powers, franchises or privileges," he or they "shall be fined," &c. The "bond or bonds" mentioned in this section, evidently means such bond or bonds as the law requires the corporators to execute before exercising the "corporate powers and privileges" granted to them. There is nothing in said section requiring the appellee, or its predecessor, to execute the covenant to said counties, &c., as a condition precedent to its right to exercise its "corporate powers or privileges" which are usually found in their charter. There is nothing in the charter of the Elizabethtown, Lexington and Big Sandy Railroad, nor in any general law, that requires said "covenant" to be executed "before" it could exercise its "corporate powers, franchises and privileges." It may be, as the right to amend said charter was reserved, the Legislature had the right to require such covenant as a condition precedent to its right to the further exercise of the "corporate powers, privileges," &c., and it may be that the framers of the act of the 12th of April, *supra*, intended the third section thereof in reference to requiring the execution of said covenant, and the penalty for a failure to do so, to be supplemental to the act of the 9th of the same month, and as requiring the execution of said covenant as a condition precedent to the right of such corporations to further exercise their corporate powers and privileges; but, if such was their intention, they shot wide of the mark; for the language they employed conveys no such meaning. Besides, the county bonds were executed in aid of the Elizabethtown, Lexington and Big Sandy Railroad Co., whose duty it was, if required, to execute covenant to said county.

If said road was in default in that regard, it was guilty of a negligence or wrong, for which its lessee, the appellee, is in nowise responsible; although the appellee is using the same property, &c., it is not responsible for the negligence or wrong of its predecessor; for, the property can be guilty of no negligence or wrong—human beings alone can be guilty of that; and to impose a penalty upon persons because of the negligence or wrong of their predecessors, who are lessors only, in the management of the same property, would be revolting to the first principles of justice.

The judgment is affirmed.

COMMONWEALTH V. MAYNARD.

(*Filed Jan.* 17, 1891.)

Criminal law—False swearing—Perjury—Indictment—This appeal questions the sufficiency of an indictment which reads as follows, viz: That appellee, "being on trial before D., a justice of the peace for Pike county, charged with a breach of the peace upon one Lawson, did, after having been duly

sworn as a witness for himself, by the said justice, who was authorized to administer the oath, wilfully, corruptly and knowingly falsely swear and testify that Lawson, during the difficulty, came out of the house with a pistol, which he drew on him, when, in truth, Lawson did not do so, and that his evidence was known by the appellee to be false, and was wilfully and corruptly given." *Held*—That said indictment was sufficient to constitute either the offense of perjury at common law, or the offense of false swearing, as described in section 2, article 8, chapter 29, General Statutes, and the Commonwealth could elect which offense it would try.

2. *Jeopardy*—A demurrer having been improperly sustained to an indictment for felony, the defendant has not been put in jeopardy, and, after the reversal, may be tried upon the indictment.

P. W. Hardin and S. G. Kenner for appellant.

Appeal from Pike Criminal Court.

Opinion of the court by Chief Justice Holt.

The appellee, James Maynard, was indicted for giving false evidence, under section 2, article 8, chapter 29, of the General Statutes, which provides: "If any person, in any matter which is or may be judicially pending, or on any subject in which he can legally be sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall, wilfully and knowingly swear, depose, or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years."

The indictment charges that the appellee, being on trial before Lewis Duskins, a justice of the peace for Pike county, charged with a breach of the peace upon one Lawson, did, after having been duly sworn as a witness for himself by the said justice, who was authorized to administer the oath, wilfully, corruptly and knowingly, falsely swear and testify that Lawson, during the difficulty, came out of the house with a pistol, which he drew on him, when, in truth, Lawson did not do so, and that this evidence was known by the appellee to be false, and was wilfully and corruptly given.

A demurrer was sustained to the indictment, and the appellee discharged.

We are at a loss to see upon what ground this was done. It is said, in argument, that it was because the court thought that, upon the averments of the indictment, the accused should have been charged with perjury, instead of giving false evidence. Our statute does not define perjury. It simply says that one guilty of it shall be punished by confinement in the penitentiary not less than one nor more than five years. The punishment for the two offenses is the same.

We must look to the common law, therefore, to see what constitutes perjury. As there defined, Bishop says, it is the wilful giving, under oath, in a judicial proceeding, or in the course of justice, of false testimony material to the issue or point of inquiry. 2 Bishop's Crim. Law, section 1015. Substantially the same definition is given in volume 2, section 2198 of Wharton's Criminal Law.

The evidence need not be given in court to constitute the offense, but it must be by oath, in some form allowed by law, in the course of justice. It must be connected with the administration of the law. The offender must have been properly sworn by one authorized to administer the oath. It must be absolute and false, and made with wilful intent. It must have been material to the issue,

and in pleading, the matter alleged to have been sworn should be negatived by special averment.

The indictment need not aver, in so many words, that the oath or testimony was material, but, at least, the facts so showing must be set out. These are the elements of perjury at common law.

Section 134 of our Criminal Code, says: "In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court, and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned."

This provision does not do away with the necessity of the indictment averring or showing materiality of the testimony. By providing that it should set out the "matter in respect to which the offense was committed," it was intended that the materiality of the oath should appear. While, however, all this is substantially shown in this indictment, and while its averments would have supported the indictment, if the charge had been perjury, yet, they are also sufficient under the statute relative to giving false evidence.

It is averred that the accused was properly sworn by one authorized to administer the oath as to a matter judicially pending, and as to which he could be lawfully sworn, and that he wilfully and knowingly swore to that which was false.

The offense, under the statute, is complete, if it appear that the false oath was taken knowingly and wilfully, as to a subject upon which the party could be legally sworn, and before a person legally authorized to administer it.

It is manifest that the statute was intended to embrace a class of offenses not amounting to perjury at common law; cases of false oaths not made in the administration of or course of justice; but we fail to see why, when the Commonwealth has a case, which, according to the statements of the indictments, authorize it to proceed either for perjury, or for the statutory offense, it may not do so. Clearly it has its election.

The demurrer to the indictment should be overruled; and, as the accused has not been put in jeopardy, the judgment is reversed with directions to do so, and for further proper proceedings.

KENTUCKY SUPERIOR COURT.

ROBERTS V. COOPER'S ASSIGNEE.

(*Filed Oct.* 1, 1890.)

1. *Sureties—Contribution*—If one of several co-securities subsequently takes a security from the principal for his own indemnity, it inures to the common benefit of all the sureties.

2. *Same*—If, by the negligence of one surety, any security which he holds

has depreciated or been lost, he will be chargeable with the amount of such security to his co-sureties in an adjustment of their proportion of the debt.

3. *Same*—Where one took an assignment of a policy of insurance to indemnify him against any existing or future liability as surety for the assignor, the security did not inure to the benefit of one who, subsequent to the assignment, became bound with the assignee as surety for the assignor. The assignee had the right to apply the entire proceeds of the insurance to the payment of the obligations upon which he was bound as surety for the insured at the date of the assignment of the policy.

J. D. Carroll for appellant.

W. B. Moody for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Young.

In September, 1880, J. M. Barnes had his life insured in the Presbyterian Mutual Insurance Company, of Louisville, Ky., and said J. M. Barnes assigned the benefit of said policy to J. E. Cooper to indemnify Cooper on obligations already incurred, and against any obligation which he might assume for Barnes in the future. At the time of this assignment, it appears from the proof that Barnes was indebted in the sum of $1,443.

On the 2d of October, 1885, J. M. Barnes borrowed of the National Bank of Newcastle, Ky., the sum of $525, due in four months, and gave appellant, J. W. Roberts, and appellee, J. E. Cooper, sureties thereon. November 27, 1885, said Barnes borrowed of the Deposit Bank of Eminence, Ky., $75, and executed note for same, due in four months, with same parties as securities.

October 30, 1885, said Barnes borrowed of said Deposit Bank of Eminence $300, and executed note for same, due in four months, with same securities.

J. M. Barnes died in a few months after the said notes were executed. In the settlement of his estate it proved to be insolvent, and only paid about 20 per cent. of his liabilities.

Appellee, J. E. Cooper, paid the $525 note to the national bank and the $75 note to the Deposit bank in full, and one-half of the $300 note to the Deposit bank, the appellant, J. W. Roberts, failing to pay any part of them.

In 1888 J. E. Cooper made an assignment of all of his property to the appellee, A. R. Cooper, for the benefit of all his creditors.

A. R. Cooper, assignee of J. E. Cooper, instituted an ordinary action against appellant to require him to pay his part of the notes paid by Cooper, and an equitable action to require him to pay one-half the note the other half of which Cooper had paid.

The two actions were consolidated with a suit by the assignee to settle the estate of Cooper.

The defense relied upon by appellant, that in 1880 J. M. Barnes, the principal in the notes, by and with the consent of the Presbyterian Mutual Insurance Company, in which he held a policy payable to himself for $2,000, assigned and delivered said policy to Cooper to "secure and indemnify him, as the surety of Barnes, in any notes, debts or obligations, upon which he was then or might thereafter become bound as security;" that Cooper accepted the policy, and, upon the death of Barnes, which occurred in 1886, collected from the insurance company $1,376, which amount he accepted in full payment of the policy, and that Cooper is chargeable with the full amount of the policy, &c.

The appellant contends, first, that the policy was assigned to Cooper by Barnes, to protect Cooper and other persons bound with him as sureties for Barnes, and appellant, being so bound, is entitled to share with Cooper the benefits of the money received on the policy; second, that Cooper was bound to exercise reasonable diligence in endeavoring to collect the full amount due on the policy, and if he failed to do this, and, in consequence of such failure, a part of the amount due was lost, he is liable to the appellant for the amount so lost.

At the time of the assignment of the policy by Barnes to Cooper, in 1880, Cooper was bound, as appears, as surety for Barnes in obligations amounting to the sum of $1,443, and that he had paid those debts, or was still liable for them, except to the extent of 20 per cent. paid by Barnes' administrator.

It is a well-settled principle of equity that if one of several co-securities subsequently take a security from the principal for his own indemnity, it inures to the common benefit of all the sureties. Morrison v. Poyntz, 7 Dana, 307; 17 Mass., 163; McCune v. Beth, 45 Mo., 174.

The reason of this rule is that sureties are bound to observe good faith towards each other, and when funds are placed in the hands of one surety by the principal, to be applied either to the payment of the debt or for the purpose of indemnifying him against any loss that may arise from the suretyship, he must be considered as holding them for the common benefit of all concerned.

If by the negligence of one surety any security which he holds has depreciated or been lost, he will be chargeable with the amount of such security to his co-securities in an adjustment of their proportion of the debt. Goodloe v. Clay, 6 B. Mon., 237.

The assignment of the policy was made to Cooper by Barnes, in 1880, for what purpose? "To secure and indemnify *him*, as the surety of Barnes, in any notes, debts or obligations upon which he (Cooper) was then or might thereafter become bound as his security." It is evident that all of the co-securities of Cooper on any obligations of Barnes, at the date of this assignment, that the security taken by Cooper inured to the common benefit of all the then securities, and it would have inured to the common benefit of all the securities of Barnes, who were such at the date of the assignment of the policy. At the date of the assignment of the policy of insurance to Cooper, Cooper was bound, as Barnes' security, on notes and other obligations in the sum of $1,443. What interest could the appellant, Roberts, have had in this policy in 1880, when he did not become the security of Barnes until 1885? At the time Roberts became the surety of Barnes, he could not have relied upon this policy of insurance as constituting a portion of the estate of Barnes, because it had been assigned five years before.

Cooper had the right to apply the proceeds of the policy of insurance to the payment of the obligations that he was on as security for Barnes, at the date of the assignment of the policy, and we have seen that those obligations then amounted to the sum of $1,443.

The appellant contends that Cooper only collected $1,376 on the policy after Barnes' death, and that he failed to exercise reasonable diligence in endeavoring to collect the full amount due on the policy, and if he failed to do this, and, in consequence of such failure, a part of the amount due was lost, he is liable to appellant for the amount so lost.

It is in evidence that the insurance company was based upon the mutual plan, and, when a member died, the members were assessed

to pay the policy, and that when Barnes died the legal assessments on those members living could only be assessed and collected on a $2,000 policy. The sum of $1,376, the amount collected by Cooper as the debts and obligations that Cooper was bound for at the time of the assignment, amounted to the sum of $1,443, and, as he had the right to apply the money received on the policy to the payment of this sum, there was no money left to be applied on the debts that appellant was bound on as co-security with Cooper.

The judgment of the lower court being based upon the views entertained by this court, the same is affirmed.

Judge Barbour not sitting.

SUPERIOR COURT ABSTRACTS.

STANDARD LIFE AND ACCIDENT INSURANCE CO. v. THOMAS.

Filed December 10, 1890. Appeal from Warren Circuit Court. Opinion of the court by Judge Yost, reversing.

Accident Insurance—Verdict against evidence—In this action upon an accident insurance policy to recover for the death of the insured, the evidence showed that the insured fell on the 12th of June, bruising his side; that he was taken sick in a few days thereafter, and died on the 2d of July. The physicians testified t at he died of typhoid fever, which did not result and could not have resulted from the fall. A nurse of long experience testified that the insured did not have typhoid fever. *Held*—That the evidence preponderates so decidedly in favor of the theory that the insured died of a disease not brought on by the accident, the court should have set aside a verdict in favor of plaintiffs.

Galloway & Sims for appellant; W. T. Cox and Edward W. Hines for appellee.

STANDARD OIL CO. v. COMMONWEALTH.

Filed December 17, 1890. Appeal from Hopkins Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Indictment for buying empty coal oil barrels without erasing inspector's brand*—The act of April 8, 1878, which imposes a penalty upon any person who shall buy or receive empty coal oil barrels without first erasing all marks or brands "now" required by law to be marked or branded on a barrel by a county inspector, does not authorize the punishment of one who buys empty coal oil barrels without erasing brands which, at the time of the passage of the act of April 8, 1878, were not required by law, although required by a subsequent law. And with the exception of the act of April 8, 1878, there is no law which makes it an offense to buy an empty coal oil barrel, no matter how it is branded.

2. *Same—Variance*—Under an indictment charging the defendant with buying empty coal oil barrels marked "standard oil" he can not be convicted upon proof that he bought barrels marked "standard fire test," al-

though the two brands may be generally understood to mean the same thing.

Gordon & Gordon, C. J. Waddill, Humphrey & Davie for appellant; James B. Garnett and P. W. Hardin for appellees.

ABERNATHY & LONG v. WHEELER, MILLS & CO.

Filed December 17, 1890. Appeal from Christian Court of Common Pleas. Opinion of the court by Presiding Judge Barbour, reversing.

Sale by warehouseman of goods not belonging to his principal—A commission merchant or warehouseman to whom goods are consigned or delivered for sale, and who, in ignorance of any claim by other parties or want of title in his principal, sells the goods and pays over the proceeds to his principal, who, it is afterwards discovered, was not the owner or authorized to sell them, is not liable to the real owner for the value of the goods.

Petrie & Downer and D. L. Johnson for appellants; Henry J. Stites for appellees.

WILLIAMS & HOPKINS v. CALLOWAY.

Filed December 17, 1890. Appeal from Henry Circuit Court. Opinon of the court by Presiding Judge Barbour, reversing.

The statute of frauds extends to all contracts which are not to be carried into full, effective and complete execution within the space of one year from the making thereof. Part performance within the year will not render the contract enforceable.

Plaintiff contracted with defendant to breed his mare to their stallion, the colt to be delivered to defendants at weaning time, when they were to pay plaintiff $100. Defendants refusing to receive and pay for the colt when tendered, this action was instituted to recover the $100. *Held*—That as the time fixed for the delivery of the colt and the payment of the price could not, in the course of nature, arrive within one year from the making of the contract, the contract was within the statute of frauds, and, not being in writing, is not enforceable.

John D. Carroll for appellants; Wm. Carroll for appellee.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. OWEN, &c.

Filed December 17, 1890. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

1. *Railroads—Duty to provide safe means of unloading stock*—If the means furnished by a railroad company for unloading a horse, which it has undertaken to carry, were insufficient and unsuitable, the company is liable for the damages resulting therefrom, even though the wildness or viciousness of the horse may have contributed to the injury and although the shipper may have been apprised of the danger.

2. *Special contract limiting liability of carrier*—Public carriers are bound to carry property within the scope of their business under such contracts as the law implies, unless the shipper freely and understandingly enters into a special contract. Therefore, where the carrier undertakes to carry property with the knowledge of its value, and the shipper does not read a clause in the contract limiting the liability of the carrier, and its conditions are not understood by the him or suggested to him, he is not bound by the limitation.

3. *Contract by carrier for shipment over connecting lines*—A carrier has the power, unless forbidden by its charter, to contract for shipments over its own and any connecting lines to the destination of the goods to be shipped, and this shipper has the right to infer that the agent of the carrier has the authority to make such a contract, no other company being named in the contract.

Wm. Lindsay and Barnett, Miller & Barnett for appellant; Humphrey & Davie and L. C. Willis for appellees.

McGILL'S ADMINISTRATOR v. RICHARDS, &c.

Filed December 17, 1890. Appeal from Hardin Circuit Court. Opinion of the court by Judge Young, reversing.

1. *Gifts from principal to agent—Fraud presumed*—Alleged gifts by an old woman to two friends who had charge of all her business, and whom she consulted as to all her affairs, are prima facie void, by reason of the confidential relation which existed, and the burden is upon the persons claiming as donees to show that the gifts were the voluntary and unbiased act of the donor.

All the facts and circumstances show that there was, in fact, no gift, but that the persons claiming as donees, received the property in controversy in trust for distribution among the nieces and nephews of the alleged donor.

2. *Evidence as to transaction with decedent*—The persons seeking to establish the gift are not competent to testify for themselves, the alleged donor being dead, but each may testify for the other.

J. P. Hobson and S. H. Bush for appellant; J. C. Poston and John S. Sprigg for appellees.

COMMONWEALTH v. COFFEE.

SAME v. SOUTHERN NATURAL GAS AND OIL COMPANY.

Filed January 9, 1891. Appeal from Martin Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Correction by county court of assessments—The county court has no supervisory jurisdiction over assessments which have been examined and approved or corrected by the board of supervisors for the county; its jurisdiction exists only when, after the board of supervisors have acted, assessments are made of persons and property which have theretofore been omitted.

P. W. Hardin for appellant.

RHODES v. COMMONWEALTH.

Filed January 14, 1891. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Keeping bawdy-house*—Upon the trial of appellant, who was indicted jointly with another for keeping a bawdy-house, the court should have given the jury a peremptory instruction to find for defendant, there being nothing to connect him in any way with the keeping of the house complained of. The mere fact that he was notified that a bawdy house was being kept by his co-defendant was not sufficient to convict him without proof of his ownership or control of the premises.

2. *Same*—A house may be a disorderly house, and yet in no sense a bawdy house. It was, therefore, error to instruct the jury that if they believed appellant was the owner of the house during the time alleged in the indictment, and had notice that his co-defendant was keeping a "disorderly house," and took no steps to suppress it, they should find him guilty.

3. *Same*—As the indictment states facts constituting a public offense within the jurisdiction of the court, is not so defective as to authorize an arrest of judgment. Whether or not it would have been good on demurrer is not decided.

John Young Brown, Edward W. Hines and F. M. Hutcheson for appellant; P. W. Hardin for appellee.

KENTUCKY CENTRAL RAILWAY COMPANY v. MARTIN.

Filed January 14, 1891. Appeal from Harrison Circuit Court. Opinion of the court by Judge Yost, reversing.

Railroads—Killing of stock on track—Contradictory instructions—The employes of a railroad company in charge of a train, upon the discovery of stock

upon the track, are required to use only such means to prevent injury to the stock as are consistent with the safety of the train. It was, therefore, error in this case to instruct the jury that it was the duty of those in charge of the train to use all the means in their power to prevent injury to stock upon the track. And the error in this instruction was not cured by an instruction telling the jury that they must find for defendant if they believed the servants in charge of the train, after discovering the stock upon the track, used all the ordinary means in their power, consistent with the safety of the train, to prevent the injury. It should not be left to a jury to harmonize inconsistent and contradictory instructions.

T. T. Forman for appellant; Swinford & Evans for appellee.

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KENTUCKY COURT OF APPEALS.

TRUSTEES OF SCHOOL DISTRICT NO. 1 v. JAMESON.

(*Filed Jan.* 17, 1891—*Not to be reported.*)

School superintendent—Condemnation of school house—Taxation—Where a tax was imposed by the trustees of a common school district for the purchase of a site and erection of a new school-house in the district where the old one had been condemned, by the county superintendent, as unfit for such purpose, a tax-payer can not enjoin the collection of it, on the ground that such expenditure was unnecessary. The decision of the county superintendent, in ordering the condemnation, is final; and the trustees were authorized to levy the tax, after receiving notice of condemnation from the superintendent, and it is immaterial whether said notice was verbal or in writing, or whether the order of condemnation was entered on the record of the superintendent before or after the notice was given, or whether said order was entered at all on the said records. The judgment of the county superintendent and trustees seems to have been exercised wisely in this instance, in both changing the site of the school-house from the verge of a precipice, which endangered the lives and limbs of the children, to a place better suited for its location, and in erecting a new and more comfortable building for the teacher and children, as the old building was a log structure that had been erected about forty years ago, and had become very much dilapidated.

Boles & Duff and Thomas H. Hines for appellants.

Lewis McQuown for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor.

This appeal is prosecuted from a judgment below, by which an injunction was made perpetual against the trustees of school district

No. 1, in Barren county, preventing them from collecting a tax levied for the purpose of building and furnishing a school-house within the district. The appellees, who are some of the tax-payers, allege that the school-house already built and located within the district was sufficient, in every respect, for the comfort of both the teacher and the children, and that it had never been condemned, for any cause, by the county superintendent. This is the only issue made except the further averment that colored persons reside within the district, who own property liable for taxation, and perhaps others whose property is held to be exempt, and that such discrimination in the imposition of the tax is illegal and in violation of the constitution. The constitutional question involved has been settled by this court in the case of Marshall v. Donovan, 10 Bush, 681. That the trustees have the power to order the tax for the purpose of purchasing a site and building a school-house, was decided by this court in the case of Macklin v. Trustees, MS. opinion, and, therefore, no question can arise in this case affecting this power on the part of the trustees, if the old school building had been condemned by the county superintendent, and notice given the trustees of that fact. It is made the duty (under the school law of the State) of the superintendent to condemn dilapidated school buildings, when unfit for the uses designed, and when this is done, and the trustees notified by the superintendent, it becomes their duty to have the old one repaired or a new building erected. Section 7, or articles 6 and 8, General Statutes, pages 1155 and 1167. The superintendent stands between the trustees and the tax-payer, and to him is confided the duty of seeing that the children have comfortable buildings in which to be taught; and the tax-payer, when the law has been complied with, must pay the tax.

In this case, notice was given the trustees by the superintendent, and the property condemned by him, for the reason that it was not suitable for a school building. It had been occupied as such for a period of forty years; was constructed of logs, and in a rotten and dilapidated condition, and better suited for the abode of bats and owls than a school-room for children. It is argued by the appellees that no necessity existed for a new building. They had no right to make such an issue. This was with the trustees and the superintendent, who have had erected a comfortable school building, on another site, at an expense of less than $500. There is no pretense that the money was squandered, or that any advantage had been taken of the tax-payers by the trustees, but, on the contrary, it is plain that they acted in good faith, and in the interest of the children who lived in the particular district.

It is said that the superintendent never condemned this school building, and testimony has been introduced contradicting his statement in this regard. He testified that he did condemn the property, and the trustees say they were notified, and, acting in accordance with the notice, had the building erected. It is insisted that the trustees should have seen the order of condemnation, although they had been notified by the superintendent that a better house was required, and that the old one had been condemned. It was not necessary that they should have seen the order condemning the property; and, if the building of a school-house, or the necessity for it, is to be determined by the tax-payers and not the superintendent or trustees, there would, in every case, arise a contest between the reluctant tax-payer and these officials as to the necessity of imposing a tax for school buildings.

Here the necessity for the building is manifest. The building has

been erected, and after condemnation, and whether on the order book of the superintendent before or after notice, it is sufficient.

The levy is for building and furnishing the school-house. This necessitates a site upon which to build, and the trustees were wise in not locating the new building on the site of the old one, because, from the testimony, it was so near a dangerous precipice as to endanger the lives of the l ttle ones, who were often tempted to play upon its edges. Some had, in fact, been injured by falling into the sink, and there was as much necessity for changing the location of the building, as there was for building a new one.

This judgment must be reversed, and the cause is remanded with directions to dismiss the petition.

Judge Pryor delivered the following response to petition for rehearing:

It is still urged in the petition for a rehearing that the school building was not condemned when the testimony of the trustees uncontradicted, is to the effect that they were notified that the building had been condemned; and it is also argued that the notice should have been in writing, and, for that reason, was insufficient. We have examined the statute and find no such provision, nor is any such notice required to be in writing. The trustees might demand it, to preserve evidence of their right to tax, but for no other reason. It is again said that the order of condemnation should appear on the books of the superintendent, and, there having been no such order, the proceeding to tax was illegal. While it is the duty of the superintendent to keep a record of his acts, conceding for the purposes of this case, that the testimony of tne superintendent is to be disregarded, as well as the entry on his books, and yet the failure to enter his acts of record is no defense to the tax. It is not a court of record, nor is the trustee of a school required to go to the office of the superintendent and see that he has a record of his acts. All required of them is to know from the superintendent that the building has been condemned, and if, in good faith, they then proceeded to erect a new building, the chancellor ought to protect them. In this case, however, the superintendent and his books show a condemnation, and there is every equitable reason for holding these trustees blameless in the proceeding.

Petition overruled.

USHER'S EX'ORS V. FLOOD.

(*Filed Jan.* 22, 1891—*Not to be reported.*)

Decedent's estate—Demand and proof of claims—A testator, having placed a person in possession of land, in consideration of valuable services rendered to the testator, he will not be ejected from the land, although there may be no written evidence of the transfer of title. The testator, being the best judge of the value of said services, and having given the land as compensation for same, the chancellor will not fix the value of said services at a sum less than the value of said land.

Where a suit, setting up a claim against a decedent, has progressed until issues have been made up, it is too late to object to the further prosecution of same, for want of demand and proof of its justice.

While no judgment, enforcing said claim, can be rendered until an affidavit of the claimant as to its justice is made, where the record contains ample proof of the claim, after the claimant's affidavit is made, judgment should be entered.

A. P. Humphrey and Lytle Buchanan for appellants.

E. E. McKay and Lane & Harrison for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

We have again examined carefully the case with the testimony in which the opinion in Usher's ex'ors v. Flood was rendered. That Usher gave to the appellee the house and lot, and placed him in possession, is well established, and the only reason the testator had for making this donation was in consideration of the valuable services rendered to him by the appellee during a long period. That the testator regarded his services as more valuable than the compensation received, is manifest, as nothing else could have prompted him to make such a liberal allowance to the appellee. He knew what service the appellee had rendered, and has himself fixed the compensation to be made, and we are not disposed to allow less than the sum fixed by one who knew more of his obligation to the appellee than all the witnesses on both sides of the controversy. It is both just and equitable to carry out the plain purpose of the testator, and the fact of the absence of a writing passing the title should not prevent the chancellor from allowing a sum equivalent to the value of the house and lot, and the chancellor having done this, judgment to that extent will not be disturbed. There was no demand made of payment of the personal representative, or affidavit as to the justice of the claim; but the case had proceeded as if the parties to the original transaction were living, and a judgment rendered.

No objection seems to have been made until the question was raised by the commissioner, and, as the testimony is all in showing the existence and justice of the claim, no other proof is necessary; but the affidavit of the claimant must be made, as required, before the personal representative is required to pay the claim. No claim shall be allowed by a commissioner or court, which is not verified by affidavit, as required by the statute in 39, General Statutes. The affidavit of the justice of the claim must be made by the claimant before judgment; and, as the court has before it the sworn testimony as to its correctness, the judgment should be set aside, the affidavit of the claimant allowed to be made, and then the judgment rendered. Worthey's adm'r v. Hammond, 13 Bush, 516; Perry v. Seitz, 2 Duvall, 122.

Judgment reversed, and remanded for proceedings consistent with this opinion.

HENDERSON NATIONAL BANK V. ALVES, ASSIGNEE, &C.

(*Filed Jan.* 22, 1891.)

1. *Usury—Jurisdiction of State courts*—This is an action to recover of a national bank, in a State court, twice the amount of interest paid on notes discounted by said bank, where interest greater than the legal rate was received, under section 5198, Revised Statutes of the United States. Said statute expressly recognizes the right of State courts to grant relief in such cases, but it is contended that, unless jurisdiction was expressly conferred on such courts by the State Legislature, no such jurisdiction can be exercised. *Held*—That rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or

in the State courts competent to decide rights of the like character and class, subject, however, to the qualification that when a right arises under the law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. Consequently, the circuit court had jurisdiction to grant the relief prayed for.

2. *Limitation*—Under the statute of the United States, the statute of limitation begins to run "from the time the usurious transaction occurred." In this instance, the usurious interest was paid at the date of the notes, and the cause of action to recover same is barred two years after said date.

3. *Parties to actions—Assignment*—The term *legal representative*, as used in the statute, comprehends an assignee, under a deed of trust for the benefit of creditors, and the action to recover usury, paid by his assignors, could have been maintained by him alone, as he is entitled, in his representative capacity, to what may be recovered.

4. *Pleadings—Demurrer*—The failure of the petition to allege what statute the recovery was sought under, was not fatal on demurrer in this case, as the federal statute is the only one under which the recovery could be had. The statute authorized a recovery only where the usury was *knowingly* received by the bank, and the petition, failing to contain this allegation, was fatally defective; although the proof showed that the cashier received the usury *knowingly*, the defect in the petition was not cured thereby.

Wm. Herndon and Yeaman & Lockett for appellant.

John Young Brown, J. F. Clay and E. G. Sebree for appellees.

Appeal from Henderson Circuit Court.

Opinion of the Court by Judge Lewis.

By section 5197, Revised Statutes of the United States, it is, in substance, provided that any banking association, organized under act of Congress, may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State * * where the bank is located, and no more. Section 5198 is as follows: "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action for debt, twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court, in the county or city in which said association is located, having jurisdiction in similar cases."

This action was brought October, 1886, by Reutlinger and Eisfelder, suing for use of W. S. Alves, their assignee, and by the latter suing for himself, as assignee, to recover of Henderson National Bank judgment for twice the amount of interest alleged to have been paid at the rate of eight per cent. per annum, on divers notes, for borrowed money described in the petition. And judgment having been rendered for part of the amount sued for, defendants have appealed, plaintiff prosecuting a cross-appeal.

To the petition were filed special demurrers, that the plaintiff,

W. S. Alves, as assignee, has not legal capacity to sue, and that the court has no jurisdiction of the subject of the action, and also a general demurrer.

1. It seems to us the term, "legal representative," used in the statute, comprehends an assignee, under a deed of trust, for benefit of creditors, such as Alves is, and the action might have been maintained, if at all, by him alone; for he is entitled in his representative capacity to what may be recovered.

2. The question of jurisdiction of State courts of cases like this has never been directly presented to or decided by this court.

In Haney v. Sharp, 1 Da., 441, decided in 1833, a warrant was issued against the defendant for a penalty denounced by an act of Congress for refusing to give to the marshal a list of his family, when required to do so, for completing the fifth census, and on appeal from the judgment against him, this court used the following language: "The courts of this State, deriving their jurisdiction, as they do, from the authority of the State, can not take cognizance of a penal case, arising under an act of Congress, unless some law of this Commonwealth had given the right to do so, and the general government had, by an act of Congress, also consented. In such case as this, no tribunal of the State has an inherent concurrent jurisdiction; and, therefore, without such co-operative legislation, as that just suggested, the jurisdiction of the courts of the federal government must, necessarily, be exclusive; and, whether any Legislature could confer jurisdiction, in such cases, on State courts, depends upon the proper construction of the federal and State constitutions, which we will not now consider."

The liability incurred in that case was in the nature of a fine, or penalty for violation of a general law, by which the public was affected, but that did not directly injure or affect private rights at all, and the proceeding was strictly penal in its nature and result. But the reciprocal power of Congress to confer, and of the Commonwealth to accept, or confirm jurisdiction of State courts, was not denied, even then. But, as said in Ordway v. Central National Bank, 47 Md., 217, a case like this, and where the same question of jurisdiction was decided: "In this case the cause of action is a forfeiture, a penalty of a civil nature, for the exacting and taking of usurious interest upon money loaned; and the remedy given by the statute is by private civil action of debt to the party grieved. The government or the public is not concerned in it. It is, therefore, a private right, pursued by a private civil action."

In Bletz v. Columbia National Bank, 87 Pa. St., 87, it was held that the form of the action being within the jurisdiction of the State court, the right claimed in this form being private, belonging to the borrower alone, it is immaterial whether the source of the right is a State or federal law. And to the same effect is Hade v. McVey, 31 Ohio St., 231. In fact, such seems to be the general current of decisions on the subject. In Claflin v. Houseman, 93 U. S., 131, in discussing the relation of the federal and State governments, the Supreme Court says: "The laws of the United States, and laws in the several States, are just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty, as regards the several States, but is concurrent and within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State—concurrent as to place and persons, though distinct as to the subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either

sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right, acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class, subject, however, to this qualification: That, when a right arises under the law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. * * If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in the State court. The fact that a State court derives its existence and functions from State laws, is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State, as it is to recognize the State laws."

Whether, if the statute under which this action is brought, was criminal or strictly penal in its nature, consent of the State Legislature would be necessary to exercise of jurisdiction by State courts, is immaterial. The infraction of the statute affects alone private rights, and the complaint must be by a private citizen seeking a remedy against another citizen, or corporation, expressly given by the statute, and which can be obtained in many cases, this being one, alone in a State court. For, under operation of the statute in question, not only is the right to seek the remedy in the State courts expressly given, but it can, in this case, and others like it, on account of the amount involved, be obtained no where else. Moreover, a banking association created by the statute can, unquestionably, make complaint and obtain complete redress in a State court against a debtor, or other person dealing with it, who has, in any way, infringed its rights existing in virtue of the statute; and it would be a strange interpretation to decide that such debtor may not seek and obtain in the same tribunal such redress of grievance as the statute affords him against the bank. It seems to us, as the right to maintain such action is a legal and enforcible one, and jurisdiction is expressly given to State courts, by the statute, consent of the State Legislature to exercise of it, even if necessary, must be implied.

3. The criterion of recovery in such a case is, we think, in the unambiguous language of the statute: "Twice the amount of interest thus paid." For, if it had been the intention to limit recovery to excess of interest above the legal rate, which is six per cent., terms would have been used describing the amount recoverable as such excess, or as the usury paid and received.

4. We also think that the limitation of two years, prescribed by the statute within which an action may be commenced, begins to run, in the language of the statute, "from the time the usurious transaction occurred," which appears to have been, in each instance, mentioned in appellee's petition, at the dates, and not times, of the payments of the several notes. Consequently, the lower court properly excluded recovery, in each case, when the transaction had occurred more than two years before commencement of the action.

5. One ground of demurrer is failure of appellee to state in the petition under what statute the penalty had been incurred, and right of action therefor had accrued, and Bell v. Norris, 79 Ky., 48, is cited to support the demurrer. But, in this case, unlike that, there

is no right of alternative recovery, nor any right to recover at all, except under the statute creating appellant as a corporation, and fixing liability for taking or receiving usury.

6. But the statute makes a banking association liable for the penalty sued for in this action, only when "the taking, receiving, reserving or charging a rate of interest greater than is allowed," thereby *be knowingly done*. And, as the petition does not contain this allegation, which we regard indispensable, the general demurrer ought to have been sustained for that reason. It, however, appears the cashier of the bank stated, as a witness, and the court found as a fact, trial by jury having been waived, that the excess of interest was taken and received by appellee knowingly. But, we think, the defect of the petition was not cured thereby, because, in absence of the allegation mentioned, there was no cause of action stated; and, a general demurrer having been filed, no judgment could be properly rendered without amending the petition.

We have considered and determined the other questions presented and argued, notwithstanding that defect of the petition; wherefore, for that reason, the judgment is reversed on the appeal, and the cause remanded for further proceedings consistent with this opinion, which may include an amendment to the petition, and is affirmed on the cross-appeal.

O. & M. RAILWAY CO. v. TODD, TRUSTEE.

(*Filed Jan.* 27, 1891.)

Constitutional law—Division fences—Section 12, of the act amending article 2 of chapter 35, General Statutes, title "Inclosures and Certain Trespasses," requiring that where a railroad has been in operation ten years, and the right of way has been donated to the company by the adjoining land owner, or any remote vendor, such land owner may, by giving notice to such railroad company, require it to fence its right of way, at its own cost, is unconstitutional, because it discriminates against one class of land owners, requiring them to bear a greater burden and expense than is imposed by general law on other land owners; besides, it attempts to delegate to an adjoining land owner the authority to judge of the necessity of such fencing, when such power can be exercised only by the legislative body, within the scope of its police powers, in prescribing proper regulations for the protection of lives and property. It would be proper for the Legislature to direct what portion of a railroad track should be fenced, in order to protect passengers from injury or stock from destruction, but it can not delegate such power to an individual.

Wilbur F. Browder for appellant.

Joe. Haycraft for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

In this case a judgment was rendered against the railroad company (appellant) for the sum of $242, the cost of erecting two lines of fence separating the land or right of way owned by the company from the land of the appellee. The way of the company passed through the tract of land, and this right, on the part of the company, had been granted to it about ten years before the action was instituted, by a remote grantor of the appellee, without any claim

to damages; in other words, the right to pass over the land was, by the original owner, donated to the company. The right of recovery for the entire cost of building the fence on each side of the track from the railway company, is based on the act to amend article 1 of chapter 55, General Statutes.

The title to the original act is that of "*inclosures and certain trespasses.*" Section 2 of the amended act provides, where a railroad has been built for ten years, and is in operation, and assessed for taxation, places such road on equal terms with other land owners, making each pay their proportion of the cost of fencing on the line dividing the right of way from the adjacent land. Section 5 gives to one, owning land adjoining this right of way, the right to notify the railroad company of his purpose to build a division fence, or has already built one, then the company is required to build its part of the fence in four months after the notice; and, upon failure to do so, the land owner may build it for the company and recover the cost of construction, &c.

Section 12 provides that where a railroad company has been given the right of way, free of charge, then the fencing is all to be done at the cost of the railroad company, after notice by the land owner adjoining that the fence must be built. The notice having been given in this instance to the company, or its agent, as provided by the act, and the company failing to build the fence, it was built by the owner of the land and the entire cost recovered of the company.

The railroad company complains of the judgment, and insists that the act is unconstitutional, because it exempts the owner of the adjoining land from any part of the burden, and places it all on the company, and for the stronger reason that the act in question gives to the owner of the adjoining land right to compel the company to build the fencing, and providing a remedy in the event of its failure to comply with the demand, and imposes no such obligation or duty on the part of the owner to the railroad company.

It will be found that laws are being constantly enacted that are applied solely to the obligations and duties of corporations; and, while such statutes are special, and apply alone, in many instances, to a particular class of corporations, they are, nevertheless, held valid, because of the legislative control over them, in order for the protection of the public and the safety of the citizen. The right to legislate for the purpose of protecting the lives of those who are being carried as passengers on railroads, and to secure the safety of both persons and property, is within the province of the law-making power; and, therefore, a railroad may be compelled to fence its track when, in the opinion of the Legislature, it is necessary for the safety of those who are passengers upon its train, or even to prevent the useless or negligent destruction of stock. Such legislation may be regarded as a proper regulation of the duties of railroad corporations. The rights and privileges conferred, when connected with tee public interests involved, authorized this legislative control, and in no manner interferes with the proper exercise of the rights conferred by the act of incorporation. The power is retained by the Legislature to regulate the exercise of the rights given for the safety of the public. If the Legislature should deem that it was necessary for the security of passengers and the public, that the company should fence its right of way on any particular part of the company's track, we would have no hesitation in adjudging that the power to do so existed; but, in this case, there is no pretense that the Legislature is in the exercise of this police power.

The act in question is intended to provide the manner in which

division fences shall be built by the owners of adjoining lands. It is found, under the title of inclosures, and fixes a liability for the destruction of stock, but discriminates in favor of one land owner to the prejudice of the other. There is a plain distinction in an act of the Legislature requiring a railroad company to build its line of fence on a particular part of the way, and, in the event of its failure, providing that the owner of the adjacent land may build it at the cost of the corporation, and an act requiring the corporation to build its line of fence at the instance of the owner. In the first instance, the police power is being exercised by the Legislature, and in the last by the owner of the soil. We are alluding now to the 12th section of the amended act, that enables the owner of the adjoining land, where the right of way has been given the corporation, even by a remote grantor, to require the corporation to build both lines of fence, at its own cost, and, if not built, then the fence may be built by the adjoining owner, and the entire cost recovered of the corporation. It is left with the owner of the adjoining land, not only to enforce, but to determine for himself, the necessity for this police regulation, and, therefore in violation of the constitution. Such a power can not be delegated to the citizen; and, as this fencing is alone for the protection of the land owner, and at his instance the duties and obligations must be reciprocal, and with such a discrimination, the 12th section of the act can, in no sense, be regarded as legitimate legislation. If any line of a railroad, or a part of it, is required to be fenced by the company, for the public safety, the Legislature must so enact, and not leave so important a question to be determined at the mere will of the owner of the adjoining land. Such regulations, says Mr. Cooley, in his work on Constitutional Limitations, "must have reference to the comfort, safety or welfare of society, and they must not, under pretense of regulation, take from the corporation any of its essential rights. In short, they must be police regulations in fact." Cooley's Lim., 710.

This is the general doctrine applicable to the rights of private and *quasi* public corporations, corporations under their charters, and, when applied to the facts of this case, the 12th section of the act in question is plainly for the benefit of one land owner at the expense of another.

The judgment is reversed, and remanded with directions to sustain the demurrer, and for proceedings consistent with this opinion.

ABERT, &C. V. LAPE, TRUSTEE, &C.

(Filed Jan. 22, 1891—Not to be reported.)

1. *Advancements—Board—Trusts*—T. made a deed to L. of certain personal estate, and all his real estate to be held in trust, and, after the payment of his debts, the residue to be divided between his children and his grandchildren, but subject to the charges by way of advancement made by him in a book kept by him for many years, in which entries were made from time to time, as he desired. After his death the trustee endeavored to settle the estate according to the directions of the deed, but one of the daughters complains principally of a charge made by her father against her for board for herself and children, she having lived with her father at his invitation. She claims that the entry of the charge for board, having been made by her father in the advancement book, after the date of the execution and acknowledgment of the deed of trust, is not binding on her. *Held*—That as the proof shows the delivery of the deed and advancement book were

not made to L., as trustee, until after the entry of charge for board was made, the deed and advancement book must be construed together as evidencing the intention of the grantor, and, in the settlement, the daughter is bound by the charge for board in said book; she, having accepted the bounty from her father, must take it *cum onere*. The grantor, having seen fit to charge his daughter with board by way of advancement, neither the trustee nor court can disturb this disposition of his property. Under the statute regulating advancements, a duty and discretion is devolved upon the court and personal representative to allow proper charges only by way of advancement, but this rule has no application to this case. While board furnished a guest at the invitation of the housekeeper could not be recovered at law, it will be allowed as an advancement.

2. *Appeals—Partial transcript*—While a party to an equity action may, on appeal, bring up only such part of the record as he wishes, if an inspection of the record discloses that a part of the evidence heard below has been omitted, the presumption will be indulged that such evidence would support the judgment.

J. C. Wright, J. F. Follett, T. F. Hallam and S. A. Reece for appellants.

Geo. Washington, Alvin Duvall and Wm. Lindsay for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Holt.

James Taylor died on March 29, 1883, leaving five children and two grandchildren by a deceased child. He was a man of large wealth, and for a quarter of a century or more had, from time to time, been making advancements to his children, and charging them to them in his advancement book.

On May 29, 1882, he concluded to carry out in person a will theretofore made by him, save so far as he desired to change it, and to this end he made a deed of trust conveying to W. H. Lape absolutely, but as trustee, and for the purposes designated in the deed, certain personal and all of his real estate. It provided for the payment of the grantor's debts; the payment to him annually, until the happening of a certain event, of a sum of money for his use, and, at the end of that time, for the investment of enough money in securities to realize for him that sum as income; the equalization of his children and grandchildren as to advancements; the conveyance to certain ones of them of certain real estate, if not needed to pay debts, the grantee to be charged with the value thereof in the settlement; that all the balance of his real estate be sold, and that the surplus of the trust estate, over and above that necessary for equalization and the satisfaction of any demands upon it, created by the deed of trust, be divided into six equal portions, and be either paid to or invested for his children, and the two grandchildren and their mother, as provided in the deed.

It was virtually a disposition of his whole estate, because what remained and passed to his administrator, at his death, was but a pittance compared with what he had advanced and given to his children by the deed of trust.

The advance book is not a part of the record before us, but it appears from the pleadings that it contains charges against each child for certain property advanced to him or her at a value fixed by the donor; and, according to it, his daughter, the appellant, Lucy C. Abert, had received $123,801.73, there being embraced in it a charge of $8,216.66 for the board of herself and her family from January 1, 1871, to June 1, 1882.

She brought this suit on February 23, 1884, claiming, *inter alia*, that the charge against her embraces items of estate with which she is not chargeable by way of advancement under our statute; that the values given are overestimates, and that the other beneficiaries are chargeable with more than is shown by the advancement book. All of the entries in it, including values, were made by the donor.

Complaint is especially made of the charge for board, and it is contended that it is the duty of the trustee, by the terms of the deed, to settle the advance accounts among the children and grandchildren, according to the law of this State. In other words, that the entries made by the donor in the advance book are not final or conclusive; but that the trustee, like a court of equity in cases of intestacy, should allow this or that item according as it may appear to be correct, or a proper charge, by way of advancement, under our statute If so, then the book would be merely used as a guide, so far as correct, and so far as the entries constitute advancements under our law.

It is contended that the deed became effective on May 29, 1882, when it was signed and acknowledged by the grantor; that, therefore, if the advancement book is, by the terms of the deed, to be regarded as a part of it, yet any entries in it, made after May 29, 1882, can not be considered as a part of the deed, and are not to be taken as absolute and correct. All of the evidence is not before us. It has not been brought up by the appellants; but, waiving any objection upon this score, it appears from what has been presented that the deed, after being signed and acknowledged, was delivered by the grantor to a third party, with the direction to give it to Lape, and to tell him to put it away, and that he (Taylor) would see him the next morning. He did not do so, however, until July 5, 1882. Then, having gotten the deed, he gave it and the advancement book to Lape, saying in substance to him that he was now the trustee; that the advance book and deed were inseparable and must be kept together; that if any one assailed them he must defend them at all hazards, and to have the deed recorded.

The entry as to board appears to have been made after May 29, 1882, but was certainly made before the deed and advancement book were delivered to Lape. The deed took effect from the time when they were so delivered. If Lape had, prior to then, attempted to use or act under the deed, the grantor could, by proper proceeding, have prevented it. Until then he was the mere custodian of it; until then there was no such delivery of it as vested the title in him. Martindale on Conveyancing, section 207, note 1.

The item as to board, therefore, so far as being considered a part of the deed, stands upon the same footing as the other entries in the advancement book.

The deed says: "After my debts are paid by my trustee, he will take the advance book and settle the accounts amongst my children, and the children of my son, James. Not having for many years kept up the advance account with Barry, he has agreed (see page 68 of advance book) that his account shall stand and be settled in the amount equal to the lowest of any of the children. In making the settlement, whatever is coming to Barry and my daughters, one-half will be paid them in money and the other half invested in productive real estate, the title to be taken to them for life, remainder in fee to their heirs forever."

The "settlement" of the advance account is referred to in several other parts of the deed; but evidently, when the grantor directed that the trustee should "take the advance book and settle the ac-

counts amongst my children," he did not thereby intend to give him the power to annul or alter the charges which the grantor himself had entered against the beneficiaries. He had known the trustee but three or four years, and it is unreasonable to suppose he intended to confer the power to change the entries made by him through a long course of time, and especially upon one whom he had known but a comparatively short time. He evidently used the word "*settle*" in the sense of fixing, by addition, the total of the entries as made by him, and the word "settlement" looks to the equalization of the beneficiaries.

The fact that the deed provides that his son, Barry, owing to his account not having been fully kept up by the donor, is to be charged with an amount equal to the lowest sum charged to any other child, confirms this view, and, in our opinion, there can be no doubt that the grantor intended charges to be accepted in the settlement of the trust exactly as made by him. He expected the advancement book to be used in carrying out the trust. He made it, in effect, a part of the deed by the direction to the trustee to take it, and settle and equalize his children as to advancements.

Charges of alterations in it, since it came to the hands of the trustee, are made. They are unsupported by the testimony, however; and even if there was any evidence tending to so show, they would not be sustained by this court in the absence of a part of the testimony, the lower court having found against them.

An appellant, in an equity cause, may bring up from the lower court so much of the record as he deems necessary to the determination of the question involved, but if, upon the hearing, it appears that a portion of the evidence bearing upon the question at issue has been omitted, it will be presumed that it supported the judgment of the chancellor, and it will be sustained. Terrill v. Rowland, 86 Ky., 67. Moreover, no motive appears for any such conduct upon the part of the trustee.

It is urged that the Abert family lived with the grantor by his invitation, and were told by him that it should be without expense. Conceding this to be so, and that under what is commonly known as "the hospitality act" he could not have made them pay board, yet this did not hinder him charging it to them in the distribution of his own bounty.

As suggested by counsel for appellees, it is not a payment by the appellants of money out of their own pockets, or an expenditure of their own means, but having received that much from the donor, he doubtless believed that, in justice to his other children and by way of promoting equality, the charge should be made. However, it is not proper for us to enter into the discussion of the moral phase of the matter. It is sufficient to know that the donor intended the charge should be made, and actually made it.

He, by the deed of trust, which was accepted by all the beneficiaries, not only disposed virtually of all of his estate, but by making the advancement book, in effect, a part of the deed, he determined that the advancements therein shown should be charged to the donees; and having done so, any adjustment of them, according to our statute relating to advancements, is precluded in the settlement of the trust estate. The charges to be made were specified and fixed by him. It was his right to do so in the distribution of his bounty, and they must be accepted as correct. If the donee accepts the bounty, as the appellant has done, he must take it *cum onere*, and as it comes from the donor without reference to our statute regulating advancements in cases of intestacy, total or partial.

We are now speaking, of course, of the distribution of the property embraced by the deed of trust. The appellant has accepted a conveyance of the real estate directed to be conveyed to her by the deed of trust, as well as money to which she was entitled under it; and conceding that owing to lack of information as to the advancements charged to her, she did not thereby waive all right to thereafter object to them, yet they were made by the donor. There is no sufficient showing that in making them a part of the deed of trust he labored under any mistake as to what he was doing, or was controlled by any improper influences; and, under such a state of case, the beneficiary of his bounty, under the deed, can not, in a distribution of the trust estate, question the correctness of the charges made by him. Some of his children may, and there is testimony tending to show that they were claiming to him they had not received as much as he had charged to them, or that he had overvalued the property advanced; and certainly, under such a state of case, a donor may put the question at rest and give himself peace by making a deed of gift, and providing that, in the distribution of the trust estate, the donees shall be charged with this or that sum. If this be his intention, unproduced by fraud or improper influences, then the charges of advancement are conclusive in the distribution of the trust property.

This is not so, however, of the estate, which the deceased owned at his death. While it is but a small amount in comparison to that advanced and given by the deed of trust, yet, in disposing of it, and by way of equalizing, the chancellor must, inasmuch as it is undisposed estate, be governed by our statute relating to advancements, and may, therefore, determine whether a charge by the donor is correct.

The judgment of the lower court conforms to the views above expressed, and it is, therefore, affirmed.

GARVEY, FELTMAN & CO. v. MOORE.

(*Filed Jan.* 22, 1891—*Not to be reported.*)

Married women—Consideration—In a controversy to subject sixty-eight acres of land, conveyed by the husband to his wife, to the satisfaction of the husband's debt, created prior to the conveyance, the defense that the land can not be subjected because the husband received personal property belonging to the wife, can not prevail in the absence of proof of any ante or post-nuptial contract. But the defense that the consideration for the conveyance of this tract of land was the release, by the wife, of her potential right of dower in a valuable tract of land, will be recognized as a valid claim on said land, to the extent of the value of her said dower interest in the land relinquished.

E. W. Hines, Cochran & Son and James P. Harbeson for appellants.

John P. McCartney, Wm. J. Hendrick and G. A. Cassidy for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Pryor.

The appellants sought to subject to the payment of their debt a tract of land containing sixty-eight acres, that M. D. Moore, the

debtor, had conveyed to his wife. The debt existed prior to the conveyance, and, therefore, if in fraud of the rights of creditors, whether known by the wife or not, the land should be sold to pay appellants' debt.

The only question arises as to the consideration. The attachment was discharged on the ground that the wife was a creditor. The defense relied on, to the effect that the husband obtained money and property of the wife by reason of the married relation, is not available. This property became the husband's on the marriage, or by reason of it, and there is no evidence showing a post-nuptial or an ante-nuptial contract between them in reference to this estate of the wife. It does appear that the wife relinquished dower in a valuable tract of land mortgaged to a creditor of the husband, and that this was done in consideration that he would account to her for it, or secure her a homestead. She was deprived of this contingent right and also of the use of the homestead in common with her husband, by reason of this mortgage, and to that extent the wife should be secured. If the land conveyed, or to which she relinquished dower, was of the value of $8,000 or $10,000 at the date of her relinquishment, then her contingent right of dower would be worth only $300 or $400, while the land conveyed to her by her husband is worth $2,000. The homestead of the husband and wife is gone by reason of the conveyance, and the wife should have either the value of her contingent right of dower, or the right to a homestead on the sixty-eight acres during her life, the creditor having the right to sell the land subject to the life estate of the wife.

The wife may elect to take the value of her contingent right of dower, or $1,000 in value of the sixty-eight acres of land, as long as she lives. She was sixty years of age when she signed the mortgage, and her husband about the same age. Ascertaining the value of the land mortgaged, the chancellor can easily arrive at the value of the contingent right of dower by reference to the table of mortality found in the case of Lancaster v. Lancaster, 78 Ky., 198.

It may be argued that this relinquishment, being a valuable consideration, the wife can not be disturbed in her right to the land, as she was innocent of any wrong. Both the husband and wife may be innocent of any intentional wrong, still the inadequacy of consideration is such as to compel the chancellor to hold the transaction fraudulent as to creditors; but the wife, being in nowise guilty of the fraud, she should be secured to the extent of the consideration paid for the land.

The judgment below is, therefore, reversed and remanded for proceedings consistent with this opinion. The attachment should be sustained.

VANOVER V. MURPHY'S ADM'R.

(*Filed Jan. 27, 1891—Not to be reported.*)

Promissory notes—Signature by mark—Non est factum—Liens—V. sold by title bond to C. a tract of land, and C. executed his notes for the purchase money. One of these notes was afterwards assigned to M. as collateral security for a debt. The land sale was rescinded, and V. made a small payment on the note held by M., and took up the note held by him, to be returned to C., as the land sale had been rescinded and in lieu of the notes taken up, V. executed his note to M. for $192.26. The note was executed by the mark of V., but was not attested by any witness. In an action by

the administrator of M. to recover the amount of said note and to enforce the same as a lien on the land, V. pleaded as defenses that the note is not his act and deed; that the signature by his mark merely, evidences no obligation, even if made by him, and that he had executed to M. his note for more than was due, in consideration of which M. agreed to accept same and rely upon the personal obgliation of V. without retaining any lien on the land to secure same. *Held*—That if the mark was really made by the obligor and proven, its validity as a written obligation necessarily follows. The mere presentation of a note with a mark only, is not evidence of its validity, unless attested as directed by subsection 7, section 732, Civil Code of Practice. A note, where the mark is attested as required by the Code, proves itself if the plea of *non est factum* is not made; but where the plea of *non est factum* is made, the burden of proof rests on the obligee to prove the signature when denied, regardless of the manner in which it is made. M. being a good business man, knowing V. to be insolvent, it is hardly to be presumed that he would have accepted the personal obligation of V. in lieu of a note secured by a lien on land.

Sweeney, Ellis & Sweeney for appellant.

Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Vanover, sold by title bond, to one Chapman, a tract of land for $1,100, evidenced by notes payable at stipulated periods. The appellant was indebted to Bryan, and assigned to him, in payment of the indebtedness, one of the same notes. Bryan, being indebted to Murphy, placed this land note in his hands as collateral security for the payment of the debt.

After this had been done the contract between Chapman and Vanover for the sale of the land was rescinded, and the title bond surrendered. The appellant had paid on the land note $75 while in the hands of Murphy, and Murphy surrendered the note to Vanover that he might deliver it to Chapman, as the land sale had been rescinded, and in lieu thereof executed to Murphy this note:

"One day after date I promise to pay Matthew Murphy $192.26 with six per cent. interest, balance due on land note.

"ELI $\overset{\text{h's}}{\underset{\text{mark}}{X}}$ VANOVER."

The note is dated June 8, 1882. Murphy being dead, his administrator brought this action in equity to enforce his lien on the land that Vanover had taken back from Chapman, alleging that such was the agreement. The appellant filed an answer, pleading that he had paid $100 on the note instead of $75, and denying that he ever executed the note sued on, but admitting that he did execute a note for $200 to Murphy, that was accepted by the latter in lieu of the Chapman note, and that Murphy agreed to look to the appellant alone for the debt, and retained no lien whatever on the land by agreement or otherwise.

The administrator of Murphy swears that he saw the appellant in regard to the note, and told him its amount, and the latter stated that he would try and make arrangements to pay it.

Dr. Bryan shows the manner in which Murphy became the holder of the note, and there can be no doubt but what the note in controversy was executed by Vanover.

The appellant insists, however, that the note is not his act and deed, and that the signature by the mark merely evidences no obli-

gation, even if made by him. He refers to subsection 7 of section 732, Civil Code, by which "a signature includes a *mark* by or for a person who can not write, if his name be subscribed to an instrument and witnessed by a person who, near thereto, writes his name as a witness."

This note is not attested, but if the mark was really made by the obligor and proven, its validity as a written obligation necessarily follows. In the one case it proves itself, if the plea of *non est factum* is not made, and when there is no attesting witness, other proof will be required of its execution. It is true the plea of *non est factum* places the burden on the obligee whenever a signature made in either mode is denied; but the mere presentation of a note with a mark only is not evidence of its validity, unless attested, as directed by the Code; but when proven to have been made, is as valid as any other signature. Maupin v. Kirkley, MS. opinion filed February 7, 1882.

Vanover was insolvent. Murphy, the obligee, was a business man, and it is scarcely to be presumed that he would have relinquished his lien or debt already secured, and accepted in lieu of it the note of an insolvent; besides, the whole record shows that the appellant is evading the enforcement of the lien, but is willing to assume the personal liability.

We think the judgment below was proper.

Judgment affirmed.

NORTHUP, &C. V. WARD.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Contract—Consideration—Appellants, Jay H. Northup and John Carlisle, brought this action against appellee to enforce the specific performance of a contract reciting that, in consideration of $1 in hand paid, and the further consideration of the benefits and advantages which will result to appellee from the location, construction and extension of the Chattaroi railway from its terminus to Whitehouse creek, by the first day of October, 1889, appellee would convey to appellants the undivided half of all mineral on seventy-five acres of land more or less. *Held*—That if the $1 recited consideration is treated as nominal, it does not appear from the pleadings that appellants have any interest in or control over the Chattaroi railway, or were under any obligation to afford the advantages recited in the contract, or that they contributed in any way to the completion of a railway to the terminus recited, and appellants can not, therefore, enforce the contract.

F. T. D. Wallace, James Goble and Ireland & Ireland for appellants.

Stewart & Stewart for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Lewis.

Appellants brought this action to enforce specific performance of the following contract:

"Know all men by these presents: That I, Marion Ward, of the county of Johnson, State of Kentucky, for and in consideration of the benefits and advantages which will result to me from the location, construction and extension of the Chattaroi railway in a south-

erly direction, from or near its present terminus, and the further consideration of $1 in hand, paid by John Carlisle, of Cincinnati, O., and Jay H. Northup, of Louisa, Ky., to me, the receipt of which is acknowledged, do agree and bind myself, heirs, assigns, and to give, grant and convey to said Carlisle and Northup, their heirs and assigns, the following described property, to-wit: The undivided half of all mineral on my land, being seventy-five acres more or less." [Here follows description of the land.] "The above is given upon the condition that the said railway extension is to be made on or before the first day of October, 1889, to Whitehouse creek, otherwise not to be binding. When said railroad is constructed to Whitehouse creek, I hereby bind myself, heirs and assigns, to make said Carlisle and Northup, their heirs or assigns, a deed of general warranty to the above described property."

It will be observed that treating the $1, stated to have been paid, as merely nominal, there is no consideration whatever, express or fairly implied, set out in the contract for the conveyance by appellee, Ward, of the half of all mineral on his land; for appellants, Carlisle and Northup, do not appear from the instrument to have, nor stipulate they have, any connection with or control of the Chattaroi railroad, nor undertake directly or indirectly to construct and extend that road any distance or direction from its terminus at that time. So that, according to the terms of the contract, appellee covenanted to convey to appellants one-half the mineral on his land without having received, or appellants being bound to render, any consideration whatever. Nor do they allege in the petition they would or could cause extension of the road, or contribute any thing of labor or money to that end.

It is true they state in their petition they at once set about the carrying out of the proposed extension; that the Chattaroi Railway Company, having encumbered its road and property, it was deemed best to cause the extension to be made under another charter, and to this end "the Ohio, Kentucky & Virginia Railway Company" was organized under an act of the General Assembly of Kentucky, approved April 19, 1886, and that appellants were two of the corporators named in the act, and the extension was made under the charter.

They further state that, looking to and relying on the writing filed, and some others of like character, to compensate in some degree for their time, labor and outlay in causing said railway extension, they did so exert themselves, making large outlay of labor, time and money, whereby the extension was made of a railway to the point mentioned in the contract, and within the time mentioned. But it is not still alleged appellants had any interest in or control of the Chattaroi Railway Company, nor that they had any thing to do with organization of the Ohio, Kentucky & Virginia Railway Company, further than they were two of the corporators. It is true they say they exerted themselves by making large outlay of money, labor and time in causing said extension, but whether that was done under obligation they owed, as members, to the new corporation, is not stated.

We, therefore, think that, as the contract does not import any consideration for the conveyance by appellee, and it is not sufficiently alleged in the petition there was any, the judgment sustaining the demurrer to the petition must be sustained.

BOURLIER BROS. V. MACAULEY.

(*Filed Jan.* 20, 1891.)

Damages—Wilfully procuring or inducing anothnr to break his contract—Parties to actions.—Appellants as owners of Masonic Temple Theatre made a contract with A.. manager of the Mary Anderson Theatrical Company, by which that company would perform in said theatre three nights, and appellee, as the owner of a rival theatre, as is alleged, wilfully induced the manager of said theatrical company to break his contract with appellants and his company to perform at appellee's theatre on the same nights it was to have performed at appellants' theatre, and appellee had done said wrongful acts for the purpose of deriving a profit to himself. *Held*—That no cause of action is stated in the petition, as the principles of law do not forbid competition in business by obtaining the services of theatrical talent in the conduct of theatres.

Section 14, article 15, chapter 29, General Statutes, making it unlawful for any one to wilfully entice or persuade any person who has contracted to labor to abandon his contract, was not intended to apply to contracts for performance of dramatic artists.

The doctrine as announced in the case of Chambers & Marshall v. Baldwin applies fully to this case. If there is any damage that has resulted to appellants from the breach of contract the manager, who was a party to it, is alone responsible.

Kohn, Baird & Speckert for appellants.

E. F. Trabue for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

The cause of action stated in the petition of appellants is, in substance: That being owners of Masonic Temple Theatre, in Louisville, they, in 1888, made a contract with H. E. Abbey, manager of Mary Anderson, a dramatic performer of great reputation, and her company, whereby it was agreed they were to perform there February 25, 26 and 27, 1889, which contract appellants complied with in every respect, having at great expense made necessary preparations for and advertised the performance. But that appellee, owner of a rival theatre, though having notice of the contract, with malicious intent to injure the reputation of appellants, and of their theatre as a first-class place of amusement, and their business, wrongfully induced and procured Mary Anderson to refuse to perform at their theatre, and made a contract with Abbey, which was carried out, for performance of Mary Anderson and her company at his, appellee's theatre, on the identical days it had been previously agreed they would perform at the theatre of appellants. Whereby they were injured in their credit and standing as theatrical managers and deprived of profits they would have otherwise made, to their damage, &c.

Appellee is alleged, according to the plain meaning of the petition, to have done the act complained of as well with design to benefit himself by securing performance of Mary Anderson and her company at his own theatre, as with malicious intent to injure appellants. Consequently, two principal questions of law arise on demurrer to the petition. First. Whether one party to a contract can maintain an action for damages against a person who maliciously advised and procured the other party to break it. Second.

Whether an act, lawful in itself, can become actionable solely because it was done maliciously.

These two questions were considered and determined by this court in the case of Chambers & Marshall v. Baldwin, decided at the present term, and a rediscussion of them is, therefore, unnecessary. The cause of that action, as stated in the petition, was that the plaintiffs having made a contract with one Wise for sale and delivery of his crop of tobacco, at a price agreed on, defendant, being also a tobacco dealer, maliciously and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract.

It is, however, contended for appellants that the principle upon which the leading English case of Lumley v. Gye, 2 Ell. and Bl., 228, was decided, is correct and applicable to this. The complaint in that action was that the defendant maliciously enticed and procured a person, under a binding contract, to perform at plaintiff's theatre, to refuse to perform and abandon the contract. And in one count of the declaration there was an allegation, not made in this case, that the person had agreed to perform as, and had become and was, plaintiff's dramatic artist when so procured to abandon the employment.

But it is proper to say no distinction was taken by the court between the contract, regarded as merely executory, and as being in course of execution, the majority of the judges deciding the action would lie in either case, while Justice Coleridge, who delivered a dissenting opinion, contended it would lie in neither.

Unlike this case the act, made cause of action, was there alleged to have been committed with no other than a malicious motive, and, inferentially, for no other than a purpose to injure the plaintiff. But the dissimilarity is not material, because if the principle by which the decision of that case was controlled can be applied here, as there, without qualification or condition, this action will lie.

The theory upon which Lumley v. Gye seems to have been decided is, that remedies given by the common law in such cases as that are not limited to any description of servants or service, and the action was maintained upon the principle stated in Comyns' Digest, that "in all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case, to be repaired in damages."

But it was held in Chambers & Marshall v. Baldwin that to maintain an action upon the case at common law the act upon which it is founded must not only amount to a legal wrong, but be the proximate cause of the loss or damage sustained. And that upon principle and according to decided weight of authority in the United States, whether a legal wrong has been done or not, depends upon the nature and quality of the act, not upon the motive of the person doing it. The following clear and forcible statement of the proposition, in Jenkins v. Fowler, 24 Pa. St., 308, being quoted and approved: "Malicious motives make a bad case worse, but they can not make that wrong which, in its own essence, is lawful."

In reference to the other of the two main questions involved, it was there held that as the reasonable and necessary presumption, in every case of a binding contract, is that each party enters into it with his eyes open and purpose and expectation of looking alone to the other party for redress in case of breach by him, the following rule, stated in Cooley on Torts, 497, and previously contended for by Justice Coleridge in Lumley v. Gye, is correct on both

principle and policy: "An action can not, in general, be maintained for inducing a third person to break his contract. The consequence, after all, being only a broken contract for which the party to the contract may have his remedy by suing upon it." And it was further held that there can be consistently and safely but two classes of exception to that rule. One was made by the English Statute of Laborers, passed in 25 Edward III, to apply where apprentices, menial servants and others, whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statutes. The other arises where one party to a contract has been procured against his will, or contrary to his purpose by coercion or deception of a person to break it to the damage of the other party.

If the opinion of this court in that case is to stand, it does not make any difference whether appellee was actuated by merely malicious motive to injure appellants, or by that and the additional one of personal benefit. And it is, therefore, necessary to inquire whether the facts stated bring this case within the first named exception to the rule, that only a party to a contract can be sued for its breach; the other exception manifestly having no application. But, of course, the question whether the act was in itself a legal wrong is always in such case vital and precedent.

It is not the policy of law to restrict or discourage competition in any business or occupation, whether concerning property or personal service, there being no good reason for making more stringent regulations in respect to the latter, except where some one of the domestic relations exist than the former.

For, if in order to leave sale and exchange of property free and unrestrained, a person may lawfully and without legal inquisition of his motive, buy what another offers for sale and has right to sell, it is no less just and expedient that in order to have fair remuneration for labor, a person be allowed to hire the service of any one, *sui juris*, who offers to be hired. And in every case the employer should be required to look alone to the person employed for breach of the contract, just as the seller must look to the buyer, and the creditor to the debtor, in default of payment. For to enforce a doctrine making the hirer responsible for breach by the person hired, of a previous contract with another, involves legal recognition of a personal dominion, bordering on pure servitude, which is neither in harmony with our form of government nor well for those who labor for subsistence. And such doctrine can be applied in this State only when expressly provided by statute, and, being arbitrary, should be extended no farther than was clearly intended by the Legislature.

Chapter 74, General Statutes, prescribes rights and duties growing out of the relation of master and apprentice; and article 2 thereof provides, as was done by the statute of 1798, that persons who come into this State under a contract to serve another, in any occupation, shall be compelled to perform the contract specifically, during the time thereof, not exceeding seven years. But the only existing statutory provision which authorizes another than a party to it to sue for a breach of contract is section 15, article 14, chapter 29, as follows: "If any person shall wilfully entice, persuade, or otherwise influence any person or persons, who have contracted to labor for a fixed period of time, to abandon such contract before such period of service shall have expired, without the consent of the employer, shall be fined not exceeding fifty dollars, and be liable to the party injured for such damage as he or they may have sustained." We

are satisfied that statute passed soon after slavery ceased to exist in this State, and consequent change of the labor system took place, was intended to apply principally to farm laborers; and to extend application of it so as to include contracts for performance of dramatic artists, would be not only fraught with much injustice, unnecessary strife and litigation, but entirely beyond the intended scope and operation of it.

In our opinion, the only remedy appellants have is against Abbey, who made, and whose voluntary breach of the contract was the direct cause of the alleged loss and damage, and the action can not be maintained against appellee.

Judgment affirmed.

RUDD, &C. v. FORD.

(*Filed Jan.* 31, 1891.)

Landlord and tenant—Exemptions to sub-tenant—A landlord can not subject to the satisfaction of his debt for rent the property of his sub-tenant, which is exempt. The sub-tenant will be construed to be a *debtor* of the landlord within the meaning of the statute, allowing exemptions whenever the landlord attempts to subject his property to satisfy his claim for rent. This construction of the statute is consistent with the humane intentions of the law makers towards poor debtors and their families.

Wilfred Carrico for appellants.

W. T. Ellis for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, J. C. Rudd, rented certain lands to one Allen for one year. The rent was payable on January 30, 1888, which was the end of term.

Allen, without the knowledge of Rudd, sub-let a small part of the land to the appellee, J. W. Ford, who cultivated it in tobacco, Allen to get one-half of it as rent. The crop was sold and removed from the premises on and shortly prior to January 14, 1888. January 30, 1888, the purchasers, Jay Hardy & Co., disregarding the protests of Ford, paid the proceeds to Rudd upon his rent, he having indemnified them in doing so.

Ford was a housekeeper, his family consisting of himself, wife and eight children. He had no property, save his part of the tobacco, or its proceeds.

The lower court held that Rudd, as landlord, had a lien upon the tobacco or its proceeds, but that it was subject to a claim by Ford under the exemption law.

The amount allowed the latter does not exceed what he is entitled to as an exemption, if his case comes within the statute; and the only question necessary to be considered is, whether a sub-tenant, who enters under a tenant who holds for a term not exceeding a year, is entitled to the exemption allowed by section 1 of the act of May 17, 1886 (General Statutes, page 571), as against the claim of the landlord upon the original tenant. It says: "The following property shall be exempt from execution, attachment, *distress*, or fee bill, namely: * * * * all wearing apparel, sufficient provisions, in-

cluding breadstuff and animal food to sustain the family for one year; if not on hand, other personal property, *money*, or growing crop, nor to exceed forty dollars in value, for each member of the family." * * * * The statute relative to landlord and tenant provides, that the personal estate of a sub-tenant, found on the rented premises shall be liable to distraint by the landlord, and that he shall have "a superior lien on the produce of the farm, or premises rented, on the fixtures, on the household furniture and other personal property of the tenant, or under tenant, owned by him, after possession is taken under the lease, but such lease shall not be for more than one year's rent due, or to become due, nor for any rent which has been due for more than one hundred and twenty days." General Statutes, chapter 66, article 2, section 13.

The exemption statute applies, however, as against the landlord's lien. He can not seize for his rent the property which is exempt to the tenant. The lien is subordinate to this right of the latter. The statute relating to landlord and tenant, expressly says: "Property exempted from execution shall be also exempted from distress or attachment for rent, except for money or property furnished the tenant by the landlord, for the purpose of enabling the tenant to subsist, or to raise his crop, for which the landlord shall have a lien on the whole crop of the tenant, raised on the leased or rented premises." General Statutes, chapter 66, article 6, section 5.

It is said, however, that the exemption statute only applies as between debtor and creditor; that the sub-tenant is not the debtor of the original landlord, and that, therefore, he can not claim the exemption as against him. Our statute does not use the word "debtor," but, conceding that an exemption ordinarily applies to the relation existing between creditor and debtor, yet does not the sub-tenant, when the original landlord attempts to seize his property for the rent, occupy the relation of debtor within the spirit of the statute?

It was enacted for humane purposes; the intended policy is to be considered, and it is to be liberally construed in furtherance of the spirit and policy which led to its adoption.

The word "debtor," in its broad sense, implies liability; and, if our exemption statute is taken as having been enacted with the view that the words "creditor," and "debtor," were to be understood, although not used, then, in view of the purpose and spirit of the law, they should be given their broadest meaning.

It is a stern statutory rule which makes the property of the sub-tenant liable for the rent owing to the original landlord; and the latter can not well complain if another statutory provision, enacted for a benevolent purpose and dictated by a proper policy, exempts certain property from liability to his claim. The law has provided him with a remedy ample for his protection. He may, if the lease be not for a longer term than two years, dispossess the occupant, if the tenant sub-lets the premises without his written consent.

The case before us is not like one where the landlord's lien has attached, and then a sale is made of the property.

In such a case he may, of course, follow it in the hands of the vendee, and subject it to his lien, if he does so within the period prescribed by the statute; and this was the case presented in Eberhart's appeal, 39 Penn. St., 509. Moreover, the statute under which the exemption was there claimed expressly used the term "debtor."

Here, however, the property or its proceeds, which is sought to be subjected, always belonged to the sub-tenant. It is true it was raised upon the rented land; but the superior lien given to the

original landlord as to it is subject to the tenant's right of exemption. The statute also gives the landlord a superior lien on the household furniture and other personal property of the tenant and sub-tenant, owned by him after possession is taken under the lease; but, suppose a sub-tenant has but one horse or one table, both of which are exempt by the statute, will it be contended that the original landlord could distrain them for the reason that, in the strict meaning of the terms, the relation of creditor and debtor does not exist between him and the sub-tenant? Equal reason exists for the right to do so, if the property or its proceeds now claimed as exempt is not so; and thus the sub-tenant may be stripped of all his exempt property, and his family left utterly destitute. Such a construction would defeat the humane purpose of the statute, and the spirit of it does not admit of such an interpretation. Patterson v. Moseby, MS. opinion, Court of Appeals, April 15, 1880.

The lien of the landlord, in a case like this one, does not attach to the property prior to the vesting of the right to it in the sub-tenant; and, therefore, while the statute gives the former a lien upon it, yet it is subject to the statutory right of the latter to his proper exemption, because, in case of distraint, the statute expressly provides that it shall be subject to any existing exemption right.

A proper construction of the statute requires that whenever the landlord, in a case like this one, attempts to subject the property of the sub-tenant to his claim for rent, whether that property be the crop raised by the sub-tenant upon the land, or otherwise, he is entitled to the statutory exemption, because his property is sought to be made liable, and as against that liability the exemption is allowed.

The judgment below conformed to this view, and it is, therefore, affirmed.

BLYEW V. COMMONWEALTH.

(*Filed Feb.* 3, 1891.)

1. *Criminal law—Jurisdiction—Former jeopardy—New trial*—On appeal from a conviction for murder committed in 1868, appellant urges as errors committed by the lower court to his prejudice, that the lower court refused his pleas that he had been tried and convicted for the same offense in the United States Circuit Court; that he was tried in 1890 on a new indictment, instead of the indictment found in 1873; that the court refused him a new trial on his motion showing that, after the jury had retired to consider of their verdict, two of the jurors retired together into a different room from the other jurors, and were absent about thirty minutes. *Held*—That the plea of conviction in the United States Court was not good, as that court had no jurisdiction of the offense; that the trial, having been had on a new indictment for the same offense as charged in the old indictment, can not be deemed prejudicial to appellant. While there is no authority, under the Code, for finding a new indictment, unless under an order of court disposing of the old one, it will be presumed that the old one had been lost or mislaid during the interval between the finding of the old indictment and the new, during the greater part of which time appellant was at large and beyond the jurisdiction of the court, having made his escape from jail. Nor did the court err in refusing to grant a new trial on account of the separation of the jury, there being no evidence that any undue influence was exercised over them by any person. While the practice of permitting

juries to separate is not approved, yet their verdict should not be disturbed unless undue influence is shown.

2. *Evidence—Dying declarations*—It was not error to permit parol proof of dying declaration of decedent, the bill of exceptions failing to show that such declarations had been reduced to writing.

Thomas & Pugh for appellant.

P. W. Hardin for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Lewis.

It appears that the crime of murder, the conviction for which appellant now complains of, was committed in 1868, and he states in the plea filed in the lower court he was for the offense indicted, tried and convicted in the United States Circuit Court. He further states that he was afterwards, in 1873, indicted and tried in the same court when the judgment appealed from was rendered, but there was then no verdict or judgment rendered, the jury disagreeing. It appears that after that appellant escaped from jail, and remained out of the jurisdiction of the court until 1890, when another indictment was found, and under it, and not the one of 1873, he was convicted.

1. As the United States Circuit Court had no jurisdiction of the offense, he has not, in the meaning of section 14, article 13 of the State Constitution, "for the same offense, been twice put in jeopardy of his life," and there was nothing to prevent the trial and conviction in the State court.

2. Section 118, Criminal Code, defines an indictment as an accusation in writing, found and presented by a grand jury to the court in which they are impaneled, charging a person with the commission of a public offense.

It does not appear why appellant was tried under the indictment found in 1890, instead of the one found in 1873, and it must, therefore, be assumed the first one was lost or mislaid, during the long period which elapsed between 1873, when appellant fled, and 1890, when he was re-arrested. But while there is no provision in the Code expressly authorizing a new indictment, found without some order of court in reference to the first one, we do not see how appellant's substantial rights have been prejudiced, for he has, by the new indictment, been accused of and put on trial for the identical offense with which he was charged in the other, and in every particular the same proceeding has been had that could have taken place if there had been but one indictment.

Upon the motion for a new trial, affidavits were filed tending to show that, after the case was submitted to the jury and they had retired to their room in the court-house for deliberation, two of the jurors went to another room in the same building and remained thirty minutes or more away from the other jurors.

It is the policy of the law and necessary to the ends of justice that jurors should be kept together, and freed from communication with other persons on any subject connected with the trial; and it is furthermore made their duty not to converse with each other on any subject connected with the trial, nor express any opinion thereon, until the case is finally submitted to them. But no authority exists in the court to set aside a verdict returned freely and with apparent unanimity, when there is no evidence whatever of undue

influence or interference by others, merely because two of the jury may have conversed or deliberated apart from the others for a short time in the same room, or even an adjoining room. Argument and suggestions from one to others, or even another member of a jury, are not only proper, but necessary in many cases to agreement on a verdict, and, when it has been reached, it is not the province of the court to inquire how it was done, in the absence of undue influence by outsiders.

The objection that the dying declarations of the person appellant is charged to have murdered, were proved by oral testimony, without production of or accounting for the writing in which it is contended they were contained, can not avail for the reason that the bill of exceptions, as it appears to us, does not show the declarations were reduced to writing. It is true the bill, as first written and signed by the judge, in the absence of the commonwealth's attorney, shows the dying declarations were reduced to writing; but upon his motion, and by order of court, that part of the bill was stricken out, and it does not now appear to this court that fact was proved on the trial; consequently, the evidence was competent.

Perceiving no error of law to the prejudice of appellant's substantial rights, the judgment is affirmed.

McFARLAND v. BAUGH, &C.

(*Filed Feb.* 3, 1891—*Not to be reported.*)

1. *Quieting title—Estoppel*—Husband and wife, having been given a tract of land by the father of the wife, under a parol contract, and possession delivered to them, they, by parol contract, gave to the trustees of a school district one acre of ground, upon which to erect a school-house. The acre of ground was not surveyed, but was stepped off by appellant and others, and estimated as containing one acre, and appellant assisted in erecting a school-house thereon, which has been used as such since 1870. After the legal title to the whole tract had been conveyed to the husband and wife, and they had conveyed same to appellant, he instituted this action to quiet his title to a field containing nine acres, the school-house lot being a part of same. *Held*—That the appellant is estopped by his acts to claim the school-house lot, and the chancellor should have directed the school-house lot to be laid off so as to contain one acre, with the school-house as near the centre thereof as practicable, and that a conveyance for same should be made to the trustees of the school district, but to revert to appellant whenever it should cease to be used for school purposes.

2. *Easement*—The way over lands of another, used by pupils for a period of fifteen years of ingress and egress to and from a school-house, will be recognized as a necessary appurtenant to said school-house. The owner of adjoining lands, having granted the site for the school-house, it will be presumed that he also granted a necessary way to and from said lot.

Montgomery & Jones for appellant.

J. E. Hays for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Pryor.

This proceeding, under the former practice, could be called a bill *quia timet*, and it seems to this court that the chancellor erred in dismissing the petition.

Many years ago one Samuel Lony gave by parol to his daughter, Mrs. McFarland, and to her husband, Wm. McFarland, a tract of land and placed them in possession. While in the occupancy of the land, and before any conveyance was made by the father-in-law, McFarland gave to the trustees of School District No. 32 one acre of this land, upon which to build a school-house. The trustees took possession and built the house, and have been using it for school purposes since the year 1870. The acre was not laid off by any regular survey, but the distance each way stepped by those present, so as to embrace what they supposed would be that much ground. The present appellant was present, and took part in the building of the house and in making this survey. Lony subsequently made to Wm. McFarland and his wife a deed to the tract of land including this school property, and after this the husband and wife conveyed it to the appellant, Benj. McFarland, who is now asserting claim to the property, and asks that his title be quieted to the nine-acre field in which the school building is located.

We think there can be no question about the right of the trustees to the use, title and the possession of the acre of land and the school building, and if that was the only question involved, the judgment would be affirmed. It seems from the testimony that the location or boundary of the acre of land is not accurately defined, and that those in possession of the school building are constantly trespassing upon the adjoining land in the same field, and are claiming that the boundaries of the school property include a part of the orchard planted by the appellant since his purchase, and the parties are left at sea as to the extent of their rights. The chancellor, therefore, should have directed a survey, so as to include the building, and containing one acre of this land, and, in making it, should leave out the orchard, or any part of it belonging to the appellant, but should leave the building as near the centre of the acre lot as practicable. He should have corners planted so as to mark the boundary.

Another question is as to the right of ingress and egress to the school-house. It appears that there is a well-defined way that has been used for over fifteen years by the scholars in reaching the school-room, and this right they should be allowed to exercise, and even if the use has not been enjoyed for the statutory period, the owner, having sold the land, or induced the erection of the building, must be presumed to have given the right of way to it. When the survey is made a conveyance should be made to the trustees of the acre of ground, with the right of ingress and egress, for the benefit of the school district, the property to revert to the appellant when the property is abandoned and no longer used for school purposss. It seems that such was the agreement between McFarland, the donor, and the trustees, or those living in the district. They were all, or many of them, aiding by their labor and means to build this house, and the donor agreed to give the ground if the other parties interested would erect the building. This has been done, and the parties, both William and Benjamin McFarland, are estopped to assert title to this land. They stood by and saw the building erected; one was the donor, and the other aided in building the same, and now to claim it is inequitable and unjust to those who contributed their means and labor to aid in such a beneficent enterprise.

Judgment reversed and remanded for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

CORNEILISON V. TONEY.

(*Filed Jan.* 21, 1891.)

1. *Refusal to issue writ of habeas corpus*—A judge, in acting upon an application for a writ of *habeas corpus*, acts in his judicial character, and his refusal to issue the writ to one entitled to it does not subject him to the penalty imposed by secton 401 of the Criminal Code, if he considered the application, and his refusal to issue the writ was merely an error of judgment, and not from corrupt motives.

2. *Same*—The writ of *habeas corpus* is a discretionary writ, to be issued only when it is shown by the petition, or otherwise, that there is probable cause to believe that the applicant is detained without lawful authority.

3. *Same*—That one is held "under a judgment obtained by fraud and forgery on a forged indictment" is not sufficient to entitle him to a writ of *habeas corpus*. The judgment is conclusive until reversed or set aside by the proper tribunal.

4. *Same*—That one is held under a re-arrest and re-imprisonment for the same offense and same imprisonment from which he was lawfully discharged, under a writ of *habeas corpus*, is not sufficient to entitle him to another writ, there being nothing to show that the officer who issued and tried the writ under which he was discharged had jurisdiction.

5. *Same*—The fact that one is imprisoned, under a judgment, in a jail of a county other than that in which he was tried, is not sufficient to entitle him to the writ. It is to be presumed that his removal was duly authorized by the competent tribunal, in the absence of any allegation showing how or why he was removed.

Samuel McKee for appellant.

O'Neal, Jackson & Phelps for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Presiding Judge Barbour.

This is an action brought by the appellant against the appellee, the judge of the Louisville Law and Equity Court (to whom the appellant had applied for a writ of *habeas corpus*, which was denied him), to recover the penalty of $500, under section 401 of the Criminal Code.

"The writ of *habeas corpus* shall be issued upon petition on behalf of any one showing, by affidavit or otherwise, probable cause to believe he is detained without lawful authority, or is imprisoned, when, by law, he is entitled to bail." Section 399, Criminal Code. And "if any officer, authorized to grant the writ, shall, when legally applied to, refuse to issue it, he shall forfeit and pay to the person in whose behalf it was applied for, $500." Section 401. The latter section refers to the former, and an application is legally made only when it is shown by the petition, or otherwise, that there is probable cause to believe that the applicant is detained without lawful authority. Who is to determine whether the probable cause is shown? Manifestly the judge to whom the application is made. It was so held in Bethurman v. Black, 11 Bush, 632, where the court says: "A person in prison is not entitled to a writ of *habeas corpus*, as of course. It is a discretionary writ, to be issued upon probable cause being shown,

and if, upon the face of the petition therefor, it appears that there is no sufficient ground for the release of the prisoner, the writ will be denied."

It is a discretionary writ, says Judge Cofer. The consideration of the application, and the granting or refusal of the writ can not, then, be mere ministerial acts. They necessarily invoke the exercise of judicial discretion. If, upon the inspection of the petition, or other evidence, the judge is of opinion that probable cause for believing the applicant to be illegally detained is not shown, it is not only his right, but his duty to refuse the writ; and, to hold that he is, in such case, liable to the penalty fixed in the statute, because, in the opinion of some one else, probable cause was shown in the application, is a proposition repugnant to reason.

Would it be seriously claimed that a court should, at the suit of the applicant, enforce the penalty on the judge for refusing the writ, when, in the judgment of the court, the applicant failed to show probable cause for the issuing of the writ? Certainly not. If this be so, it would seem to follow that the determination of the sufficiency of the application would necessarily require the judicial discretion of the judge to whom the application was made.

Between the statute of Charles II and the statute of New York, which are substantially the same, and our statute, there appears to us a marked distinction. The former statutes provide for the issuing of the writ by the court in term time, and in vacation they, upon certain prescribed conditions, make it mandatory upon the judge to issue it. It might be said, with some reason, that these statutes make it imperative upon the judge applied to in vacation to issue the writ. But our statute makes no such distinction. The writ is always issued by the judge, and not by the court; and, as we have said, can only be demanded when probable cause is shown.

The effect we give to section 401 is, that it merely fixes the penalty to be imposed upon the judge who improperly refuses the writ, but was never intended to restrain or control his judicial discretion. The construction contended for by counsel is contrary to the whole theory of our judicial system. Before giving to the statute such a construction, subjecting a judge, acting in his judicial capacity, to a penalty for an innocent error in judgment, we should look well to the rule so firmly founded in the common law, that no judge is amenable to a civil suit for his judicial decisions.

"The authorities show the general reason and policy of the law maintaining judicial inviolability; and surely we ought not to adopt a construction of this statute abhorrent to every principle of justice and sound policy, unless the interpretation be imperiously required by the express and unequivocal terms of the statute. In this case the appellee acted in his judicial character. There is no pretense that he acted from corrupt motives. That a judge should be compelled to decide new and difficult questions, at the peril of incurring a severe penalty, if he happens to decide wrong; that pure intentions and honest endeavors to perform his official duties shall afford him no protection, are propositions repugnant to reason and humanity, and can not be law. The *habeas corpus* act is justly prized as one of the bulwarks of freedom, and can be endangered only by its misapplication and abuse. Let us beware that, in our zeal for securing personal liberty, we do not destroy the virtuous independence and rightful authority of our courts of justice, and thereby subvert the foundation of social order." Yates v. Lansing, 9 John, N. Y., 887; 6 Am. Dec., 302.

Section 401 of the Code is not unequivocal in its terms—does not

make the forfeiture imperative upon the refusal of the writ. It is only where the applicant has shown to the judge the probable cause of belief that he is illegally detained, that the statute imposes the penalty for refusing to issue the writ.

It was the duty of the appellee, upon the presentation of the application, to consider it. This, we must presume, was done, as the petition does not allege that he refused or failed to entertain the application, but merely that he refused to issue the writ.

For the foregoing reasons we think the court properly sustained the demurrer. We have examined the written application, incorporated in the petition, which was the basis of the demand for the writ, and, in our opinion, it fails to show probable cause to believe that he was detained without lawful authority.

The grounds alleged are: First. That he (the appellant) is held under a judgment obtained by fraud and forgery on a forged indictment. Second. That he is held under a re-arrest and re-imprisonment on the same charge and for the same offense, and same imprisonment from which he had, on May 5th, 1887, been lawfully discharged under a writ of *habeas corpus*. Third. That he is imprisoned in a county jail, not authorized by law, not in the jail of the county in which he was tried.

We hardly deem it necessary, but in view of the earnest argument of counsel, we will briefly notice each of these grounds in the order named:

1st. The judgment of a court having jurisdiction of the person and subject-matter, is, until reversed or set aside, conclusive; and we know of no way in which it can be annulled, except by a proceeding in the court which rendered the judgment, or by an appeal to the appellate court.

2d. What the jurisdiction of the officer was, who issued and tried the writ of *habeas corpus*, on May 5th, 1887, whether he was a judicial or ministerial officer, is not made to appear. The Code, section 399, provides who may issue the writ, and the conditions and the order in which the several judicial officers therein named may acquire jurisdiction to issue it, and the petition should have stated the facts so as to enable the appellee, when applied to for the writ, to determine whether such officer had jurisdiction to act in the premises.

3d. In cases of fine and imprisonment, the statute provides that the imprisonment shall be by confinement in the jail of the county in which the defendant is tried. General Statutes, chapter 29, article 1, section 25. But the statute (General Statutes, chapter 61, article 2), also authorizes the removal of a prisoner to another jail, and the order of the court or judge directing the transfer is conclusive evidence that it was proper, and is a justification to the jailer for holding the prisoner, &c. As the petition for the writ shows that the appellant was tried and convicted in Montgomery county, and, in pursuance of the judgment, was confined in the jail of that county, and that he was, at the time of the application, in confinement under the same judgment in the jail of Jefferson county, in the absence of any allegation showing how or why he was removed, it should be presumed that his removal was duly authorized by the competent tribunal.

It seems to us that, in either aspect of the case, the judgment dismissing the petition was right, and it is, therefore, affirmed.

Judge Young not sitting.

SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. GRANT.

Filed February 4, 1891. Appeal from Christian Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Railroads—Negligent killing of stock.*—When in an action against a railroad company for the negligent killing of stock by one of its trains, there is other testimony than that of defendant's employes in charge of the train, as to the circumstances attending the killing, the court should not instruct the jury as matter of law, that the facts proved by defendant's employes constituted due care.

2. *Juror not competent to impeach verdict*—The testimony of jurors is not competent to explain the grounds of their decision to or impeach the validity of their finding.

H. J. Stites for appellant; Joe McCarroll for appellee.

CRABTREE v. ATCHISON, &c.

Filed February 4, 1891. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Burden of proof*—In an action upon an assigned note in which the defendant, by his answer, pleaded want of consideration and fraud, and the plaintiff, for reply, denied the allegations of the answer, and relied also upon an estoppel, the burden of proof was upon the defendant, as judgment must have been rendered for plaintiff if no evidence had been given on either side.

2. *Same—reversible error*—A party may rely for reversal upon the error of the court in refusing to give him the burden of proof, although the case was submitted to the jury without argument. The fact that he was thus denied the right to the concluding argument to the jury, may have been the reason his counsel did not argue the case, and, therefore, the court can not say he was not prejudiced.

3. *Defenses to assigned note*—The purchaser of a lightning rod executed his note for the purchase price and with the note delivered to the payee two certificates addressed "To all whom it may concern"—one certifying that the rod had given satisfaction in every respect, and the other certifying that there was no offset or defense against the note, and that it would be paid in full to the payees or their assignee. *Held*—That the payor is estopped to rely upon want of consideration or fraud as a defense to the note against one who purchased it upon the faith of these certificates.

Sweeney, Ellis & Sweeney for appellant; Weir, Weir & Walker for appellees.

DOOLIN, &c. v. DUGAN.

Filed February 4, 1891. Appeal from Pulaski Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Exemptions—"*Family*"—A debtor was entitled to the exemptions allowed by statute to a "housekeeper with a family," although his family consisted only of a daughter who supported herself by teaching school, and when not teaching, made her home with her father, fully compensating him for her board by the performance of household duties. It is the duty of the father to furnish the daughter a home, although she earns her living, and in the performance of the household duties more than compensates him for her board. In order to constitute a "family," within the meaning of the statute, it is not necessary that the persons living with the debtor should be "dependent" upon him for support in the narrow and restricted sense of that word.

Curd, Denton & Waddle for appellants; W. A. Morrow, L. D. Parker and James T. May for appellee.

GREEN, &c. v. KENTON INSURANCE CO.

Filed February 4, 1891. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

The sale of insured property and the assignment of the policy terminated the liability of the company, and the mere fact that the agent of the company was informed of the transfer of the property and the policy and made no objection or suggestion that it was necessary for the company to indorse its consent upon the policy, does not estop the company from relying upon the transfer as a defense.

T. R. Gordon for appellants; E. E. Settle for appellee.

MCCONNELL v. PEDIGO & HAYS.

Filed February 18, 1891. Opinion of the court by Presiding Judge Barbour, affirming.

Railroads—Granting of Exclusive right to stand vehicles at depot—A railway company can not grant to one person—a common carrier—the exclusive right of coming, and standing his vehicles upon its grounds, to solicit the patronage of incoming passengers with respect to carrying them and their baggage, and exclude all other persons from the exercise of such rights. The company has no right to discriminate in such a matter, where the discrimination is not necessary to the successful prosecution of its legitimate business.

Porter & McQuown for appellant; Thomas H. Hines for appellees.

GREEN v. COMMONWEALTH.

Filed January 14, 1891. Appeal from Nelson Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Larceny by servant—Breach of trust—Embezzlement*—A servant may commit larceny by taking and appropriating to his own use the goods of the master left in his care.

Where one who was left in control of a mill by the owner sold wool that had been delivered to the owner of the mill, to be carded into rolls, and converted the proceeds to his own use, he was guilty of larceny and not of embezzlement, or breach of trust. But if he had been authorized by the owner of the mill to sell the wool, he would have been guilty of embezzlement in failing to account for the proceeds; or if the wool had been delivered to him by the owners, to be carded into rolls, after he was made superintendent, he would have been guilty merely of a breach of trust in selling the wool and converting the proceeds.

2. *Where goods have been stolen from a bailee*, an indictment for the larceny may describe the goods as belonging either to bailee or to the bailor. Therefore, the fact that the indictment in this case described the stolen property as belonging to the owner of the mill, when, in fact, he was only bailee, was no obstacle to a conviction.

J. D. Wickliffe for appellant; P. W. Hardin for appellee.

BRONGER, &c. v. HOOVER, TRUSTEE.

Filed January 14, 1891. Appeal from Hardin Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Trustees—Parties to actions*—The trustee of an express trust may sue in his own name, without making the *cestui que trust* a party.

2. *Same*—Marion Hoover sues as trustee upon a promissory note, executed to "Marion Hoover, trustee for Alice Parr." *Held*—That as the judgment obtained in this action would be a bar to an action brought by plaintiff on the same note in his individual name, the defendants are not injured by the variance between the petition and the note sued on, and, therefore, can not complain.

3. *Judicial sales—Divisibility of lands*—Although the petition alleges that the lands sought to be sold can not be divided, yet as it shows that there are two tracts the defendants were not prejudiced by a sale of the two tracts separately.

Montgomery & Barry for appellants; James C. Poston for appellee.

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KENTUCKY COURT OF APPEALS.

MEGUIAR v. HELM.

(*Filed Dec.* 11, 1890.)

1. *Partnership—Estoppel—Construction of contract*—In 1877 H. and W., having been engaged in the tobacco warehouse business, became insolvent, and entered into a partnership agreement with the appellant, M., who was a man of means, by the terms of which they were to continue the tobacco warehouse business, M. furnishing the money necessary to conduct same, and all to share equally the profits realized, and M. to have, in addition, the benefit of the *warehouse interest account*. The partnership continued for seven years, when M. and H. purchased the interest of W., and continued the partnership business on the same terms for two years longer. The books of the firm were regularly kept, and monthly balances and annual settlements were made, showing the amount of profits due each partner, as well as the interest account regularly credited to M. About ten years after the partnership was first entered into, H. sued M. for a settlement, alleging that M. had received more money, under what was termed the *warehouse interest account*, than he was entitled to under the terms of the partnership contract. For defense, M. alleged that he was entitled to all the interest credited to that account, whether paid to the firm or not, and that appellee was estopped from claiming that M. was only entitled to the profits realized from the account, because the method of crediting the interest to M., on the books of the firm, had been acquiesced in without complaint on the part of H. for seven or eight years, and that method must be construed to be the proper construction of the partnership contract. *Held*—That he is estopped from insisting that the proper meaning of the contract is different from the construction given to it by all the partners for such a long period. The entries are *prima facie* correct, and the presumption is that they were made by the consent of all the partners, and this assent is founded on the duty of each partner to avail himself of the opportunity of inspection and the right of access, and see that the books are correctly kept. It is a well-settled rule that, in case of ambiguity in the articles, or

want of explicitness, the interpretation of the parties, as shown by their subsequent conduct, will be accepted as the true construction, and in aid of the intent.

2. *Same—Assessments*—All the funds constituting a partnership fund in business should be assessed in the name of the partnership, and the taxes so paid without regard to the fact that on a settlement of the partnership one partner may be entitled to a larger share of the profits or of the capital than another.

Wm. Lindsay and Brown, Humphrey & Davie for appellant.

J. S. Pirtle and Helm & Bruce for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

In the month of January, in the year 1877, the appellant, P. Meguiar, and the appellee, John L. Helm, together with W. M. Wilson, entered into a verbal agreement by which they became partners, under the style of Meguiar, Helm & Co., in the operation of a tobacco warehouse, in the city of Louisville, for the sale of tobacco.

Helm and Wilson had, previous to this agreement, been engaged in the same business with a firm called Ronald, Webb & Co.; that firm composed of Ronald, Webb, Helm and Wilson. This last firm was unfortunate in business, and its property had been turned over to the appellant, Meguiar, as the trustee, for the benefit of creditors. It seems that Helm and Wilson, who were connected or had been members of the insolvent firm, being desirous of continuing the business, and having worked up, as it is learned, a large trade for the house, proposed to the appellant, who was a man of means and credit, to go into partnership with them, and upon the first suggestion the preliminaries of the partnership were agreed upon, and the firm of Meguiar, Helm & Co. formed.

The settlement of this partnership, it having been dissolved, is the subject-matter of the present controversy. The terms of the partnership were as follows:

They were to share equally in the profits, with this exception: Meguiar, who was the only member of the firm having at that time money and credit, was to furnish the capital agreed on, and was to have for that responsibility or expenditure on his part, the *benefit of the warehouse interest account*. The partnership was to last for one year, and to continue from year to year, as might be agreed upon by the partners.

It was a partnership from year to year, as is manifest from the testimony of Meguiar, Wilson and Tilgman. The appellee, Helm, regarded it as a partnership for an indefinite period, and while he, no doubt, understood it in that way, the decided weight of the testimony is, that at the end of each year the partners, or either of them, could continue or dissolve it, as might be deemed best, that discretion being with one or all of the firm. Still, we do not think, in view of the questions raised, that such a construction of the agreement could control the decision of the main question.

The parties to the appeal differ as to the meaning of the *warehouse interest account*, the appellant insisting that he was entitled to all the interest credited to that account, whether paid to the firm or not, and the appellee maintaining that it was only the profit realized from the account that Meguiar was to receive. It is insisted by

the appellant that the appellee is estopped from now asserting any such claim as to the wrongful credit to Meguiar of this interest unpaid, because the entries upon the books of the firm for the period of near eight years, with running balances and yearly settlements, showing the interest of each member of the firm, with the amount of profit or loss, is conclusive as to the right of Meguiar to the entire interest account, and as to the meaning to be given that part of the agreement.

This action was not instituted until ten years after the formation of the partnership. In the month of September, in the year 1884, more than seven years after the firm had begun business, Meguiar, the appellant, and Helm, the appellee, purchased out the interest of Wilson in all the firm assets, and formed a new firm, bringing into it new partners. This new firm continued for over two years, when the appellee, Helm, ceased to be a member, and a short time after that discovered the manner in which the interest account had been kept, and that Meguiar had received credits, in the way of interest, to which he was not entitled. It appears that the books of the firm were regularly kept, balance sheets made out monthly and examined by each member, and that there was no pretense of concealment or fraud on the part of Meguiar, or any one connected with the firm's business. The clerk seems, during this entire period, to have construed the meaning of the contract, without even the suggestion of any of the partners, and to have given Meguiar the benefit of the interest account, whether collected or not. The books must have been examined, or the assets ascertained, when Wilson sold out in the year 1884. This interest account had been credited to Meguiar up to the date of the dissolution, and there had been no complaint. The appellee says that he was not familiar with bookkeeping, and that his business and that of Wilson was to travel through the country and work up the trade for the house, while Meguiar was the financier and manager of the warehouse; that he was at the warehouse for two years prior to the dissolution, but his attention was not called to the manner in which the books had been kept, with reference to the interest account. Wilson seems never to have discovered any errors, and for the reason, as he says, no examination was made of the books by him or any one for him, and besides he was not an experienced book-keeper.

It is insisted by the counsel for the appellants, that the partners having construed the contract for themselves by the repeated entries on the books from January, 1877, those entries being continually made from month to month, and from year to year, until the year 1884, they ought not now be allowed to open the accounts and have a re-adjustment of balances that contradict that construction of the contract placed upon it by the partners, as evidenced by those entries. There is no mistake or error shown to have been made by the clerk, but an allegation, after the lapse of ten years from the formation of the partnership, that one of the partners had obtained more than his share of the firm assets by reason of the action of the clerk, who made the entries, or the partner causing the entries to be made placing a different construction upon the contract from that placed upon it by the plaintiff.

It is said in section 981, volume 2, Bate on Partnership, "that its terms, or any alteration therein, or construction put upon them, may be proved by the nature of the charges or entries in the books as conclusively as by any other writing." The entries are *prima facie* correct, and the presumption is that they were made by the consent of all the partners, and that this assent, says the same au-

thor, "is founded on the duty of each partner to avail himself of the opportunity of inspection and the right of access, and see that the books are correctly kept." Section 978. Again it is said: "In case of ambiguity in the articles, or want of explicitness, the interpretation of the parties, as shown by their subsequent conduct, will be accepted as the true construction, and in aid of the intent." Section 215.

In Moore v. Lewis, 31 Ark., 113, parties had a grocery and dry goods business. A third person furnished the dry goods, and was to have half the profits of that business. The firm was in the habit of advancing money to farmers, and, when paid back, it was first applied to the advances; second, to payment for the groceries, and, third, to the dry goods. As the partners in the dry goods part of the firm never objected to this, when it had been done through a series of years, the court presumed she assented to it, and refused to disturb the mode of settlement.

All the partners had access to the books of the firm. The warehouse interest account is not shown to have been kept in a manner different from such accounts kept in like warehouses; in fact, the interest account was kept as it should have been, and it is urged only that too much of this interest was allowed the appellant. Yearly settlements, or rather balances, were made showing the profit or loss, and what had been realized for distribution between the partners. When the account or balances showed a profit for either Helm or Wilson, it was credited to them, and interest at eight per cent. allowed on the amount when used by the firm. Meguiar's part of the profits was also shown, but he looked to the warehouse account for his interest. This interest account was stated, and if it appeared to be too much, the appellee should have complained, and it must be assumed, as a matter of law, that he knew the existence of so many like entries in the books that were subject to his inspection at any time, and that had to be resorted to in order to show the amount of interest the appellee was receiving. That the appellee never examined the books, or paid but little attention to any entry in them, is evident from his statement. But these entries for so long a period, sustained by the evidence of Meguiar, coincided with the circumstances under which the contract of partnership was entered into, must, in our opinion, settle the question as to the meaning to be given its terms.

The appellee's inducement to enter into the agreement to give to Meguiar the interest account, is that he would not pay a greater rate of interest than would have to be paid to the banks, or that when the principal of the loan was not paid Meguiar was not to get the interest, doubtless existed in his mind; but, on the other hand, Meguiar was giving to Wilson and the appellee an equal interest in the profits, agreeing to perform as valuable service as they did, and assuming the entire pecuniary responsibility of conducting a business involving, in each and every year, many thousand dollars. His reason, therefore, is that the advantage intended was to be given him by the agreement. If the meaning placed upon its terms by the appellee is to prevail, then Meguiar does not get the *warehouse interest account*, but only so much of it as was collected after paying the principal sum that had been advanced, and not only so, if collected during a series of years, and partial payments credited the borrower, and interest credited to warehouse account at the end of the year, yet if, after that time, the balance of the principal of the advance is lost, the credit of interest previously given Meguiar, or found in warehouse interest account, is to be taken from that ac-

count and applied to the payment of the balance of the principal still owing.

We think such a construction should not be given the contract, and certainly not when the mode of ascertaining Meguiar's interest had been followed for so many years, and was perfectly consistent with the terms of the agreement.

The warehouse interest account was debited by the interest paid Helm and Wilson, on the balance due each. These balance sheets, upon which this appeared, showed the state of the interest account. The two partners obtained interest on the balances due them; they obtained an equal share with Meguiar in the profits for selling, the commissions, the insurance, &c., and in every way equal partners, except that Meguiar, for his money and credit, was to have the interest account. If, therefore, he paid as capital into the firm $50,000, and this was advanced to customers at eight per cent. interest, and only $25,000 was paid back and the other half lost, Meguiar's loss would be one-third of the loan to customers that had not been repaid, and the entire interest upon it, and all that he could get in the way of interest, would be the interest on the $25,000 that had been paid.

This, it seems to us, is not the spirit or meaning of the contract. So it is contended that if the firm had advanced to the farmer $1,200 to be paid in tobacco and out of the first year's crop, the farmer had paid $600 on the advance, and the interest on his advance had been credited to warehouse account of interest, and the farmer for the next year had failed to pay any of the principal remaining due, but became insolvent, that the interest already credited to warehouse account should be taken from it and applied to the discharge of the principal remaining unpaid. This view of the contract, we think, can not be sustained. It is argued that it should be, for the reason that Helm and Wilson would sustain two-thirds of the loss, and, besides, the entire interest on the balance due on this debt. This is doubtless the result, based upon a contract that the parties saw proper to make, and for the reason that Meguiar had agreed to perform, and did perform, as much labor as either of the partners in the conduct of the firm, and assumed, in addition, to advance his money and pledge his credit to maintain it. There is no perceptible reason why he should hold the interest and his co-partners still share their one-third each of all the profits. If an advantage was given Meguiar it was by reason of the contract, and to adopt the view presented by the appellant, the terms of the contract must necessarily be changed.

Again, it appears from the testimony of Wilson, one of the partners, that himself and the plaintiff had talked about the interest account at different times as to its meaning and import, but there was no definite understanding as to what it did mean. The interest was then being credited in the manner claimed by the appellant, who seems never to have heard of any objection to the credits until shortly before this action was instituted, nearly ten years after the first entries of credit to Meguiar began.

There is some suggestion in the record, and perhaps it so appears, that money was borrowed by the firm at eight per cent., and the interest allowed Meguiar was ten per cent. We think this was never contemplated by the parties, and, if such an error exists, it should be corrected, but, in other respects, the entries of interest to the credit of Meguiar should stand.

As to the taxes paid by the appellant, it is evident that he listed with the assessor what belonged to the firm after deducting its debts.

It is not a proper mode of assessment to list each partner's capital or profit, and require each to pay on his individual account. If these appellees had borrowed of the Bank of Kentucky $100,000, and placed it in the firm as capital stock, it would then have become firm assets, and the partners sharing in the profit and loss, the firm must pay the taxes. So if Meguiar placed in the firm $50,000, and by the terms of the partnership the profits were to be divided between the three, the fact that Meguire had invested more capital, or had to his credit a larger sum than his other partners, affords no reason for making him pay a greater proportion of the taxes than his co-partners, and, in the absence of a special agreement that one shall pay more than the other, the amount of taxes paid must be debited to the partnership, and to that extent the profits, in which all share equally, will be lessened. Nor is it material whether such partners' interest is equal, if a partnership, the firm, as such, must pay the taxes.

The judgment below is reversed and remanded for proceedings consistent with this opinion.

L. &. N. R. R. Co. v. Orr.

(*Filed Jan.* 15, 1891.)

1. *Damages—Nuisance—Parties to action—Limitation*—This is an appeal from a judgment for damages rendered against appellant in an action instituted in October, 1884, by appellant, to recover damages to his dwelling and its appurtenances, located on S ratoga street, caused by the construction of appellant's railway track, on that street, the constant moving of trains upon the track, the prevention of ingress and egress to and from his property, the noise produced by the escape of steam, the cracking of the walls of his house, and the emission of smoke, soot and cinders from the smoke stack into the dwelling.

The appellant relied upon the plea of the statute of limitation of five years, as a defense to the action. *Held*—That, as the railroad track was constructed in 1870 and '71, by another company, that operated the railroad until 1881, when appellant became the purchaser of its rights and franchises, the cause of action resulting from such construction, such as inconvenience and depreciation in value of adjoining property, as well as the cause of action resulting from the prudent operation of the trains and engines on said track, accrued as soon as said road was put in operation, and full damages for same could have been recovered of the former company, vendor of appellant, and such action can not be severed so as to hold appellant responsible for any part of same; therefore, the statute of limitation protects appellant from recovery for such damages, even if it could be held answerable for the torts of its vendor; and the blowing of smoke into appellee's dwelling by the wind is an unavoidable result of the operation of said road, for which no action can be maintained. But, if soot and cinders are thrown into appellee's dwelling as the result of improper or careless operation of the road by appellants, then appellee may recover damages for same.

2. *Evidence*—It was incompetent to permit evidence to go to the jury showing the depreciation in value of property on that street, by reason of the construction of the railroad. It was also incompetent to show that the trains were run along that track at a speed in violation of the city ordinance.

Lyttleton Cooke, J. C. Wright and George Washington for appellant.

C. S. Raisin, jr., for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, Alfred Orr, instituted this action in the Campbell Circuit Court, on the 10th of October, in the year 1884, against the appellant, the Louisville and Nashville Railroad Company, seeking to recover damages to his dwelling and its appurtenances, located on Saratoga street, caused by the construction of appellant's railway track on this street; the constant moving of trains upon this track; the prevention of ingress and egress to and from his property; the noise produced by the escape of steam; the cracking of the walls of the house, and the emission of smoke, soot and cinders from the smoke stack into the dwelling. There was a judgment for $1,300, in the court below, which was brought to the Superior Court and reversed, and is now in this court on an appeal from the Superior Court.

This road was constructed and operated on the street upon which appellee's dwelling fronts, by the Louisville, Cincinnati and Lexington Railroad Company, in the years 1870 and 1871. While this company was operating its road, its rights of property and franchises was sold upon a petition filed to enforce certain liens in the case of Douglas' trustee against the company, and purchased by the Louisville, Cincinnati and Lexington *Railway Company*. The latter company operated the road until the year 1881 (November), when the present appellant, the Louisville and Nashville Railroad Company, became the owner, and has operated the road since its purchase The defense denied the existence of the alleged wrongs, and pleaded the statute of limitation of five years. This action was instituted in the year 1884, and the appellant became the owner of the road in the year 1881, and, therefore, the injury of the property of the appellee, by appellant, must have occurred between November, 1881, and October, 1884. The court below, however, seems to have made the appellant liable for all the injury, if any, to the appellee's dwelling, caused by the operation of the road, by those in possession prior to its occupancy and operation by the appellant; and, in this view of the case, which is a mistaken one, the plea of limitation was interposed.

A railroad must be regarded as a permanent structure; and, when its construction in the streets of a town or city is authorized by legislative and municipal authority, it can not be said to be a nuisance, when operated in a careful and proper manner. All damage that would naturally result from the road can be ascertained and determined when the road is being constructed, or rather when it is operated so as to show the damages that will necessarily result from its prudent management. If the right of ingress and egress is affected by it, the right of action arises so soon as the road is being used by running the cars and engines upon it. So the constant increase in the number of cars on the track, as public necessity may demand, caused by the growth of trade and commerce, all such matters enter into the question of damage. All such damages can be ascertained the moment the road is used for transporting freight and passengers, and, after the lapse of five years, an action for such damages is barred. They all may be recovered in a single action; and, therefore, the statute of limitation begins to run from the time the action could have been first instituted. There seems to be a width of near nineteen feet on each side of the track, excluding the width of

the sidewalks, that are twelve feet, and, therefore, no cause of action exists as to the right of ingress or egress. That the appellee, with such a passway, had the reasonable use of the street, is unquestioned; and, if a recovery can be had for such damage as results from the mere inconvenience that the operation of the road causes the appellee, it then necessarily results that the Legislature nor the municipality had the right to authorize the construction of the railway in front of appellee's lot. In such a case as this, it should be held that the passway, on either side, is sufficient.

The track of a railway may be operated by one company, in such a manner as to cause a direct injury, resulting from the want of skill or care in those operating it; but, when the track is operated by another company, under a purchase that vests it with the right to use it, and having no other connection with the company committing the wrong than the fact of having made the purchase, we see no reason for holding the purchaser liable for the torts of the vendor. It is a distinct corporation, under a different control, and is liable for its own acts, and not that of its predecessor. C. & O. Railroad Co. v. Griest, 85 Ky., 619. In ordinary actions for trespass to real estate, the recovery is for the injury accruing up to the institution of the action; but, where a railway is constructed in a street, the injury, if any, to the adjacent property is permanent in its character, and continuing as long as the road is operated; and the cause of action for the damages, resulting from its prudent operation, arises as soon as the cars begin to run; and, in the estimate is included the future operation of the road; for, if otherwise, there would be a cause of action for every time the cars passed the dwelling of the owner. Troy v. Railroad Co., 23 New Hampshire, 83; Pratt v. Desmoines Railway Co., 72 Ia., 249; Ill. Central Railroad v. Grabill, 50 Ill., 241. In McAuley v. Chicago and Eastern Illinois Railway Co., 121 Ill., 160, "the court, in discussing a question similar to the one before us, held that where the original nuisance is of a permanent character, the damages are permanent, and the recovery must be had for the entire damage in one action, and such damages accrue from the time the nuisance is created, and from that time the statute of limitation begins to run." Railroad Company v. Combs, 10 Bush, 393. The damages resulting from the necessary and prudent operation of the road can not, therefore, be recovered in this action, because barred by the lapse of time, conceding the liability of the appellant as the vendee of the company, constructing it. We have already seen, however, that for the wrongful and unskillful operation of the road, by the original owner, from which damage arises, a subsequent purchaser is not liable. The only question really involved in this case, is as to the operation of the road by the appellant since its purchase. If it has injured appellee's property by placing it in greater peril, by changing the grade or lessening the width of the passway on either side, so as to obstruct the passage to appellee's dwelling, the company is responsible. We have discovered no such state of case, and the only difference is the increased number of cars in transportation, with such increased burdens on the track, as would necessarily result in the operation of such a railroad, and for which no liability rests on the appellant. The appellee was allowed to prove depreciation in value of the property on that street, by reason of the construction of this road, all of which was incompetent. Was also allowed to prove that the rate of speed was in violation of the city ordinance, which was equally so, and all other evidence affecting question of damage, resulting from the operation of the road prior to the purchase by the appellant, should have been excluded from the jury.

In this State the use of the street by the railway may be granted by the Legislature, and the consequential damages, resulting from this use, gives to the owner of abutting property no cause of action. It is only where the rights of the owner are unreasonably abridged, and, therefore, the noise, the fear of injury from approaching trains, the smoke emitted from the pipes, and cinders that fall from the cars upon the street, constitute no cause of action; and, even if an injury, it is the necessary result of the operation of the road; and if special damage is caused by it, the statute of limitation could apply, as already indicated. In this case the street is about sixty feet in width, with the track in the center, and, while the smoke from the cars may be taken by the wind to appellee's house, that can not well be avoided, it does appear that soot and cinders not only strike against, but pass into the appellee's dwelling, from the passing trains; and, if so, it is manifest that such wrongs could be avoided, and for such injuries there should be some remedy; and because a like injury has been inflicted on the owner by the original company, it does not follow that, in estimating the damage resulting from the original construction of the road, the jury or court would have taken into consideration the fact that such an injury would likely result from a prudent and careful operation of the road. While we can not adjudge that such an injury could, with proper precaution, be avoided, it seems to us that the jury should be allowed to say whether or not such an inconvenience and wrong would necessarily result from the running of cars, in a prudent manner, on this track; if so, the statute of limitation would apply, in reference to this particular complaint; but if, by proper precaution, it could be prevented, the company should be held liable in damages for the injury resulting to the appellee from this want of care and precaution in operating its road. This is the question that, in our opinion, should have gone to the jury, and the instructions given were erroneous and misleading. If the fact exists that soot and cinders are thrown into plaintiff's dwelling by passing trains, is such an injury the result of an improper or careless operation of the road? The action in equity relied on by the appellant as a bar to the recovery in this case, when examined, shows that the question involved was the right only of the original company to construct the road and did not affect the question of damage, and, therefore, the answer presenting the defense was properly disregarded.

The judgment below is reversed, and the cause remanded for proceedings consistent with this opinion.

NATIONAL BANK OF LANCASTER V. JOHNSON.

(*Filed Jan.* 24, 1891.)

Usury—Penalty—Jurisdiction—The State courts have jurisdiction of actions to recover, as a penalty against a national bank for collecting usury, twice the amount of interest paid on a note.

The doctrine of Henderson National Bank v. Alves, &c., 12 KY. LAW REP., 722, approved.

Wm. Herndon for appellant.

W. O. Bradley for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action February, 1889, to recover of appellant judgment for twice the amount of interest alleged to have been paid at the rate of eight per cent. per annum, within two years previous to that date, on two notes which he had executed to it; and judgment having been rendered for the amount prayed for, and interest thereon from the date of the judgment, less amount of a note and interest pleaded as a set-off, this appeal is prosecuted.

The statements of the petition were not controverted, and the two questions presented and argued are as to jurisdiction of the court and amount of recovery, the latter involving construction of sections 5197 and 5198 of the Revised Statutes of the United States. Both of these questions have been considered and determined at the present term of this court, in the case of Henderson National Bank v. Alves, &c., and need not be further discussed.

It was in that case held that a circuit court of this State "has jurisdiction of the action authorized by section 5198, to be brought to recover back twice the amout of interest paid, when the rate charged, reserved or received by a national bank exceeds what is authorized by section 5197 to be so charged, reserved or received, which is six per cent." It was also held that the criterion of recovery in such case, according to the plain language of the statute, is "twice the amount of interest" paid, and not merely twice the amount of the usury.

It being alleged in the petition, and not denied, the interest sought to be recovered back was all paid within two years next before commencement of the action, it is not necessary to decide, as was done in the case mentioned, at what time the limitation of two years began to run in this case.

There being, in our opinion, no error of the lower court in this case, the judgment is affirmed.

BRAMBLETT, &C. V. MCVEY.

(*Filed Jan.* 24, 1891.)

Void judgment—Failure to serve summons—Parties to actions—Appellants were indicted in the Grant Circuit Court of the offense of trespass, and process thereon, directed to the sheriff of Nicholas county, was returned indorsed executed. Judgment was rendered against each by default for the sum of $500, upon which a *capias pro fine* was issued, directed to the sheriff of Nicholas county, who being about to seize the body of one of appellants, he executed a replevin bond for the amount of said judgment, with the other appellant as his surety. Appellants then instituted an action against the clerk of the Grant Circuit Court, the county attorney of that county, the Commonwealth's attorney for that district, and the sheriff of Nicholas county, to enjoin the collection of said replevin bond. The petition and amended petition allege that the return of the officer is untrue and made by him through mistake of fact, as he had not seen appellants or served the process upon them, and they were thus prevented from appearing on the trial of the indictment, and setting up a good defense which they had. It is insisted as defenses that no cause of action is stated in the petition and amended petition, nor are the defendants proper parties to the action. *Held*—That under section 23, Civil Code of Practice, the circuit clerk, county attorney and Commonwealth's attorney, each having an interest in the controversy, were properly made defendants. Section 17, chapter

81, General Statutes, expressly authorizes the return of an officer to be impeached, in a collateral proceeding, upon the charge of fraud or mistake, and the allegations of the petition, if true, subjected appellants to a liability or penalty without any notice whatever of the proceeding, which is against public policy and rendered the judgment void, which appellants can avoid by enjoining proceedings thereunder.

J. P. Norvell and W. W. Dickerson for appellants.

R. W. Masterson and M. D. Gray for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Lewis.

Appellants, John W. Bramblett and G. W. Bramblett, state in their petition they were indicted in the Grant Circuit Court, charged with the offense of trespass, in taking and carrying away a horse in possession and property of I. Marksbury, and, upon the indictment, a summons was issued, directed to the sheriff of Nicholas county, who endorsed thereon he had executed it upon both defendants, when, in fact, he never did, in any manner, execute it upon John W. Bramblett; that at a subsequent term of that court, though neither of them was present at the time, a trial of the charge took place, and, without any evidence being heard to sustain it, there was a verdict of the jury, followed by judgment of court against both of them, for a fine of $500; that, to satisfy that judgment, an execution of *capias pro fine* was issued against appellant, John W. Bramblett, directed to the sheriff of Nicholas county, who was about to seize his body, and would have done so if he had not executed a replevin bond for amount of the judgment, which was done, G. W. Bramblett being his surety; that afterwards an execution was issued on the replevin bond, and to restrain collection of it an injunction was prayed for. It was further stated in the petition that he, John W. Bramblett, was not guilty of the offense for which he was indicted, and would, if an opportunity had been afforded, have so pleaded, and is now ready to do so.

In an amended petition, tendered after a general demurrer had been sustained to the original, they state that the return on the summons mentioned is untrue, and was made by mistake of the sheriff, who supposed he had executed it on appellant, John W. Bramblett, when, in fact, he had not executed it on nor seen him.

The question of law presented on the appeal is whether the facts stated in the petition and amended petition, taken as true, are sufficient to authorize the relief prayed for, which is to perpetually enjoin collection of the replevin bond.

The parties made defendants to the action by name are the clerk of Grant Circuit Court, the county attorney of that county, the Commonwealth's attorney for the district in which that county is situated, and the sheriff of Nicholas county; and it is contended in argument the action can not be maintained against them, because the judgment upon which the original execution issued is not in favor of them.

Section 23, Civil Code, provides that "any person may be made a defendant who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved in an action." If some one, or all of the parties named, could not be made defendants to an action like this, the plaintiff, however just his cause of complaint, would be without

remedy, for the Commonwealth can not be sued. But both the attorneys have an interest in the fine adjudged against appellants, and to prevent the enforcement of it the clerk who issues the execution and sheriff into whose hands it goes, must necessarily be made defendants. Public policy requires, and it is held by courts that when an officer has authority to act, he will be presumed to have acted correctly, and to maintain this action it will be necessary, on trial of the issue of fact, for appellants to prove what on demurrer is to be assumed to be true, that the sheriff did not execute the summons on appellant, John W. Bramblett. But the conditions upon which the correctness and verity of an official endorsement or certificate may be called in question are prescribed in section 17, chapter 81, General Statutes, as follows: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

No trial of a charge of felony can take place without presence of the accused, because the Constitution forbids it. But though a fine for misdemeanor may be imposed, just as a judgment for money may be rendered, without the defendant being present, yet it is indispensable to validity of both that the person against whom the charge is made, or recovery is sought, that he have notice of the proceeding against him, so he may deny and call for proof of the charge or of legality of claim against him; and it is so plain as to be generally held that a judgment rendered without such notice is, and ought to be, treated as absolutely void; and it is equally plain that the defendant, in all cases, should have the right to show that a judgment against him, whether rendered under an indictment or in a civil action, was in fact, if it be so, rendered without legal notice; and, therefore, while for obvious reasons official return of a summons duly executed is presumed to be correct, and, consequently, sufficient to authorize a trial and judgment by the court, it would be equally against public policy, because unjust and o pressive, to deny the right of a defendant, against whom a judgment has been rendered, to show that the officer did not, in the mode required by law, actually summon him; and, hence, the statute authorizes it to be done when either the party benefited by the judgment has fraudulently procured return of service, or the officer had made it by mistake.

It is true this court has held in Taylor v. Lewis, 2 J. J. M., 400, and Shuffet v. Menifee, 4 Da., 150, that it was incompetent for a party to aver and prove the falsity of a return made by a proper officer, in a collateral mode, without a direct proceeding against the officer himself. But the statute we have quoted was evidently intended, and does in terms authorize, an officer's return to be put in question when the conditions therein mentioned exist. Besides, when a judgment in favor of the Commonwealth for a fine has been rendered, which requires imprisonment in default of its satisfaction, the defendant should not be required to look alone to the official bond of the officer for redress, even if that was always feasible and certain, but in defense of his liberty may proceed directly to contest the validity of such judgment, by showing the all-sufficient fact it was rendered without notice to him of the charge upon which it was based.

The execution of a replevin bond does not estop a defendant in

such case to deny the validity of the judgment for two reasons: First, the alterna ive in such case is presented either to execute the replevin bond, or else surrender his body to the officer, in case he has not sufficient means to satisfy the judgment; second, if the judgment was rendered without service of summons on him to answer the indictment, it was absolutely void, and being so, all proceedings under it, including the replevin bond, are null and unenforcible.

We think appellants stated in their petition and amended petition facts sufficient to constitute a cause of action, and the judgment is reversed for further proceedings consistent with this opinion.

COLSTON V. EASTERN CEMETERY CO.

CITY OF LOUISVILLE V. SAME.

(*Filed Jan. 27, 1891—Not to be reported.*)

Constitutional Law—Exemption of cemetery property—The appellant, cemetery company, having the right to the interest on a fund directed by its charter to be applied to the improvement and ornamentation of burial grounds, also owning about thirty-five acres of ground, is sought to be held liable for an assessment made by the ci·y of Louisville, under authority of an amendment to the charter of said city, approved March 24, 1882. In defense it is claimed that the charter of said cemetery company, granted in 1854, exempted the property of said company from all taxation or assessments or execution, and the Legislature had no power to impose any liability for assessments on said property. *Held*—That as said exemption was granted prior to the act of 1856, subsequent Legislatures can not alter same; besides, public policy will uphold said exemption.

E. L. Colston and H. S. Barker for appellant.

T. L. Burnett for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The Eastern Cemetery Co. was incorporated in the year 1854, with thirty-five acres of land constituting the property of this corporation, and this land had been given by Schwing and wife and Richardson and wife, and was originally intended as a place of burial for the members and their families of two Methodist churches then organized, and afterwards, by the act of incorporation, the trustees were empowered to sell lots and apply the proceeds to ornamenting and improving the grounds and buildings, and one-half of any sum remaining in the hands of the trustees was to be invested in safe stock until a fund of $10,000 should be created, the interest of which was to be applied in keeping the cemetery in repair, and all money not heretofore appropriated and set apart was to be paid over at the end of each year to the trustees of the two respective churches, *for the use and benefit of each society*. The cemetery proper is entitled to the interest on the fund, and the fund itself belongs to the two churches. By the terms of this charter, "the grounds, fixtures, shrubbery, and every thing growing therein, shall be exempt from State revenue or other taxes, and shall not, after the ground has been fully paid for, be subject to be levied on or sold by any judg-

ment, execution or decree for any other debt or cause whatsoever." This exemption was found on the statute in the year 1854, and has never been repealed, unless by an act of the 24th of March, 1882, amending the charter of the city, whereby the owner of land in a cemetery, or the corporation known as the cemetery, is made responsible for an assessment made against the land of the corporation. The lien may be enforced by this amendment on any land not actually occupied by graves. This enactment was, doubtless, framed to avoid the effect of our opinion, rendered by this court in the case of the city of Louisville v. Nevin, 10 Bush., 549, where it was held that this court would not subject land used as a cemetery to the payment of such assessments. We still adhere to that opinion, and particularly in a case where the exemption was made prior to the year 1856. It must be conceded that in a large city like that of Louisville the existence of burial grounds become a matter of necessity, and if not placed under corporate control, where money may be invested and donated for the purchase and improvement of grounds to be used for cemeteries, the expense for such a purpose would be a public burden, and hence the State is, or should always be, ready to encourage the creation of such corporations, not only to lessen the rate of taxation, but to invest the corporate body with the power to raise such funds as will enable them to beautify and ornament the homes of the dead. This was the object of the charter creating this cemetery, where is found, from the testimony, at the time this action was instituted, near 40,000 graves, and no Chancellor should authorize the tax gatherer to invade this territory of the dead to enforce the collection of any assessment made by a State, county or municipality, or take from the faithful trustee the funds set apart from the sale of lots and apply them to such a purpose, when, by the terms of the charter, the land itself is exempt from execution.

The judgment below is affirmed.

HITE V. WHITLEY COUNTY COURT, &C.

(*Filed Jan.* 27, 1891.)

Damages—Liability of county court for failure to provide proper and healthy jail—A county court is not liable in damages to a person who complains that while confined in jail her health and eyesight had been impaired by the failure of the court to erect and keep in repair a good jail, and one supplied with proper heating apparatus, and that the jailer had neglected to keep the one, which was provided, comfortably warm, and in proper condition otherwise. Both the county court and the county are parts of the machinery of the State government. Being but arms of it, they are no more liable to be sued for the neglect of their officers than the State is for that of those in charge of it. The county court can not be held liable for such an injury unless such liability is imposed by a statute. Section 4, article 17, chapter 28, General Statutes, only imposes a liability on the individual members of the court whose names do not appear on record in favor of erecting a proper jail.

Perkins & Harding for appellant.

Hill & Denham for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The appellant, Mollie Hite, claiming that her eyesight and health had been impaired by confinement in the Whitley county jail, brought this action against the Whitley county court and the jailer, J. L. Jones, to recover damages, upon the ground that the court had negligently failed to erect and keep in repair a good jail, and one supplied with proper heating apparatus, and that the jailer had neglected to keep the one, which was provided, comfortably warm, and in proper condition otherwise.

Without objection or exception from her, she was ruled to elect whether she would proceed against the county court or the jailer, and she thereupon elected to prosecute the action against the county court, and it was dismissed as against the jailer, without objection or exception by her. There is, therefore, no ground for an appeal as to him.

A demurrer by the county court to the petition was sustained, and the appellant failing to plead further, the action was dismissed.

We will consider the action as being one against the county, inasmuch as it would have to satisfy a judgment, if one could be obtained againt the county court.

A court is simply an instrumentality for the administration of justice.

No action can be maintained against a county court, as such, or a county for an injury arising from mere neglect, or even from positive act, in the absence of a statute authorizing it.

A county is not liable for an injury so arising, unless the liability is imposed by statute, either expressly or by necessary implication.

It was so held in Dosdall v. County of Olmsted, 30 Minn., 96, where the county was sued for the neglect of its officers in failing to repair a sidewalk appurtenant to the court-house.

Also in Wehn v. Commissioners of Gage County, 5 Neb., 494, where it was sought to make the county liable for the erection of a jail, which was suffered to become a nuisance. Other cases may be found to the same effect, among which is that of Downing v. Mason County, 87 Ky. Rep., 208, where a citizen sued the county for an injury to his premises, caused by their being flooded by the erection of a county jail.

Both the county court and the county are parts of the machinery of the State government. Being but arms of it, they are no more liable to be sued for the neglect of their officers than the State is for that of those in charge of it.

There is no statute authorizing an action like this one.

Section 4, article 17, chapter 28 of the General Statutes, provides: "The county court, at the court of claims of each county, shall cause to be erected and kept in repair a secure and sufficient county jail, and upon a failure to erect and keep in repair a good and sufficient jail, *each member of the court, whose name does not appear recorded in favor thereof*, shall be liable to a fine of not less than $50 nor more than $100; and shall be liable in a civil action for all damages sustained by any person by reason thereof."

It is evident a personal liability only is created by this provision.

The individuals of the court may be sued, but as to them the right exists only against those whose names do not appear of record as in favor of erecting and keeping in repair a proper jail. This action is not against any individuals, who are members of the court, but it is against the court itself.

Judgment affirmed.

LINDEMEIER v. LINDEMEIER, &C.

(*Filed Feb.* 19, 1891.)

Wills—Life Estates—Re-investments—By his will, a testator gave to his step-son a house and lot, after the expiration of the life estate vested in the wife of the testator. By a subsequent clause in the will, it is provided that the step-son shall have no right to sell, or otherwise dispose thereof, but to be left to his heirs.

After the death of the widow, the step-son, in an action to which his children were parties, sought a sale of said property for the purpose of re-investment. A sale of said property having been had under a judgment rendered in said action, the purchaser insists that power to sell is forbidden by the will. *Held*—That said will does not forbid the sale for re-investment, and the proceedings being in conformity to sections 491-2, Civil Code of Practice, the purchaser acquired a good title.

M. A., D. A. and J. G. Sachs for appellant.

Jas. Quarles for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

The will of Clemens Uhler provides: "3. I give and bequeath to my step-son, Clemens Lindemeier, my double frame house and lot, on the north side of Marshall street, between Preston and Jackson streets. * * * * It is my will that my wife, A. M. Uhler, shall keep all the property hereby bequeathed for her only use and benefit during her life-time.

"It is further my will that the property bequeathed to F. Clausing, and C. and H. Lindemeier shall only be in trust for them, and they shall have no right to sell, or otherwise dispose thereof, but to be left to their heirs, and, should one of the three last named die without heirs, their widows shall have the benefit thereof as long as she remains a widow, and then the property shall be divided equally between the remaining heirs."

The widow of the testator having died, and Clemens Lindemeier being in possession of the house and lot above described, he brought this action, making his wife and his five infant children defendants, for a construction of the will, and a sale of the property for re-investment. The defendants were properly brought before the court. A guardian *ad litem* was appointed to defend for those under age, and he, in proper time, filed his report.

Before the final submission of the cause a guardian appeared and executed to each of the infants the bond required by statute in case of a sale of infant's real estate. The lower court held that Clemens Lindemeier had a life estate in the property, but refused to order a sale of it upon the ground that it was forbidden by the will.

Clearly the chancellor was right in holding that Clemens Lindemeier was not merely a trustee of the property for his children, but that he had a life estate in it.

The Civil Code, sections 491-2, authorize a sale of real estate, where it is owned as this is, by a decree in an equitable action, if the title papers are filed, and facts be averred and proven, showing that the sale will benefit the owners; but no such sale can be ordered if it be forbidden by the title paper under which the property is held.

The petition contains the necessary averments, and it is shown by the evidence that the value of the property is decreasing rapidly;

that it is in bad repair, and the owners unable to improve it; that the rents are insufficient to pay the taxes and keep it in repair, and that it is to the interest of all concerned to sell it and re-invest the proceeds. The children are not *sui juris*, and there is need of court protection to their interests.

In our opinion the will does not forbid a decretal sale of it for this purpose. It denies to the owner of the life estate the right to sell or otherwise dispose of it. The object of the testator was to prevent the life tenant from disposing of it, and thus defeating the rights of the remainder parties. In providing as he did in his will, it was evidently his intention to reserve that much of his estate to Clemens Lindemeier for life, and then to his children. He did not have in view a sale by decree of court, which might, and, as appears, has, become highly necessary to preserve his bounty. It should not beso presumed, in the absence of language rendering it reasonably certain that he intended to forbid a sale of it, in any manner or for any purpose, during the term of the life tenant, however necessary to interest of the parties. In the case of McGraw v. Minor, 12 KY. LAW REP., 687, a clause in a will substantially like this one was considered, and held not to forbid a decretal sale for the purpose of re-investment.

The judgment is reversed, and cause remanded for further proper proceedings.

COMMONWEALTH V. DAVIDSON.

(*Filed Jan.* 24, 1891.)

Constitutional law—change of venue—The act of the Legislature, passed at the session of 1889–90, providing for the change of venue in felony cases on the application of the Commonwealth where such a state of lawlessness exists in the county where the indictment is found, and in the adjoining counties, that a fair trial can not be had, is not unconstitutional. The appellee was indicted in Perry Circuit Court for the crime of murder, and on application of the Commonwealth's attorney the venue was properly changed to the Clarke Circuit Court.

Article 2, section 38 of the Constitution, providing that "the General Assembly shall not change the venue in anycriminal or penal prosecution, but shall provide for the same by general law," must be understood as applying to changes of venue on the motion of the Commonwealth as well as the accused, nor is such right denied to the Commonwealth by the provisions of article 13, section 28, which provides that "the accused has a right * * * to a speedy public trial by an impartial jury of his vicinage," but the two sections can be harmonized by construing the latter section as limiting the right of the Commonwealth to a change of venue to the single instance of the necessity of preserving and enforcing its authority and laws. Otherwise, the first-named section would be a nullity and the accused would secure a trial by a *partial* jury of his vicinage or county, which will not be presumed was the intention of the framers of the Constitution.

J. P. Marrs and P. W. Hardin for appellant.

Appeal from Clarke Circuit Court.

Opinion of the court by Judge Bennett.

The appellee was indicted in the Perry Circuit Court, charging him with the crime of murder in said county.

The Commonwealth's attorney for said district, pursuant to the

act of the Legislature, approved ————, day of ————, 1890, made a written statement that there existed in said county such lawlessness by the friends, relations and sympathizers of the appellee, that the officers in said county were prevented from discharging their duties, and which would deter the trial jury from rendering a fair and impartial verdict in said case; also that the same conditions existed in the counties of Bell, Leslie, Harlan, Knox, Clay, Jackson, Owsley, Estill, Powell, Wolfe, Breathitt, Knott, Perry and Letcher. Thereupon the court ordered a change of venue to the Clark Circuit Court. The case having been transferred to the latter court, the Commonwealth's attorney for that district moved the court to remand the case back to the Perry Circuit Court, upon the ground that the act authorizing said change was unconstitutional. So the constitutionality of the act is the only question to be decided.

The sections of the Constitution upon that subject are as follows: Article 2, section 38: "The General Assembly shall not change the venue in any criminal or penal prosecution, but shall provide for the same by general law"

Article 13, section 12: "The accused has a right * * * to a speedy public trial by an impartial jury of the vicinage."

Section 38, quoted, is mandatory upon the Legislature to provide by general law for the change of venue as well on behalf of the Commonwealth as on behalf of the accused. But does section 12, quoted, by providing that the accused shall have the right to a trial by an impartial jury of the vicinage confine the right to the Commonwealth to provide for a change of venue on behalf of the accused, only. The greater likelihood of the accused being able to get his witnesses before the jury, and at less expense, and of the jury's knowledge of their good characters, as well as that of his own good character, if one he has established, were, doubtless, the considerations that induced the adoption of said provision. But does said provision exclude the Commonwealth from taking a change of venue under any and all circumstances? If it does, said section 38 is rendered nugatory, so far as the Commonwealth is concerned, by implication. For the reasons indicated it was certainly the intention to secure to the accused the right to an impartial trial by a jury of the vicinage, or county, and to prohibit the Commonwealth from changing the trial to another county, and thus annoy and harrass the accused, unless it was necessary to preserve and enforce its authority. The two sections thus construed, the former is not rendered nugatory; but the Commonwealth is limited by the latter to the right to a change of venue to the single instance of the necessity of preserving and enforcing its authority. While the right is expressly given to the accused to a trial by a jury of the vicinage, or county, it seems that each citizen should be deemed to have consented that the Commonwealth should reserve the power to enforce its laws, and if it should become essential to their enforcement that the Commonwealth should take a change of venue, the same should be done. Hence, that right is reserved by the 38th section, quoted, and the 12th section, quoted, limits the power to that state of case.

To illustrate: If an impartial jury can not be obtained in the county, the Commonwealth, notwithstanding the objection of the accused, has the right to obtain a jury from the next nearest county where that feeling does not exist.

It is true that in such case the trial takes place in the vicinage, or county, but the jury are not of the vicinage, or county; but the right of the Commonwealth to thus obtain a jury has never been

questioned, and it is so clearly the right of the Commonwealth it is believed it will never be seriously questioned.

The law, in certain conditions, could not be enforced without this right; without it crime would go unpunished. Imagine the pitiableness of society, with the accused, his friends, relations or sympathizers impregnating the public mind with prejudice to such an extent that an impartial jury could not be obtained in the vicinage, and then the trial of the accused by those men, else not at all, or the vicinage becoming submerged by a lake of water, or by a volcanic eruption, thereby depopulating the vicinage and rendering it impossible to try the accused therein. In the first-named case it would be clearly the right of the Commonwealth to resort to the next nearest county, where that condition did not exist, to obtain a jury. In the second case the Commonwealth should have the right to resort to the next county where she could obtain a footing to try the accused. The right of the Commonwealth in each case exist upon the ground of the necessity of preserving and enforcing its authority. So, also, if by the agency of a confraternity of lawless men the officers of the county, whose duty it is to assist in the trial of the accused, are prevented from discharging that duty, or any jury that might be entrusted with his trial are deterred from rendering an impartial verdict, thereby rendering the authority of the Commonwealth powerless in said county, the Commonwealth in such case has a right to a change of venue to a county where that condition does not exist. It is a trial by an impartial jury of the vicinage that is guaranteed to the accused; not a partial jury, nor a jury deterred by lawless men from rendering an impartial verdict, nor such a jury as the officers of the law, who are prevented by lawless men from summoning impartial juries, would select. If the former can not be obtained in the county, the Commonwealth may resort to another county for such jury to try the case in said county. In this state of case, where the Commonwealth has the power to assert its authority, it is essential to take the jury to said county in order that the accused may have the benefit of a less expensive trial than he would have in any other county; and, also, where he may have, though in a less degree, the benefit of his own good character or that of his witnesses, if any he or they have preserved; in such case, the accused is deprived of the full benefit so far as a presumable knowledge of his or his witnesses' characters are concerned, by being tried by a jury that do not reside in the vicinage; but as he is entitled to the observance of this special right, upon the condition that an impartial trial jury can be obtained in the vicinage to try him, the observance of the right ceases when such jury can not be obtained therein. Hence, the Commonwealth has the right to resort to the next county wherein such a jury may be obtained. If this were not so, the accused, in such case, could mock justice and defy the authority of the Commonwealth with impunity.

So, also, in the latter two cases, where, owing to the lawlessness existing in the vicinage, the Commonwealth is powerless to assert its authority to the end of obtaining a trial of the accused by an impartial jury therein; the same reason exists for the Commonwealth taking a change of venue to a county where that condition does not exist. We conceive this to be the meaning of the two sections quoted.

The judgment is affirmed.

STEELE v. WILLIAMS, &C.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Boundary—Where a mortgage has been executed as a lien on a tract of land, describing it by naming the adjoining owners, and also describing it as containing a given number of acres, more or less, in a controversy as to whether a fifty-acre tract, being a part of the tract described as bounded by the adjoining land owners, was embraced in the mortgage when the proof shows that, without said fifty-acre tract, the residue of the tract contains the number of acres recited in the mortgage. *Held*—It is well settled that where the boundaries of land are well established, or, in other words, in their nature monumental, they must control the number of acres as given in the mortgage, unless an intention is shown in the mortgage that the acreage, as therein given, is to control the boundaries. In this case such intention does not appear.

E. B. Wilhoit for appellant.

E. F. Dulin for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Bennett.

J. B. Williams mortgaged to Watson a parcel of land bounded on the east by the land of Erwin, on the south by the land of Perry Fult's heirs, on the north by the land of Davis, on the west by the land of James Perry. The mortgage also recites that the tract of land contains 223 acres, more or less, and was purchased by said Williams from the "heirs of John Maylon."

The statement from whom the land was purchased seems to be a mistake, for Maylon's heirs sold the fifty-acre tract now in controversy to said Williams. Said mortgage was foreclosed, and in the suit of foreclosure said fifty acres were included as having been mortgaged, and judgment was rendered for the sale of it, and it was sold and the sale was confirmed. Thereafter the appellant caused the fifty acres to be sold under an execution in his favor and against said Williams, and he purchased it. He now contends that said fifty acres was not included in said mortgage; hence, his purchase was valid. He so contends upon the ground that the mortgage recites the fact that the tract of land contained but 223 acres. But the boundary as given does, according to the positive and uncontradicted proof, include said fifty acres, which were sold as having been mortgaged.

Now, it is well settled that where the boundaries of land are well established, in other words, in their nature monumental, they must control the number of acres as given in the deed, unless an intention is shown in the deed that the acreage, as therein expressed, is to control the boundaries given. In this case such intention does not appear.

The judgment is affirmed.

COLEMAN v. SUMRALL, &C.

(*Filed Feb.* 10, 1891)—*Not to be reported.*

Execution—Wills—Jurisdiction—Equity—Several creditors of appellant, having levied their executions upon land belonging to her, under which the same was sold, and the purchaser refusing to comply with the terms of sale.

they instituted an action in equity asking a construction of the will of the husband of appellant, under which she claims, and that the purchaser be compelled to execute his bond. *Held*—That as the appellant held a life estate in said land, it was liable to sale under execution, and there was no necessity for resort to a court of equity. The will directed that the executors should, at the death of appellant, first pay the debts of appellant before distributing the estate to the devisees in remainder, and it is not decided that after the death of appellee the creditors selling the life estate and failing to receive satisfaction out of it, can then have their debts satisfied by a sale of the remainder.

Phil. B. Thompson for appellant.

E. H. Gaither for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

A number of the creditors of Susan Coleman, having had executions levied on a tract of land devised to her by her husband, and sold, or a part of it, for the payment of their debts, and the purchaser, refusing to comply with the terms of sale, brought this action in equity, asking a construction of the will of the husband, and that the purchaser be compelled to take the land and execute his bond for the purchase money. The chancellor below held that the wife had a life estate, and that it was subject to her debts.

The widow and heirs appeal, but the purchaser is not before this court. They contend that the land is not liable for the payment of the debts of the wife.

There was a demurrer to the petition, general and special—the special demurrer, raising the question as to the right of creditors to unite in a case like this, asking for a construction of the will, with a view of enforcing their claims; on the general demurrer it is urged that the petition shows no reason for going into a court of equity.

The will of the husband was executed in the year 1871, and gives to his wife an estate for life in this land, with directions to his executors to sell the land and personalty at the death of the wife, pay her debts, and then divide the proceeds between his children, as directed in a subsequent clause of his will.

We perceive no reason for going into a court of equity when the life estate is certainly liable for the debts of the wife. It is a legal, vendible interest, that may be sold under execution, and the levies made, although on the land, created a lien on the life estate, and as to the small debts the statute provides the manner in which the land can be reached. Section 723, Carroll's Code. If by the provisions of the will the land can be sold at the death of the life tenant, by the executor, and her debts paid, still, for the benefit of the remaindermen, this clause of the will must be observed, and besides it does not appear that the life estate, after exempting the homestead, is insufficient to pay the debts.

We perceive no reason for going into a court of equity, and both the general and special demurrers should have been sustained.

The judgment below is reversed and remanded for proceedings consistent with this opinion.

Judge Pryor delivered the following response to a petition for rehearing:

Under the pleadings we have adjudged that the appellees had no

right to go into a court of equity. They can sell the life estate under these executions, and whether at the death of the life tenant they can make the balance, if any, due them, when the life estate is exhausted, is a question not necessary to be decided.

Petition overruled.

ILLINOIS CENTRAL R. R. CO. V. DICK.

(Filed Feb. 28, 1891—Not to be reported.)

1. *Damages—Contributory negligence*—Appellant has prosecuted this appeal from a judgment for $3,000 damages, awarded to appellee, for the loss of an arm, as is alleged, by the negligence of appellant's employes in backing a train of freight cars along its switch in a yard and striking appellee with a car, resulting in the injury complained of. Appellee was, at the time of the injury, engaged in work in which the railroad company was interested, and being permitted to cross appellant's tracks in going to and from his work, and at that time was leaving his work and had crossed all the tracks, except the main track, when a freight train was passing along it at a rate of about twelve miles an hour, appellee w s then walking between the main track and near the switch next to it, when a freight train, that he had noticed, backed down on the switch behind him, resulting in his injury. The space between the main track and the switch is about seventeen feet, and appellant relied, as defense to recovery, that appellee's contributory negligence caused said injury. *Held*—That the verdict is palpably against the evidence, as it is evident that but for the gross contributory negligence of appellant the injury would not have occurred. It is a well settled rule that, although the evidence might show negligence upon the part of the injuring party, yet if the one injured so contributed, that but for it the injury would not have been received, then there can be no recovery, unless the party doing the injury became aware of the negligence of the other and could then, by the exercise of care, have avoided the injury. As to the latter part of the proposition, there was no proof that the appellant's agents became aware of appellee's danger, or could have avoided the injury.

2. *Injury while violating Sunday law*— It is no defense to an action for damages, in this case, that appellee was at work in violation of the Sunday law, as there is no proof showing that his work was the cause of his injury, or result of his violation of the Sunday law, but such injury may have occurred on any other day.

Z. W. Bugg and R. J. Bugg for appellant.

John W. Ray, J. M. Nichols and M. T. Shelbourn for appellee.

Appeal from Carlisle Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The appellee, William Dick, was employed with many other workmen in building caissons at the water's edge, in the city of Cairo, Ill., to be used in constructing a bridge over the Ohio river at that point.

Between where they were at work and the houses of the city, and upon the top of the levee, was the switch-yard of the appellant. It was usually called the "transfer yard," because the trains of the railroad were transported over the river at that place. The appellant had seven or eight tracks close to and parallel with each other at this point, and extending for a considerable distance along the immediate top of the river bank. Several locomotives were con-

stantly employed in the yard, and it is shown that, upon an average, three hundred cars were moved within it every twenty-four hours.

The workmen had to cross these tracks in going to and from their work. It had been in progress for about a year, from seventy-five to one hundred men being employed. All this was well known to those in charge of the appellant's trains, and its authorities had for a long time permitted these workmen to thus cross its tracks. Indeed the bridge, while not being built by it, was intended for its use.

When appellee was injured the men had quit work for dinner. All of them had crossed all of the tracks, save appellee and another man. They had done so in part, but upon reaching the main track, and which was the outer one upon the side next to the city, their progress was stopped by a heavy freight train of about eighteen cars, which was moving north and leaving the city at the rate of about twelve miles *per* hour. The appellee's companion remained standing at that point, between the main track and the switch-track next to it, until the train passed, when he crossed over in safety. The appellee did not do so, however. He walked south between these two tracks as the train was passing, as his route into the city was in a southwestwardly direction. As he did so, he, by reason of the outgoing passing train, kept near the switch-track. He did not get on it, but walked just at the end of the ties. Just at this time a train of four or five cars backed south upon the switch-track at the rate of about three miles an hour, and the front car, owing to the appellee getting near to the switch-track, struck him, knocking him down, and so mangling his arm that amputation just above the elbow became necessary.

He brought this action for damages, claiming that the injury was caused by the gross neglect of those in charge of the train.

The defense is, first, that the appellee was crossing the tracks in going from work being done upon Sunday, the prosecution of which in Illinois is forbidden upon that day, unless it be a work of necessity or charity; and, second, that the injury was the result of the appellee's own neglect.

The trial resulted in a verdict for $3,000.

The first ground of defense can not be maintained. It is true the appellee was going from work being done by him on Sunday. It is, therefore, said that this illegal conduct upon his part deprives him of all right to sue, and that he could have no redress against any one, even if those in charge of the train had wantonly injured him. Such is not, and ought not to be, the rule. The fact that one, when injured, is thus violating the law, does not place him beyond its protection. If so, he would be at the mercy of others. It can not be fairly said that the work in which the appellee had been engaged contributed to the injury. Certainly it was not calculated, ordinarily or naturally, to lead to it. There was no such connection between the doing of the work and the accident that the latter was likely to result from the former. The one did not naturally follow the other, and it could not be reasonably anticipated that it would do so. There was no necessary or even probable tendency from the one to the other. The same causes would have produced the same result upon any other day, and the fact that the accident occurred on Sunday is, therefore, altogether immaterial in considering the cause of it, or the question of contributory negligence. All other circumstances and conditions being the same, the same injury would have happened upon any other day as well.

Cooley on Torts, page 155, in speaking of cases arising under the Sunday laws, says: "The principle is, that to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury;" and then the author cites this language of Dixon, C. J., in Sutton v. Town of Wauwatosa, 26 Wis., 28: "To make good the defense (of illegality) it must appear that a relation existed between the act or violation of law, on the part of the plaintiff, and the injury or accident of which he complains, and the relation must have been such as to have caused, or helped to cause, the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. It must have been some act, omission, or fault, naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances."

The switch-train had an engineer, fireman and two brakemen in charge of it. The two first named were upon the engine; one brakeman was upon the car next to it, and the other brakeman was upon the car that struck the appellee. He was, however, at the time hanging upon the east side of it, and the top of it being higher than his head, prevented his seeing the appellee, who was at the edge of the west side of the track. It is urged that the train was moving at a greater rate of speed than the ordinance of the city permitted, which is six miles *per* hour as to freight trains; that it gave no signal by the blow of its whistle, or the ringing of the bell, of its movement; that the brakeman should have been upon the front end of the car to signal danger to passers by and warn them of it, and that for these reasons the company is chargeable with wilful neglect in injuring the appellee, and the doctrine of contributory neglect has no application.

Counsel appear to confound what is known as wilful neglect, and which, strictly speaking, exists by reason of statute only, and applies only in cases where death results, with gross neglect. Hence, it is incorrectly argued that the question of contributory negligence can not arise in this case.

Undoubtedly the appellant ought not to be regarded as a trespasser upon the yard of the company.

In the first place, it may be said that the accident occurred within the city limits, and at a point where it might well be expected persons would be crossing the tracks, and where they often did, as appears from the testimony. The tracks were between the river bank and the buildings of the city. At such a point greater caution must be used in operating a train than would be required in the country, because circumstances must necessarily regulate the degree of care to be exercised.

In the second place, however, the appellee was crossing the tracks by the permission of the company. It had, by its acquiescence in the work-hands crossing them for a long time, licensed them to do so. It was permitting such use, and it had, therefore, by its own conduct, imposed upon itself a precautionary duty as to the appellee, when he might be crossing its tracks in going from and returning to his work.

This, however, did not absolve the appellee from all care upon his part for his safety. It did not give him the right to recklessly place himself in danger from a moving train, and then hold the company liable for injury.

The testimony shows clearly that the train was moving slowly, probably not over three miles *per* hour. The evidence is somewhat

conflicting as to whether the bell of the locomotive was signaling the movement of the train. It is probable, from the weight of the testimony, that it was; but it was not required to do so continuously. If, upon starting, it gave reasonable notice by the ringing of the bell or otherwise, that it was about to move, and reasonably sufficient to warn those in the locality of its coming, then this was sufficient. Paducah & Memphis R. R. Co. v. Hoehl, 12 Bush, 41. If, however, those in charge of the train were neglectful, yet if there was such negligence upon the appellee's part that but for it the injury would not have happened, then he can not recover.

The rule is thus stated: "One who is injured by the mere negligence of another can not recover at law, or in equity, any compensation for his injury, if he, by his own or his agent's ordinary negligence or wilful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and cooperating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him." Sherman and Redfield on Negligence, section 25.

This rule was followed in the Hoehl case already cited, where it was held that, although the evidence might show negligence upon the part of the injuring party, yet if the one injured so contributed that but for it the injury would not have been received, then there can be no recovery, unless the party doing the injury becomes aware of the negligence of the other, and could then, by the exercise of care, have avoided the injury.

In this case the appellee went among the numerous tracks of the railroad, knowing that trains were constantly moving about at that point. He says himself that when he stopped, by reason of his progress being cut off by the outgoing train, he saw a train about one hundred and fifty yards north of him, upon the switch-track, but that he paid no further attention to it. If he had remained standing where he was, as his companion did, until the freight train passed, he could then have crossed the remaining track without danger of injury. Instead of doing so, however, he started south between the two tracks. Conceding that his doing this was not neglectful, yet he says himself, that after he did so, he never once looked back to see if the switch-train, which he knew was near him, was moving toward him, and instead of keeping in a place of safety between the two tracks, he recklessly exposed himself to danger by walking along at the edge of the switch-track, when he knew the switch-train was liable to move at any moment, and any signal of which he was not likely to hear by reason of the noise of the passing freight train.

The two tracks were seventeen feet apart. Three, and perhaps four, men could walk abreast between them. The appellee could have passed along between the two passing trains with entire safety; but, instead of doing so, he recklessly placed himself at the edge of the switch-track without paying any attention whatever to the train, which he knew might come upon him at any moment, and was thereby injured. He knowingly exposed himself to what he knew was constant danger. His own neglectful conduct was the proximate cause of his injury. He had no right to depend upon his hearing and not exercise his sight, when he knew that the noise of the passing freight train was likely to prevent his hearing the signal from any approaching train upon the track, upon the edge of which he had needlessly placed himself. It was, in fact, gross negligence

upon his part, because it was recklessness as to his own safety, and it is evident the injury was not inflicted wantonly by those in charge of the train.

As this record stands, it is difficult to see upon what testimony, under the instructions, the jury based their verdict. It is palpably against the weight of it, and the judgment is reversed for a new trial and further proceedings consistent with this opinion.

MCDANIEL'S GD'N, &C. V. MCDANIEL, &C.

(*Filed Jan.* 24, 1891.)

Wills—Vested remainders—A testator, by the terms of his will, devised to his wife, "*in lieu of her dower*," the farm on which he resided, until his youngest child, a daughter, should come to the age of twenty-one years, and provided, further, that when said daughter arrives at the age of twenty-one years, said farm should be given to his two children, a son and daughter, and if either of the said children should die before the daughter arrived at twenty-one years of age, then the share of such property, so devised to such deceased son or daughter, is devised "to the survivivor of said two children." The daughter died at the age of fifteen years, when the son instituted this action to recover of the widow possession of said land. *Held*—That it was evidently the intention of the testator that the widow should have the use and enjoyment of said land until such time as the daughter, had she lived, would have arrived at the age of twenty-one years. It will not be presumed that the testator intended that his wife, in waiving her dower right in his estate, should accept *in lieu* of it the enjoyment of a tract of land, depending on the condition of a child's life, which might terminate within a day after taking possession. There was nothing unreasonable in postponing the enjoyment of the estate by the children, for a period that could be calculated with a reasonable certainty; besides, it will not be presumed that the testator intended that, if the daughter died before arriving at the age of twenty-one years, that the son might recover possession of the portion belonging to his deceased sister, while the widow would retain possession of the portion belonging to the son.

Sweeney, Ellis & Sweeney for appellants.

J. D. Atchison for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Holt.

The will of Ephraim McDaniel provides: "I give and devise to my beloved wife, Christina, in lieu of her dower, the farm on which we now reside, * * containing one hundred acres, until my youngest child comes to the age of twenty-one, and all the stock, household goods, furniture, provisions, and other personal property, which may be thereon at the time of my decease, during her natural life. * * * * * When my youngest child, Susan R., comes to the age of twenty-one, I give and bequeath to my two children, Henry and Susan R., the farm on which we now reside, containing one hundred acres, as aforesaid, in equal shares; but if either of said children should die before the said Susan becomes twenty-one years of age, then the said share of such property, so devised to such deceased son, or daughter, is hereby devised to the survivor of the said two children."

Susan died in 1889, when but fifteen years old, and the other dev-

isee, Henry McDaniel, brought this action, soon after her death, for the possession of the land. He contends that all interest of his stepmother, the widow, Christina, terminated upon the death of Susan, and that not only the entire title then vested in him, but the right to the possession.

Contra, the widow claims that she is entitled to the use of it until the time when, if Susan had lived, she would have arrived at majority. The estate vested in the children at the testator's death, but the enjoyment of it was postponed. The appellant contends that there is no reason for it, after the death of his sister. He says that the specific event, entitling him to possession, having become impossible by the death of his sister, and the postponement having been for her benefit, that he should be allowed to at once enjoy the estate.

But was the postponement for her benefit? And was it the purpose of the testator, or at least his only purpose, as is said, that the widow should take the whole estate, raise the children, and, this being done, turn the land over to them? If so, why did he say that he gave the land to her *in lieu of her dower*, until Susan became of age? Doing it for the reason, as he plainly says, that he wished her to hold it instead of taking dower, is it reasonable to suppose he intended, if Susan should die the day after his death, or in a very short time, that his wife's interest should thereupon terminate? Was not the postponement of enjoyment by the devisees for the benefit of the widow?

If one devise his lands to his executors until his son comes of age, the profits to be used in the performance of the will, and the son dies shortly, yet the interest of the executors would not terminate until the son would have become of age, if he had lived, because it is reasonable to suppose the testator had calculated that the profits, until that time, will be necessary to answer his debts. To hold otherwise would be to defeat the intention of the testator, which is always to govern

Equally so would the testamentary purpose be defeated, if, where the husband gives to the wife the use of land, *in lieu of dower*, until one of their children becomes of age, her interest should be held to terminate upon the death of the child, however soon it might occur after that of her husband.

The case stated in 1 Eq. Cas. Abr., page 195, and cited in Fearne on Remainders, is unlike this one. There one devised lands to his wife until his son, and heir apparent, should become of age, when they were to pass to him and his heirs. The son died at thirteen years, and it was held that the remainder vested in the son upon the death of the father; that the wife's estate determined upon the death of the son, although she was executrix, and did not continue until the time when he would have arrived at majority, *no creditors or want of assets appearing, and the estate not being devised for the payment of debts*.

No reason appeared in this case, so far as the report before us shows, from which it could be presumed that the testator intended the estate of the wife should continue until the time when the son would have arrived at majority, if he had lived.

In the case now before us, however, it can not well be supposed that the husband intended to give the wife, in lieu of her dower, an interest in the land which might terminate before any enjoyment whatever by her.

A distinction exists between a devise to take effect upon an event, uncertain not only as to whether it may ever happen, but also as to when it may happen, and an event which, though it may never hap-

pen, yet if it happen at all, must do so at a certain time. Thus the marriage of a person is an event of the first, and his arrival at majority of the second kind.

Where there is a devise of the latter character we may, in ascertaining the testator's intention, regard him as having had in view the point of time when the event would certainly happen, if at all, and not the happening of the event, and construe the devise as referring to a certain time, which must come.

This is the rule laid down in Davis, &c. v. Wood, 17 B. M., 86, and is applicable to this case, because the testator evidently intended the devise to his children should become effective as to enjoyment at a particular time, which he fixed, not by naming the year, but by reference to his daughter's age.

The case of Levet v. Needham, 2 Vermont, 139, is applicable to this case.

There the testator devised lands to trustees and their heirs in trust, to receive the rents until his son should become of age, and to pay one-third thereof to his wife, in lieu of dower, and out of the remainder raise portions for his daughters, and devised all left to his son, when of age, in tail, remainder to B. and C. The wife died. The son died before he became of age and without issue. It was held that the wife's interest determined with her death, and that her third should not go to her executors until her son would have become of age; but that the remainder over to B. and C. was good, though the son died before majority, and that the daughter's portion being raised, *the residue of the term should go to the heir as an interest undisposed of by the will, but to vest as a chattel, and on his death to go to his executor until the testator's son should have come to majority.* Under the rule laid down in this case, and which, if enforced in the one now before us, will, as we think, clearly carry out the purpose of the testator, the period for the enjoyment of the estate by Henry will not arrive until the time when his sister would have reached her majority, if she had lived.

The words in the will: "But, if either of said children should die before the said Susan becomes twenty-one years of age, then the said share of such property, so devised to such deceased son or daughter, is hereby devised to the survivor of said two children," do not conflict with the view we have taken.

The word "*then*," as used by the testator, does not refer to a time for the enjoyment of the estate to begin. If so, it would only be as to the one-half of it, or the portion of the deceased one, leaving the other half in enjoyment by the widow; and it is unreasonable to suppose, in the light of all the provisions of the will, that this was intended by the testator.

Upon the contrary, it was used merely in the sense of the words, "in that event," meaning that if one should die before the time arrived for Susan's majority, then whatever right the one so dying had, should vest in the survivor.

In our opinion, the widow's interest does not end until the time arrives when Susan, if she had not died, would have become of age; and, as the judgment below conforms to this view, it is affirmed.

GAINES V. JOHNSTON.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Judgment obtained by fraud—Vacating judgment—In a proceeding for the settlement of an estate, and partition of land among the heirs of decedent, appellee being a niece of decedent, and entitled to an undivided interest in said land, filed an answer in which it was recited that, in consideration of the fact that her sister and her husband, the appellant, had cared for her aunt in her last sickness, she relinquished her claim to same, and requested that her interest in said land be conveyed to her sister, wife of appellant. After the death of said sister, appellant instituted an action to recover said land, against appellant, and the children of her sister. Appellant relied, in his answer, on the judgment in which the conveyance was directed to be made, to which appellee replied that she was induced to file said answer by the fraudulent representations of appellant, that appellant had been compensated for attention to the aunt by payment out of the estate, and that the true consideration for filing said answer and directing said conveyance was the verbal agreement that appellee was to have the four-fifths interest of appellant's wife in a house and lot in Maysville; that said interest had not been conveyed to her, and she had, therefore, received nothing for releasing her claim to the land sued for. *Held*—That the allegations of the reply being established by the admissions of appellant, the appellee is entitled to relief; but the judgment, which was obtained by fraud, can not be questioned collaterally in this proceeding. It must be vacated in a direct proceeding, as authorized by the Code of Practice.

Sam. E. Hill for appellant.

H. P. Taylor and E. W. Hines for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor.

The appellee, Martha Johnston, filed her petition, in the nature of an ejectment, to recover of W. S. Gaines, and his children, an undivided interest in certain lands that had descended to her from her aunt, Ann H. Yates. The wife of the appellant, Gaines, and the appellee inherited equal interest, and, in an action for the settlement of the estate of Mrs. Yates, and the division of the land between her heirs, the appellee filed an answer, in which she stated that her sister and her husband, Gaines, were equitably entitled to her interest in the land, and she wanted it allotted to them; that their services rendered her aunt entitled them to the land. This answer was filed and judgment rendered as was required by the answer, the land being divided and the interest of the appellee conveyed to her sister, Mrs. Gaines. This all transpired before the present action was instituted, to which Gaines and his children (his wife having died), filed an answer setting up the judgment allotting the land to Mrs Gaines, as directed by the answer of the appellee in this suit for a partition.

The appellee filed a reply, in which the judgment is described as having been obtained by fraud, or rather that the answer, on which that judgment is based, was obtained by fraud, and that the representations made by the husband of her sister, in order to induce her to sign that, were fraudulent. The answer of the appellee in that suit recites that "she yields up all her interest in the land because her sister and her husband were entitled to it by reason of their attention to her aunt in her sickness, and the loss they sustained in so doing."

The testimony of the husband, Gaines, was taken, and from it ap-

pears the fact that their services did not constitute the consideration for the gift, but it was a verbal agreement by which the appellee was to have the interest of the wife of Gaines, which was four-fifths in a house and lot in Maysville, Ky. The testimony of the appellee conduces to establish the fraud, and the fact further appears that Gaines and wife were paid a considerable sum of money, out of the estate, for taking care of their aunt. The appellee testifies, on the one hand, and Gaines on the other; and, if the statement of the appellant is to be relied on, the appellee had received nothing whatever for her interest in the land. The value of the services for attention paid the intestate has been allowed them, and the *verbal* assignment of four-fifths of the house and lot in Maysville passed no title.

The judgment giving to the appellee her interest in the land can not be sustained, because the former judgment, divesting her of title, must first be vacated by some direct proceedings, and, until this has been done, it constitutes a bar to the recovery.

It is argued that the reply filed by the appellee, in response to the answer, setting up the fraud in obtaining the judgment, is a direct attack upon that judgment, and the failure to file a rejoinder admits the perpetration of the fraud. A rejoinder was unnecessary, because the reply constituted no defense, as the judgment can not be attacked in that way. If a judgment pleaded in bar, rendered in an action settling the rights of the parties as to the same subject-matter, can be assailed on the ground of fraud, in another and independent action affecting and determining the same rights of property that was disposed of in the first action, it then results that whenever a judgment is pleaded in bar of the recovery, the defense may rely on the fraud in the collateral proceeding, and thus render nugatory a judgment that can only be assailed or vacated by a direct proceeding in a manner provided by the Code. The reply constituting no defense, the judgment should have been for the appellant. While the judgment in bar may not have been properly pleaded, the reply of the appellee admits that such a judgment was rendered, and is attempted to be avoided on the ground of fraud.

The appellee is entitled to some relief, but the remedy sought is ineffectual for that purpose, as the first judgment prevents a recovery of the land. Whether or not the party should be allowed to amend, so as to show that, in equity, she is entitled to a conveyance of four-fifths of the house and lot in Maysville, and, upon the failure to convey, to subject the land she parted with as the consideration for it, to the extent of the value of the house and lot, is a question not before us.

As the case is now presented, the judgment is reversed, and remanded for further proceedings consistent with this opinion.

SIKES, &C. V. PAGE, &C.

(*Filed Jan.* 31, 1891—*Not to be reported.*)

Liens—Purchase money—Mortgages—S. sold a tract of land and received a cash payment on same, reserving in the deed a lien for the unpaid purchase money, and also stipulating as follows: "It being expressly understood that the party of the second part, or his assigns, are not to be restrained, at any time, from cutting, removing or selling timber off of the above named premises." P., having furnished the purchaser the money with which to make the first payment, the purchaser executed to him a note and mortgage

on said land, in which it was stipulated that the debt might be paid in lumber. In an action to enforce satisfaction of the vendor's lien, and the lien of the mortgagee, the lower court directed that the land be sold to satisfy the vendor's lien, and that the timber be sold to satisfy the mortgage lien, the vendor failing to receive full payment of his debt, prosecuted this appeal. *Held*—That the vendor held a prior lien on the land and timber, and the mortgagee only a second lien on same.

The stipulation in the deed was not a waiver of the vendor's lien on the timber, but merely showing his consent that the purchaser might cut off the timber for the purpose of raising means to pay off the purchase money.

Lewis McQuown for appellants.

Botts & Hill for appellees.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Sikes, sold and conveyed to Peden a tract of land for the sum of $750, a part of which was paid in cash, and notes executed for the balance. A lien was created by the terms of the conveyance for the purchase money. The deed made contained this stipulation: "It being expressly understood that the party of the second part, or his assigns, are not to be restrained, at any time, from cutting, removing or selling timber off of the above named premises."

The appellee, Page, advanced the money to make the cash payment, and Peden, the purchaser from Sikes, gave him a note therefor, in which it was provided that the debt might be discharged in lumber, and, besides, Peden executed to Page a mortgage on the land purchased by him of Sikes, to secure the payment of the money loaned.

In June, 1886, Peden not having paid Page, the latter brought an action in equity to foreclose his mortgage, alleging the superiority of Sikes' lien over his, and further alleging that Peden had wasted the timber to such an extent that the land would not more than satisfy Sikes' debt. An injunction was obtained to stay waste. Judgment was obtained by Page, and about that time, or perhaps on the same day, he made, by an amended petition, the appellant, Sikes, a party to his action against Peden, alleging that Sikes' debt was a lien and superior to his, and that the land be sold to satisfy first the debt of Sikes (appellant), and then his mortgage lien. Sikes filed his answer, making it a cross-petition against Peden, asking that the land be sold to satisfy his lien for the purchase money. No priority was claimed by Page over Sikes, in enforcing these liens—and none in fact existed—and the court very properly rendered a judgment enforcing the lien of Sikes. After this had been done, the court conceived the idea that Sikes had a lien on the land, but that Page, by reason of his mortgage, had a superior lien on the timber, and entered a supplemental judgment, directing the commissioner to sell the land to pay the purchase money lien of Sikes, and the timber upon it to pay the mortgage debt due Page.

We think it manifest that the only object in inserting the clause in the conveyance, relative to the removal of the timber, was to enable Peden to cut timber and clear the land, or sell it to enable him to pay the purchase money. That he might do this, it was agreed by Sikes that he would not charge him with committing waste. There was no intention, however, to sever the title to the timber

from the land, so as to enable the vendee, Peden, to mortgage it, so as to deprive Sikes of the benefit of his lien, if it became necessary to sell the land to pay the purchase money. In fact, the mortgage to Page is on the land, and not the timber upon it; and, while the mortgage would necessarily carry with it the timber, it created a lien subordinate to the lien for the purchase money. As Sikes purchased the land he purchased the timber with it, and there was nothing to sell to Page; but the chancellor holding otherwise, the judgment directing a sale of the timber must be reversed. As the record is presented, the timber satisfies the mortgage debt to Page, and the land only one-half of the purchase money due Sikes.

Cause remanded for proceedings consistent with this opinion.

PERDUE V. HUFF, JR.

(*Filed Feb.* 3, 1891—*Not to be reported.*)

Judgment against sheriffs—Liens—Process—One who has purchased a sheriff's land, in good faith, after the execution of his revenue bond, can not defeat the lien of the State on said land, to secure the payment of the revenue, as provided in section 4, article 9, chapter 92, General Statutes.

A judgment may be rendered against a defaulting sheriff and his sureties on his revenue bond, after notices have been mailed to them, as provided in section 2, article 11, chapter 92, General Statutes, although said notices may not have been received by the persons to whom they were mailed.

It must be presumed that the persons, when assuming the office of sheriff, assented to this mode of service of process, as an incident to said office.

J. A. Brents for appellant.

Sandidge & Sandidge for appellee.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Pryor.

J. S. Cross, as sheriff of the county of Clinton, executed a bond for the collection of the State revenue, and, having collected and failed to pay over the revenue for that year, the auditor notified him and his sureties, that on the third day of the June term of the Franklin Circuit Court, for the year 1887, he would move that court for a judgment against them for the amount of the defalcation, which was $1,949. The sheriff and his sureties failing to answer, a judgment was rendered for the amount claimed, and an execution was issued that was levied on the land of the sheriff, Cross, and sold, the appellant, Perdue, becoming the purchaser, and the sheriff executing to him a deed. The appellee, Huff, claims to have purchased the land of the sheriff, after the execution of his bond, and with the lien of the Commonwealth then upon it, as provided by the statute, in order to secure the payment of this money. The appellee says he purchased the land in good faith, and while the evidence conduces to sustain such a defense, if available in a case like this, there is no reason why the purchaser should not be substituted to the rights of the estate, to the extent he has satisfied this lien upon the land that existed prior to the purchase made by the appellee.

The 4th section of article 9, chapter 92, General Statutes, provides "that the Commonwealth shall have a lien from the date the sheriff

begins to act, upon the real estate of the sheriff, then owned or afterwards acquired by him, which shall not be discharged until a quietus is obtained for all the revenue and public dues he is bound for."

It is claimed by the appellee that the judgment against the sheriff and his sureties was void for the want of service of any process, and for that reason no equity exists in behalf of the purchaser. Section 2 of article 11, chapter 92, provides the manner in which notice shall be given so as to entitle the Commonwealth to a judgment. The auditor shall, twenty days before the first day of the term of court, mail to each of the parties, directed to them at the postoffice at the court-house of the county of the sheriff, a notice in writing, stating the amount judgment will be asked for, and the time court will be held. A copy of the notice the auditor will file with the clerk of the court, &c., when judgment, as provided by the statute, shall be rendered. This statute authorizes the motion to be made in the Franklin Circuit Court, and, having been complied with, was sufficient to authorize the judgment. It is argued that this notice may not have reached the sheriff, and, in the absence of proof showing actual service, by a return on the writ or notice, the summons should be regarded as a nullity. It is ordinarily essential to any personal judgment that actual service should be had; but this rule has its exceptions, and they are found in this class of cases where public officials, by reason of a statute fixing their liability and the mode of recovery, may direct that service shall be made in a particular mode for the failure to pay over money to the State, collected in the discharge of their official duties.

It becomes a condition annexed to the qualification of the officer, and, in assuming its burdens and benefits, he agrees to the mode of recovery, fixed by the statute, for a breach of his official acts. In Rodes v. Commonwealth, 6 B. M., 359, the motion was against the clerk of the Fayette Circuit Court, and made in the general court to recover moneys collected by the clerk under the revenue laws of the State. The judgment was rendered without notice, in that case, and sustained on the ground that the statute fixed the time and manner of making such motions, and, of itself, gave notice to such collectors and their sureties, that, on the third day of the term, as fixed by law, motions would be made against those in default. The necessity for having the public revenue collected promptly, for the purposes of government, requires such summary proceedings; and it is as much the duty of the sheriff to pay the taxes over when collected, as it is that of the tax-payer to pay the sheriff. Here a reasonable notice is required to be given, and in a manner that would seldom fail to reach the hands of the collecting officer, who must know, without notice, that he has failed to pay over the revenue collected by him, and that the law, at the time he qualified, authorized such a proceeding against him.

The judgment is, therefore, reversed, and remanded with directions to enforce the lien to the extent of the payment by the appellant, with its interest.

THE TOWN OF WEST COVINGTON V. LUDLOW, &C.

(*Filed Feb.* 10, 1891—*Not to be reported.*)

Streets—Dedication—The owners of a strip of ground resist the attempt of a town to improve it as a street, claiming as their property, which has never been appropriated or dedicated by them to such public use. *Held*—That

while there is evidence of control by the town over the disputed property, as a street, for a number of years, the proof is clear that the owners of the land, which was an outlying lot, used as a common, had never appropriated or dedicated it to public use—on the contrary, they had more than once objected to such use.

There can be no dedication to public use unless the owner of land has, by either words or acts, consented to such use.

Orlando P. Schmidt and Tisdale & Gray for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

The only question in this case is, whether the owners have ever appropriated a strip of ground to public use as a street. This, as well as an acceptance by the public, is necessary to constitute a dedication. Enough is shown in this case, upon the part of the town, to constitute an acceptance; but the appropriation by the owner must precede it, and, whether this has ever taken place, is the disputed point.

The appellant, The Town of West Covington, claims that the pleadings admit it. Its answer avers affirmatively, in the second paragraph, that the land was dedicated, in 1851, by the executrix of Israel Ludlow, through whom the appellees, as heirs, derive title, but it does not say in what manner; and that the public have used it ever since as a street; the town authorities controlled and improved it, and all with the knowledge upon the part of the appellees.

No reply was filed, but the petition avers that the land had never been dedicated or given for use as a street. The issue was, therefore, made; and the fact that the answer somewhat gives details, or sets forth what might be given in evidence of a dedication, did not necessitate a reply. In brief, the pleadings, as made up, present a claim by the town of dedication from long use with the knowledge and permission of the appellees.

Prior to 1851 Bromwell & Redman acquired a portion of the Ludlow land. In that year they laid it off in town lots, and extended Lexington street westwardly through it until it reached the land of the appellees, which has always been, and is yet, an open common, and, therefore, subject to travel by the public at will, in any direction. If Lexington street were extended westwardly from where it thus ended, for about one hundred and twenty-five feet it would intersect with Main street, leaving between the two a small triangular piece of the Ludlow land, bounded upon one side by the Bromwell & Redman land, and upon the other two sides by the two streets. It was sold in 1865 by the executrix of Ludlow to one Miller, as well as about fifty feet front to one Rogers, on the opposite side, and next to the Bromwell & Redman land.

It is conceded in the testimony of the appellee, W. S. Ludlow, that the sale to Rogers had the effect of dedicating a further extension of Lexington street, to the extent of the front of the lot sold to him, and the appellees only sue to prevent the appropriation by the appellant of the strip of land, thirty-three feet in width, and about seventy-five feet long, which would be taken by the opening of Lexington street, from the west line of the Rogers lot to Main street. The deed to Miller calls for Lexington street as a boundary of the lot sold to him, when it may be opened. The language is: "Lex-

ington street produced westwardly." Two houses have been built upon this lot, but they front upon Main street. The people who built houses upon the Bromwell & Redman lots, on Lexington street, began traveling over the strip of land in contest, in going to and from Main street, shortly after 1850, and have continued to do so, more or less, ever since.

It also appears, however, that persons traveling Livingston street, which runs parallel to Lexington street, and along the Bromwell & Redman land, ending at its westward limit. also passed over the lands of the appellees to Main street. Indeed, it being a common, it was open for travel in all directions.

Some time between 1860 and 1870, the people of the vicinity, and the town, together, had some rock put on the most, and, perhaps, all of the strip of land in contest. It can not be said it was macadamized, as it was roughly done. No curbing was put down, or pavements made. Some rock were merely thrown along it, that it might admit of travel. It appears to have been renewed once, by order of the town trustees; but there is no evidence showing that the appellees knew of any claim by the appellant to the land, as a street, until April, 1875. It then proposed to build a plank walk upon one side of it. The appellees promptly denied its right to do so by a notice to its trustees, but they by order in council, had it done.

In July, 1889, they contracted for the opening and improvement of the street over the strip of land, by additional grading, paving curbing, &c. The necessary grading had been done, the curbing put down, the pavements laid, and the work all completed save putting on additional rock upon the roadway, when this suit was brought on September 2, 1889, enjoining its completion.

Fifteen years had not then elapsed from the time when the appellees had notice of the claim of the town to it, as a street, by the laying of the plank walk.

It is urged that from this use by the public, attended by the circumstances to which we have briefly alluded, constitute a dedication of the land for street purposes.

Also that the appellees, by permitting the work of improving the street to progress almost to completion, should not now be allowed to stop it. It is proven, however, that as soon as they had knowledge of it, they forbade its further prosecution, and at once brought this action. Beside, the town might well have presumed and expected objection from them, owing to the notice received by it from them, and shown by its records, when it attempted to build the plank walk.

It is well settled that land may be dedicated for public purposes by parol. Trustees of Dover v. Fox, 9 B. M., 200. The statute of frauds does not apply. Neither is any particular formality required. It may be express, as by deed or declaration from the owner, or implied, from his acquiescence in the public use. Dedications are, perhaps, usually shown by matter *in pais*, and not by matter of record. It is a question of intention upon the part of the owner, to be gathered from his acts, conduct or acquiescence in the use of it by the public. His assent to its appropriation by the public may well be presumed, after a long use, with knowledge upon his part of the claim by the public, and acquiescence in it, as for instance, for so long a time as an adverse holding of land by an individual would bar an entry by the real owner. In such a case there need be no express appropriation by the owner, the only question being whether, by permitting the public use, he intended a dedication. The use

by the public, to give it a right, need not, even in the absence of proof of an express appropriation by the owner, necessarily be for such a length of time as would constitute an adverse holding sufficient to toll an entry by the owner, provided the use has been accompanied by circumstances favoring the presumption of an appropriation by the owner. This presumption may, however, in the absence of an express appropriation by him, be rebutted, and such circumstances be shown as indicate the absence of any intention, upon his part, to appropriate the property to public use.

In our opinion, the evidence in this case does not warrant the presumption of such an appropriation by the appellees of the land in contest. Certainly there has been no express appropriation; and the circumstances offered in support of the presumption of one are not sufficient, in our opinion, to uphold it, in view of the objections proven to have been made by the appellees to the claim of the appellant.

Judgment affirmed.

LAEVISON, &c. v. BAIRD.

BAIRD v. LAEVISON, &c.

(*Filed Feb.* 5, 1891.)

Warranty—Rescission of contract—Improvements—A vendor sold to his vendee a town lot, which he conveyed to the vendee by a deed of general warranty, describing it as fronting a given number of feet, and running back even width, but he delivered possession of only a part of same to the vendee, the lot running back in a wedge shape, being about three feet in width less on the back line than described in the deed, the other portion being in the adverse possession of another person.

In an action to recover purchase money, the vendee prayed for a rescission of the contract, and compensation for improvements. *Held*—That the court properly rescinded the contract, being authorized to do so upon the plea that the vendee had not been put in the possession, and that the vendor can not comply with his covenant of warranty, a material portion of said lot being held adversely to the vendor, and his deed consequently champertous and void.

This case does not come within that class of cases where the vendee, having possession of land, can not resist the payment of purchase money, unless there has been an eviction by paramount adverse title, or non-residency, insolvency or fraud of the vendor.

The judgment awarding the vendee $2,303, for improvements, purchase money, &c., after deducting rents, is affirmed, as no cross-appeal is prosecuted from it.

Quigley & Quigley for appellant, Baird.

Bullitt & Reeves for appellants, Laevison and wife.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellant, Baird, conveyed the lot of ground in controversy to the appellee, Sophia Laevison, by deed of general warranty, and put her in possession thereof, except as hereinafter stated. The appellee and her husband, having been sued on one of the notes for the purchase money, they asked that the contract of sale be rescinded,

on the ground that Mr. Smith, who owned the southern adjoining lot, had erected a brick wall on the lot sold to the appellee, whereby said lot was left in a wedge shape, seventeen feet front, the distance called for in the deed, and fifteen feet at the rear end of the lot (three feet less than the deed called for); that said Smith held the part of the lot covered by said wall adversely to the appellant, at the time of said sale, and has so held it ever since. The proof sustains this plea, and the court rescinded the contract. The loss of the strip of ground to the appellee, and leaving the same in a wedge shape, so as to make it undesirable for the purpose of erecting a business house thereon, for which purpose it was purchased, certainly was a sufficient impairment of its value to authorize the chancellor to rescind the contract.

But the appellant contends, upon the authority of Pryse v. McGuire &c., 81 Ky., 608; English v. Thomason, 82 Ky., 280; that the appellee, not having alleged the non-residency, insolvency or fraud of the appellant, he could not maintain the plea. Said cases, consistently with a long line of cases upon that subject, hold that where a vendee has possession of land under a deed containing a covenant of warranty of title, he can not resist the payment of the purchase money, unless there has been an eviction by paramount, adverse title, non-residency, insolvency or fraud of the vendor.

This case does not come within the principle announced in said cases. They are to the effect that the vendee, having been put in the possession of the property, he can not plead that the covenant of warranty of title has been broken, unless there has been an eviction under a paramount adverse title, or non-residency, insolvency or fraud of the vendor. But if he has not been put in the possession, he may plead to an action for the payment of the purchase money, that the vendor can not comply with his covenant of warranty of title. This is upon the ground that, as long as the vendor has any thing to do to make a perfect right, possession being essential to that right, the vendee may resist the payment of the purchase money, if the vendor can not give such right.

Here the appellee was not put in the possession of the strip of ground adversely held by Smith. The contract in regard to that strip of ground was, by reason of the law of champerty, vicious and void, and, consequently, could not be enforced. Therefore, the appellee could resist the payment of the purchase money, and have a rescission without alleging eviction, non-residency, insolvency or fraud, provided she did not know that the strip was adversely held.

The appellee appeals from the judgment awarding her about $2,303 for improvements, purchase money, &c., after deducting rents. From this judgment the appellee appeals upon the ground that it is not enough. The appellee built her northern wall upon the lot of L. Harris, thinking, as she says, that her lot was seventeen feet wide all the way back, not knowing that Smith's wall was built on her lot. But the judgment of the lower court, in the case of L. Harris against the appellee, and which, on the appeal to this court by the appellee, was affirmed, held that the appellee built said wall upon the ground of Harris, knowing that it belonged to him, and that she should remove the same. The commissioner concluded that, to remove said wall would render the whole building worthless; and, as its condition was caused by the act of the appellee, the appellant, Baird, should not pay for the same.

This seems to be sound law, and as the judgment of the lower court fixes the amount of compensation at only about $100 more than that fixed by the commissioner, it must be presumed that it adopted

the commissioner view of the matter, only differing as to the amount. But, be that as it may, as the appellant, Baird, has not cross-appealed from this judgment, it must stand.

Both judgments are affirmed.

FORTNER v. DUNCAN.

(*Filed Jan.* 27, 1891.)

Constitutional law—Two offenses for selling liquor in a town—An ordinance of the town of Owenton prescribing a penalty of sixteen dollars, and imprisonment in default of payment of said fine, against any one, except a druggist, who shall sell liquor in said town, is constitutional. A city or town may impose a penalty for the same offense which may be punishable by general law, and one judgment of conviction will not bar the other.

The act of selling liquor in Owen county, including Owenton, being forbidden by law, said town may properly, in exercise of its municipal powers in preventing acts violative of good order and decency, punish the act of selling liquor in said town.

E. E. Settle for appellant.

J. A. Duncan and J. H. Dorman for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

Section 3 of the charter of the town of Owenton provides: "Said board of trustees shall have power to make by-laws and ordinances for the government of said town; for the preservation of good order, decency and decorum within its limits; for the preservation of the peace of its inhabitants, and to prescribe penalties for the violation of said by-laws and ordinances."

The ordinance of said town provides: "Any person who shall, within the town of Owenton, sell any spirituous, vinous or malt liquors, or any mixture of either, shall be fined sixteen dollars." The ordinance exempts licensed druggists who sell, &c.

The appellant was fined by the town authorities for violating this ordinance, and was put in jail on a *capias pro fine*. He, thereafter, sued the town, and its officials having to do with said proceedings, for false imprisonment, upon the ground that said ordinance was unconstitutional and void, and, consequently, the appellees were liable to an action for false imprisonment. It was decided by this court, in the case of the Commonwealth v. Gilbert, 6 J. J. M., 186, that permitting a slave to go at large in the town of Richmond, and hire himself out, subjected the owner to the fine that the Legislature had prescribed for suffering his slave to go at large in said town and hire himself out, also the penalty prescribed by the Legislature for the State at large, for suffering slaves to go at large and hire themselves out.

This decision was based upon the ground that, as it was made a penal offense against the State to suffer a slave to go at large and hire himself out, and also an offense against the town of Richmond to suffer a slave to go at large therein and hire himself out, the owner of such slave committed two offenses—one against the penal laws of the State, and one against the penal laws of said town—by one and the same act, and was amenable to each penalty.

In the case of Kemper v. The Commonwealth, 85 Ky., 219, Owensboro's charter authorized it to enact ordinances, in reference to bawdy houses in said city, which the city did, and the appellant was fined under said ordinance, which fine she plead as a bar to the Commonwealth's prosecution for the same offense, but the lower court, as well as this court, held that the fine by the city was no bar to the prosecution by the Commonwealth for the same act. The decision rested upon the ground that the act, although but one, constituted a distinct offense against each of the two political powers. Hence, the appellant was liable to a fine by each for the same act.

In each case quoted the act was against the good order of the State; and, in the Owensboro case, the city was authorized to legislate upon a named vice at common law. In the Richmond case the Legislature legislated directly for the benefit of the town, upon a declared vice by the Legislature.

It is said that the charter of the town of Owenton does not authorize the town to pass the ordinance in question; but it does authorize it to pass ordinances and prescribe penalties in the interest of "good order, decency and decorum." Is the ordinance, prohibiting the sale of whisky in said town, and prescribing a penalty for such sale, within the purview of the section of the chapter quoted? If whisky was a lawful trade in said town, then the general terms of said charter, authorizing ordinances to be passed in the interest of good order and decency, would not authorize the town of Owenton to suppress, by ordinance, the said trade therein; but it is not lawful to sell whisky in said county, including said town; the sale of it therein is prohibited upon the ground that it is opposed to good order, decency, &c., and there are penalties prescribed for the sale thereof. So we have such trade condemned by law as being against good order, decency, &c. Consequently, as said trade is opposed to good order and decency in said county, the town of Owenton, by its ordinance, passed pursuant to said charter, may prescribe an additional penalty for the sale of whisky therein.

In such case there are two political powers offended by one and the same fact; and, the penalty prescribed by each, may be enforced without reference to the other.

The judgment is affirmed.

HAWKINS, &C. V. WALKER.

(*Filed Feb.* 12, 1891—*Not to be reported.*)

Limitation—Adverse possession of land—Appellants are barred from recovery of land claimed in this action, because the same has been in the adverse possession of others for more than fifteen years before the bringing of this action.

P. W. Hardin and Cissell & Bailey for appellants.

Yeaman & Lockett for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Bennett.

In 1841 John McElroy, sr., willed to his son, John, forty acres of land, and to the heirs of his son, William, forty acres adjoining,

and to his son, Eli, forty acres, each parcel being a part of the same tract. The will expresses that each parcel had, theretofore, been surveyed or run off, but the will gives no boundary, nor is there other documentary evidence of the boundary. Not long after said will was made, John McElroy, sr., in consideration of the fact that Samuel McCrary had paid a debt for Eli McElroy, conveyed to McCrary the forty acres of land that he had willed to said Eli, which was to be laid off according to the previous allotment, except it was to be laid off so as to include ten acres, which were left lying between the eighty acres allotted said John and William and Eli, and to exclude ten acres on the west side of the forty acres allotted to Eli. It is this ten acres that the appellants claim as having been purchased from Eli by them. It seems that the boundary allotted to John and James contains about twenty-two acres more than eighty acres, and it seems that John McElroy, sr., had reference to this slip as the land lying between the said "allottments." But we have the word of John McElroy that said parcels of land were surveyed and run off to the devisees, and the surveyor and others say (indeed, it is beyond dispute), that there is a marked line corresponding with the date of the deed, which includes said twenty-two acres surplus, and which has been in the adverse possession for over fifteen years. Also, it must be presumed, in the absence of evidence to the contrary, that John McElroy, sr., made said lines. It is also clearly established that the ten acres claimed by the appellants are within the appellee's boundary; there is an old marked line on the west of said boundary. The same presumption arises as to John McElroy having made this line; that the appellee has been in the adverse possession of said ten acres for more than fifteen years; but be said presumption as it may, the boundary was marked by some one, and the parties have held and claimed it for said time.

It is a hardship upon the appellants to lose this strip of ground, but we can not give them relief without overturning principles as old as the law, made for the repose of society in such cases, which we are not disposed to do. Time has certainly barred their claim.

The judgment is affirmed.

HAMPTON, ASSIGNEE, V. MEEK.

(Filed Feb. 14, 1891—*Not to be reported.)*

1. *Evidence—Exceptions*—The depositions of witnesses, which had been taken while the action was pending in equity, but which were afterwards read on the trial of the issues which had been transferred to law without exception having been taken to their competency at the time they were read, can not be objected to for the first time on appeal. Nor will this court consider the competency of a deposition that the record does not show was read on the trial below.

2. *Finding of facts by a jury*—The Court of Appeals will not disturb the finding of facts by a properly instructed jury, unless it appears that it was palpably against the weight of evidence.

W. C. Ireland for appellant.

R. C. Burns and B. E. Roe for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Lewis.

Hampton, assignee, under deed for benefit of creditors of the firm of Wilson, Andrews & Co., bankers, brought this action in equity to recover of Meek a large amount of alleged advances upon checks in excess of his deposits, and of notes held by the firm against him.

In defense of the action Meek alleged that various sums charged in the account filed with the petition were improper, and that he was entitled to credits not set out in that account; and making his answer a counter-claim, he asked judgment over for the balance alleged to be due him upon a fair settlement.

The commissioner, to whom the case was referred, reported about $1,600 due Meek, but exceptions were sustained to the report and judgment rendered in favor of the assignee for about $3,000. Upon appeal to this court that judgment was reversed for error of the lower court in overruling the motion of Meek to transfer the action to the ordinary docket, for trial by jury of the issue made by the pleadings; and being so subsequently tried, a verdict was returned in favor of Meek for about $3,000, which was followed by the judgment now appealed from.

It has been a long-settled rule of this court, uniformly adhered to, that as the jury are the proper judges of the sufficiency of the evidence and credibility of witnesses, their verdict, when found under proper instructions, will not be disturbed unless palpably, or, as sometimes said, flagrantly against the evidence. Though the evidence in this case was contradictory and, to some extent, irreconcilable, there was enough given in behalf of the defendant, if credible, of which the jury had the sole right to judge, to support the verdict.

It is sufficient to say, without going into detail, that evidence was before the jury tending strongly to sustain the allegation of defendant that the controverted charges in plaintiff's account were improperly made, and that the credits claimed by him had been improperly omitted. Though there was evidence to the contrary, the principal witness, as well as the correctness of accounts kept by the banking firm, was impeached, and it was for the jury to say what weight the evidence of that witness was entitled to, and also whether from the facts proved the account filed was correct. This court can not, therefore, reverse the judgment upon the ground that the verdict is grossly against the evidence; nor upon the other ground stated in the motion for a new trial, that the verdict is not sustained by the evidence, which would involve an inquiry as to mere preponderance of the evidence, which we have no right to make. Whether the issues in this case were properly triable by a jury, is a question settled in the former opinion of this court, and is now not open for discussion.

The only remaining ground for reversal made either in the motion for a new trial or by counsel in their brief, is alleged error of the lower court in admitting incompetent evidence touching the general reputation of Andrews, one of plaintiff's witnesses.

Goble, one of those who testified on that subject, having stated he was acquainted with the general moral character of that witness while he resided at Catlettsburg, which was three years or more, and that it was good at first, but not all the time, was permitted in answer to the question whether, from that general moral character, he would be entitled to credit when on oath, to say, "No, sir; not with me."

Henderson, another witness, after stating he was acquainted with the general character for business honesty and integrity, and that it was bad since the failure and assignment of Wilson, Andrews &

Co., added he had heard one man say, before the failure, he did not consider Andrews honest.

It appears that neither of those witnesses was examined orally, but their depositions, taken while the action was pending in equity, were read to the jury; and as the particular parts of the testimony complained of were not objected to at the time the depositions were read to the jury, they can not now be considered, even if they were grounds sufficient for reversal.

The deposition of the other witness, Hamilton, referred to by counsel, does not appear to have been read at the trial at all.

Judgment affirmed.

COMMONWEALTH, FOR USE, V. GOWDY'S ADM'R.

(*Filed Feb.* 10, 1891—*Not to be reported.*)

Guardian and ward—Liability of county judges and their sureties on their bonds—For failure to require security of a guardian, a county judge and his sureties are liable on his official bond to a ward whose estate is lost by such failure. The principles of Cosby, &c. v. Commonwealth, for use of McFarland, are decisive of this case.

Samuel Avritt for appellant.

James S. Pirtle for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Bennett.

The appellant seeks to hold the estate of the county judge and his sureties responsible for the county judge's failure to take security from Mitchel, as the guardian of the appellant, whereby the appellant's property, in the hands of said guardian, was lost. The facts of the case are set out in the case of the Commonwealth, &c. v. Netherland's administrator, 87 Ky., 195, according to which case and case of Cosby, &c. v. Commonwealth, for use, &c., this day decided, the appellees are responsible.

The judgment is reversed, with directions to proceed in accordance with this opinion.

PURDY V. BATSELL'S ADM'R.

(*Filed Feb.* 10, 1891—*Not to be reported.*)

Purchase money—The vendor of land, believing that his boundary included a spring, so represented to his vendee when he sold to him said tract of land. In a suit for the purchase money the court should have credited the vendee with the value of said spring, which was lost to him, as not included in said tract. Fifty dollars is considered a reasonable credit for same.

Avritt & Russell for appellant.

Harrison & Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

It is plain from the depositions taken in this case that the appellee believed, when he sold the tract of land to the appellant, the spring was included within the boundary, and so represented to the appellant. This being the case, the value of that much of the land found to be outside of the boundary including the spring, should be deducted from the purchase price.

The entire tract of land was sold by the appellee to the appellant for $450, and it is unreasonable to conclude that more than one-half the value of the land that contained fifty acres, with improvements upon it, should be deducted from the sum agreed to be paid for the whole, as compensation for the loss of this spring. The land has a well upon it and two springs, and while they are not as valuable for use as the spring in question, it seems to us that $50 would be ample compensation for the loss sustained.

The testimony shows that the disputed territory belongs to the adjoining tract, and this leaves for determination the question alone as to the value of the loss.

The judgment is reversed, and remanded with directions to enter $50 as a credit, as of the date of the first payment, and this should end the controversy.

POWER v. POWER.

(*Filed Feb.* 19, 1891—*Not to be reported.*)

1. *Judicial sales*—The appellant owns one half and the appellees the other half of a store-house, subject to the dower interest of their mother, and this action was instituted under subsection 2, section 490, Civil Code of Practice, asking that a sale of the property be had on account of its indivisibility, and the proceeds due the infant appellees be re-invested for their benefit. *Held*—That the indivisibility of said property being apparent, the judgment of sale was proper, and no bond was required to be executed for the infants, as the proceeds will be under the control of the court.

2. *Parties to actions*—In an action under section 490 of Civil Code, infants may be parties plaintiff with their mother, who is their guardian, and no appointment of a guardian *ad litem* is necessary.

Wadsworth & Son for appellant.

Wall & Worthington for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

The appellees and the appellant own jointly a store-house and lot, in Maysville, with a front of thirty-three feet. The appellant owns three-sixths of the lot and the appellees the other half, subject to the one-third dower interest of the widow. The widow and her co-appellees filed this petition under section 490 of the Code. It is alleged that this property can not be divided without materially impairing its value, and that a sale would redound to the interests of all the parties. The interest of the infant appellees is asked to be re-invested for them by the chancellor.

It is apparent from the record that no division of this property can be had, and we perceive no reason why it should not be sold and the proceeds divided. The widow, who has dower in this lot, is not proceeding in her own right, to deprive by sale the remain-

dermen of the fee, under section 401. This is a vested interest by parties in possession of property that can not be divided, and the question of whether the sale will be beneficial is not involved, although alleged, and while the chancellor will see that the interests of the infants are not sacrificed, a party jointly interested has the right, where the property can not be divided, to demand a sale. By virtue of the provisions of section 490, the infants had the right to sue by their mother, who is the statutory guardian, and no defense is required to be made for them where they unite as plaintiffs.

The object of the guardian is to re-invest the proceeds for the infants—that is, to the extent of their interest—and no bond is required, as the proceeds of sale will be under the control of the chancellor.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

HAWKINS, JR. V. TRAPP.

(*Filed Feb.* 11, 1891.)

Unrecorded deed of assignment—Attachments—Upon the execution of a deed of assignment for the benefit of creditors, and the acceptance by the assignee of the trust, the title passes at once, although the deed has not been lodged for record, and, therefore, a creditor who, with actual notice of the assignment, attaches the assigned property is liable to the assignee for the damages resulting.

Charles J. Helm for appellant.

Root & Root for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barbour.

On December 24, 1887, Albert Silva made a deed of assignment of his property, including a stock of groceries, to the appellant, Hawkins, for the benefit of his creditors, and the trust was then accepted by Hawkins. The deed was lodged for record on the morning of the 27th. Attachments, issued against the property of Silva, came to the hands of the sheriff on the night of the 26th, and were levied on the stock of groceries, conveyed by the deed, in the afternoon of the 27th. Before the attachments were issued the attorneys for the attaching creditors had actual notice of the assignment, and the sheriff himself, before he levied the attachment, was notified that the assignment had been made. We gather from the record that the attachments were discharged.

This action was brought by the assignee against the sheriff for damages, growing out of the seizure and detention of the stock of groceries. Upon the trial of the issues made by the pleadings, the court instructed the jury that, if they believed the attachments came to the hands of the sheriff before the deed of assignment was lodged for record, they must find for the defendant. This was, in

effect, a peremptory instruction for the defendant, and seems, from the argument of counsel, was based upon the court's construction of section 11, chapter 24, General Statutes, which is, that "all *bona fide* deeds of trust or mortgages shall take effect in the order that the same shall be legally acknowledged or proved, and lodged for record." We do not think the section susceptible of such a construction; on the contrary, it seems plain to us that its meaning is, that between one deed of trust and another, or one mortgage and another, the first lodged for record shall have precedence. The construction contended for—that is, that the deed has no effect; does not pass title until lodged for record—is in conflict with all the adjudications on the subject. The section just preceding provides "that no deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved, according to law, and lodged for record."

In Baldwin v. Crow, 9 KY. LAW REP., 836, the court, referring to this section, held that a creditor who, even after levy of his execution, but before sale, had notice of a mortgage (though not lodged for record) which was prior in date to the lien created by the execution, would be deferred.

The purpose and the effect of the deed of trust is to distribute all the debtor's property among his creditors equally, and, therefore, the reason in refusing to one creditor, or any number of creditors, on account of attachments sued out after actual notice of the assignment, though the deed has not been lodged for record, is fully as strong as in the case of a conflict between a mortgagor, under an unrecorded mortgage, and creditors attaching with actual notice of the mortgage.

The judgment is reversed, and the cause is remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

HENRY, SHERIFF, v. HILLOCK, TREASURER.

Filed January 21, 1891. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *The county levy* primarily consists of the poll tax, and the county, unless especially authorized by law, has no power to impose any other tax.

2. *Same—Sheriff's commission for collecting*—When the Court of Claims levies the poll tax and such ad valorem taxes as it is authorized by law to levy, the aggregate amount is the county levy, and for the collection thereof the sheriff is entitled to the same commissions he is entitled to for collecting the public revenue.

3. *Same*—In estimating the commission to which the sheriff is entitled for collecting county taxes, a tax for turnpike purposes, authorized by a special act of the Legislature, is to be regarded as a part of the county levy, and not as a separate and independent tax. The sheriff is, therefore, not entitled to a commission of 10 per cent. on the first $5,000 of such tax in addition to 10 per cent. on the first $5,000 of the other county taxes, but entitled

to only 10 per cent. on the first $5,000 of the whole, including the turnpike tax, and to 4 per cent. on the balance.

4. *Same*—A provision in the act of the Legislature authorizing the turnpike tax, "that all of the laws of this State applicable to the collection of the State revenue shall apply to the collection of the tax thus levied," was merely intended to regulate the time and manner of collecting the tax, and not to fix the commissions of the sheriff.

T. H. Hines and Hanson Kennedy for appellant; John T. Norvell for appellee.

JONES v. NISBET.

Filed January 14, 1891. Appeal from Rockcastle Circuit Court. Opinion of the court by Judge Yost, affirming.

Separate estate—It is competent for husband and wife to agree that personal property of the wife, whether acquired by her before or after marriage, shall be held by her as her separate estate. And such an agreement, although not in writing, will be upheld as against creditors, if free from fraud.

A wife, with her husband's consent, continued, after marriage, to hold and claim as her separate estate a piano which she owned at the time of her marriage. The piano having been sold under an execution against the husband, this action was brought by husband and wife against the officer making the sale to recover damages. *Held*—That the plaintiffs were entitled to recover.

McClure & Williams and J. W. Alcorn for appellant; W. O. Bradley and J. W. Brown for appellee.

MEEK & MCCALL v. PATTON.

Filed January 21, 1891. Appeal from Boyd Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *New trial—Newly discovered evidence*—A new trial will not be granted on the ground of newly discovered evidence, if such evidence is merely cumulative, or corroborative of what was testified on a former trial, or merely supplies forgotten facts, or a fact known, or that could have been known by the exercise of ordinary diligence.

The fact that a defendant, in a judgment, has, since the judgment was rendered, discovered certain papers which have refreshed the memory of his co-defendant and witness, was not sufficient to authorize a new trial, as the witness, whose memory has been refreshed, testified upon the former trial that he had paid the note sued on, and the newly discovered papers would merely enable him to testify to better advantage upon the same issue. Besides, the existence of the papers might have been discovered by the judgment defendant prior to or upon the former trial, if he had used ordinary diligence in his conversations with and examination of his co-defendant and witness.

2. *Same*—While appellate courts are slow to disturb the action of the lower court in granting a new trial, they will do so where it plainly appears, as it does in this case, that there is no good reason why a new trial should be granted.

R. C. Burns for appellant; T. R. Brown for appellee.

GRAVES v. GRAVES.

Filed January 21, 1891. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, affirming.

Res adjudicata—To make a matter *res adjudicata*, the former adjudication must not only have been upon the identical cause of action, but between the same parties.

R. paid T. the amount of claim he owed him. Prior thereto T. had sold

his claim to D. and given him an order on R. D. brought suit on this order against R., making T. a nominal defendant. R. pleaded payment to T. Judgment was rendered in favor of D. against R., and thereupon R. brought this suit against T. to recover the amount he had paid him. T. pleads as a bar the judgment in the action of D. against R. *Held*—That that judgment is not a bar.

Brown & Ward for appellant; R. D. Vance for appellee.

HAACKE v. CONRAD.

Filed January 21, 1891. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Young, affirming.

1. *Separation of conclusions of law and fact*—Where the law and facts in an ordinary action have been submitted to the court, and there is no separation of the court's conclusions of law and fact, or the conclusions are not excepted to, the appeal will involve no other inquiry than whether the pleadings support the judgment.

2. *Same*—The court's separation of its conclusions of law and fact will not avail if not asked for until after the motion for a new trial has been overruled. In absence of such a separation there is nothing upon which to base a motion for a new trial.

E. E. McKay and Anton Kutzleb for appellant; Lane & Burnett and W. L. Kreiger for appellee.

OHIO VALLEY RAILWAY CO. v. MAJOR.

Filed January 21, 1891. Appeal from Henderson Circuit Court. Opinion of the court by Judge Young, affirming.

Railroads—Duty as to stock on track—Where an engineer in charge of a train knew that horses on the track in front of the train could not get away from the road bed because of a barbed wire fence on each side, and that they could not cross a trestle in front of them, it was his duty to stop his train until the horses could have been driven out of danger, and failing to do so, the company is liable for damages resulting from injuries received by the horses in attempting to cross the trestle.

J. F. Clay for appellant; Sol. S. Sizemore for appellee.

BACK & MEYERS v. WESTON.

Filed January 21, 1891. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Attachments—A person, not a party asserting a claim to, or a lien upon, property which has been attached must have himself made a party to and set up his claim in the action. So where there is a prior and a subsequent attaching creditor, and the latter claims priority on account of any irregularity in the first attaching creditor's proceeding, he must file his petition in the first action, therein disputing the validity of the first attachment, and stating the nature of his own claim. And where the cases have proceeded in the lower court as independent actions, it is too late for the subsequent attaching creditor to claim, for the first time, upon a motion for a new trial, that he is entitled to priority by reason of irregularity in the proceeding of the first attaching creditor.

C. J. Helm and E. W. Hawkins, jr., for appellants; Raison & Ahlering for appellee.

EQUITABLE ACCIDENT INSURANCE CO. v. SANDIFER.

Filed January 21, 1891. Appeal from Garrard Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Accident insurance*—Where an accident insurance policy provides that the insurance does not cover "disability resulting from voluntary exposure

to unnecessary danger. nor the violation of the rules of a corporation," the fact that the insured was riding upon a platform of a railroad train, or upon the steps of a platform, where he was injured, will not prevent him from recovering, if he can show that, by reason of the crowd on the train, there was no safer place to ride, and that the conductor permitted him to ride there. He can not be regarded as voluntarily exposing himself to danger, or as violating a rule of the corporation within the meaning of the policy.

2. *Same*—The insured can not be regarded as violating a rule of a corporation within the meaning of such a provision in an accident insurance policy, unless he had knowledge of the rule.

R. H. Tomlinson for appellant; W. O. Bradley for appellee.

EASON v. BOARD OF TRUSTEES OF TOWN OF LANCASTER.

Filed January 21, 1891. Appeal from Garrard Circuit Court. Opinion of the court by Judge Young, affirming.

Towns and cities—Power to make contracts—Neither a municipal corporation nor its officers can do any act or make any contract, or incur any liability not authorized by its charter. All acts beyond the scope of powers granted are void.

The provision in a town charter that the board of trustees "in its discretion may make special allowance to any officer it may deem proper," did not confer upon the trustees the power to make a contract with an officer to pay him a certain sum each month, in addition to his regular fees, and such a contract was void. The trustees had the right at any time to discontinue special allowances made under this provision of the charter.

J. H. Brown for appellant; R. H. Tomlinson for appellees.

GRINSTEAD v. RICHARDSON.

Filed January 28, 1891. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Fraudulent assignments for creditors*—The reservation, in a deed of assignment for the benefit of creditors, of a homestead and such personal property as was by law exempt from coercive sale for debt, without specifying the articles claimed as exempt, did not render the deed invalid. The effect of the deed is to convey to the assignee in trust all of the debtor's property, subject only to such exemptions as the law allows him.

2. *Same*—A provision in the deed for the payment of the assignor's debts pro rata, "except such as have preference by law or mortgage on said property herein conveyed, which shall be paid in full," does not render the deed invalid, especially in the light of the evidence which shows that the only mortgage was upon the debtor's homestead, which was ample to pay the mortgage debt. The deed should be given a reasonable construction, which would merely give the mortgagee the right to prove up his whole claim with the general creditors against the general estate, if necessary to pay his debts.

3. *Same*—The reservation of certain real estate, which, it is to be inferred, is the property of the assignor, *prima facie* invalidates the deed; and while the assignor and assignee claim that the reserved property belongs to other parties, the evidence fails to show that fact.

4. *Same*—The fact that the debtor had every reason to believe that he was solvent, taken in connection with other circumstances, is sufficient to show that he executed the deed with the design to defraud his creditors, and it should, therefore, be set aside.

Dodd & Dodd, W. H. Marriott and James Montgomery for appellant; J. C. Poston and J. P. Hobson for appellee.

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KENTUCKY COURT OF APPEALS.

SHAW v. CAMPBELL TURNPIKE ROAD CO.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Corporations—Ultra vires—Injunction—Parties to action—The directors of a turnpike company, whose stock pays a good premium, and whose original charter did not authorize the purchase of a connecting turnpike, had no power to obtain an amendment to said charter authorizing such purpose and carry out the same, thus depreciating the value of stock belonging to a stockholder, who in nowise was instrumental in obtaining said amendment, and such stockholder, in his own name, may enjoin the president and directors of said company from making said purchase. The original charter formed a contract with said stockholder.

Nelson & Desha for appellant.

Jas. C. Wright and Sam. E. Anderson for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

The appellant and the appellees were shareholders in the Campbell Turnpike Company. This stock was worth $150 for each $100. The appellees had incorporated the Grand View Turnpike Company, and constructed a turnpike connecting with the Campbell Turnpike Road Company. The stock in this new company has no market value—in fact, the road has no toll-gate upon it. They obtained an act of the Legislature, in the year 1888, enabling the first corporation to purchase the new road and pay for it in stock of the old road. They were about to carry into effect this purchase, when the appellant, who was in no wise instrumental in obtaining the passage of the act of 1888, filed his petition and obtained an injunction prevent-

ing the old corporation from purchasing the new road. The appellees and the old corporation are made defendants, and the facts or pleadings show a purpose to carry out the provisions of the act of 1888, by which both roads can be merged into one. The Campbell Turnpike Company was incorporated in the year 1846, and has been in existence since that time. There is nothing in its charter, or in the general law, authorizing it to consolidate with other turnpikes, or to purchase other roads, and the effect of the purchase, if made, is to lessen the dividends of the appellant in the old corporation.

A part of the stockholders in the one road, if allowed to purchase other roads with the stock of the first corporation, may destroy the investment in an enterprise in which all are equally interested, by the terms of the charter, which is the contract between them. We do not mean to adjudge that a mere extension of the turnpike, beneficial to all, would be *ultra vires*, when authorized by a legislative enactment; but, when new corporations are formed and other roads constituted, to take the stock of one to purchase other roads is, if sanctioned, compelling a stockholder to do that against his consent which is in violation of a contract common to all.

Both corporations can exist, in this case, with the tolls of each going into its own treasury, or such an agreement made between the two companies, in reference to the tolls, as would be just and equitable to all.

It is argued that the action should have been brought in the name of the corporation, and then not until the act of consolidation had been made, or the purchase effected. It is to prevent this action, on the part of the appellees, that caused the appellant to obtain his injunction; and, as the old corporation is a party, and these appellees, the president and directors, are about to do that which is in excess of their powers, and without any authority from their charter, there is no reason why the action is not properly brought. The case of Botts v. Simpsonville and Duck Creek Turnpike Company, 79 Ky., ——, is decisive of this case. Some of the authorities, where an act of the Legislature authorizes a consolidation of companies, hold that the act of consolidation by the majority is, in effect, a dissolution of the existing corporation; but all establish the doctrine that the rights of the stockholder must be protected.

In our opinion the chancellor erred in dismissing the petition and dissolving the injunction.

The judgment is reversed, and remanded for procedings consistent with this opinion.

WOODYARD v. K. C. RY. CO.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Negligence—Injury to trespassers on a railroad—Appellant, having been injured by cars on appellee's railroad track being backed against him while he was in the act of crossing the track, in the rear of a train in a deep cut, at an unfrequented point, where no street or other crossing intersected said railroad, can not recover damages for such injury, as the evidence shows he was a trespasser, attempting to cross the track at a place where the employes of the company were not required to be vigilant in observing persons on the track, and the employes, as a matter of fact, had no notice of his peril.

J. P. Tarvin for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the Court by Chief Justice Holt.

This is an action for damages for an injury resulting to the appellant by a train of the appellee backing upon him as he was crossing the track, and occurring, as is claimed, through the neglect of those in charge of it. At the close of the plaintiff's testimony the court instructed the jury to find for the company. The accident occurred in a cut some eighteen feet below the surface of the adjacent property, and which is known at that point, upon the plat of the city of Covington, as a part of Washington street. It is not, at that point, a a street in fact; but, by permission of the municipal authorities, it is occupied by the appellee's railway tracks, and has long been so used. It has never been paved, or even graded, save by the putting down of railroad tracks, and vehicles can not pass along it.

The appellant was walking south between the two tracks, and, as he came to where Fifteenth street crossed, by means of a bridge some eighteen or twenty feet overhead, a locomotive, with steam up and several freight cars attached to it, was standing, headed north, the engineer and fireman being at their post, and the train apparently being about to start. It was in the daytime, and the appellant passed by the train upon the east side. After getting by it some three or four feet, he concluded to cross behind it to the west side of the track, and thence get up on to Fifteenth street.

To do this he had first, after crossing the track, to climb over a railing some three or four feet high, which ran along the outer edge of a narrow board walk upon that side of the track, then get over a board fence several feet high, when he would be upon a stairway belonging to some individual owner, and which leads up to the street. When nearly across the track, the train suddenly backed and struck him.

No signal was given that it was about to do so. This is the principal ground of complaint.

There was no crossing at that point, and the obstructions in the way of reaching Fifteenth street, as appellant was endeavoring to do, show that it must have been an uncommon way of travel, and that persons were not in the habit of going that way. It is evident that those in charge of the train had no reason to believe that the appellant, after passing by, would attempt to cross the track just in the rear of it.

The degree of care to be exercised by those in charge of a railroad train must necessarily depend upon location and circumstances. They are not ordinarily required to be upon the lookout for trespassers, or those who have no right to be upon the track. They need not anticipate their presence, and are only required to avoid injury to them, if they can do so, upon becoming aware of their peril.

This rule is from necessity, and a due regard for the safety of the public and human life, so far modified, however, that at places frequented by many people, either by right or permission, express or implied upon the part of the company, and in localities where many are known to be constantly passing and crossing the track, as in a thickly populated town, those in charge of so dangerous an agency as a moving railroad train must be on the watch for persons on the track, and warn them, by proper signals, of their danger.

This is not required, however, at places not so frequented by the

public, and where persons can not reasonably be expected to be. At such points upon the track of a railroad, it is entitled to the exclusive use, and others are merely trespassers.

This rule has been repeatedly declared by this court. In this case, however, those in charge of the train did not know of the appellant's peril. They had no reason to apprehend it. He was crossing the track just at the rear of the train, where there was no public crossing, and at an unusual place.

They were not required to anticipate and discover his peril, nor was the place such that they were required to signal the movement of the train. The appellant went upon the track in very close proximity to the rear of the train, and at a point where he had no right to be; and, while unfortunate for him, yet he has no right to ask damages for an injury resulting from his own carelessness from a party that, without fault, inflicted it.

Judgment affirmed.

ARMSTRONG V. FOLEY.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

Action to quiet title—Pleadings—Verification—Mortgages—Husband and wife executed a mortgage upon the undivided one-fourth interest of the wife in and to several lots in the city of Covington, and the mortgagee was made a party to the suit pending for partition, and filed his cross-petition seeking to enforce his lien on said undivided interest. After the allotment was made and two lots set apart to the wife, the mortgagee amended his petition, alleging that his lien was transferred by the allotment to the two lots set apart. But, before the amended petition was filed, the husband and wife had executed a mortgage on said lots to appellant, and judgment was entered enforcing the lien of the first mortgage on the lots named, but the second mortgagee was not made a party to said suit. After the sale of one of the lots to appellee and confirmation of sale, deed executed and possession delivered to appellee, he instituted an action to quiet his title. Defendant filed an answer, which was adjudged insufficient on demurrer, and tendered an amended answer, which the court refused to permit to be filed, because neither of said answers showed that the husband or wife owned a greater interest in the two lots than was embraced in the first mortgage. Judgment by default was rendered in favor of appellee, and seven days thereafter, when court was about to adjourn, appellant tendered an amended answer, containing averments constituting a defense; but the court refused to permit same to be filed for want of verification, as required by section 126 of the Civil Code of Practice. The court also refused to hold court open another day to permit the verification to be made. *Held*—That no defense having been presented by the answer, or first amended answer, they were properly decided insufficient, and the court properly refused the last amended petition to be filed, nor did it abuse its discretion in refusing to extend the term of court to permit verification of the amended answer.

Collins & Finley and Tisdale & Gray for appellant.

W. K. Benton for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

Harriet F. Wade was the owner of an undivided fourth of several lots in the city of Covington. In February, 1885, she and her hus-

band mortgaged her undivided interest in one of them to one Scott, to secure the payment of a considerable debt. In an action by Foley's administrators, to which the Wades and Scott were parties, the fund was attached. The latter, by a cross-petition, sought a foreclosure of the mortgage, which embraced the interest of Mrs. Wade in the one lot, 190 feet square on Scott street.

While this action was pending, partition of all the lots was had among the owners by a proper action, which had been begun before the execution of the Scott mortgage, and there was allotted to Mrs. Wade, as representing her one-fourth interest in all of them, a lot of about 52 feet front out of the 190-foot lot on Scott street, and also another small lot.

An amended petition was thereupon filed in the Foley suit, setting up the facts as to the allotment, and claiming that thereby the Scott lien, by operation of law, had been transferred to the lots which had been allotted to Mrs. Wade.

Before this amended pleading was filed, she had mortgaged both the lots so allotted to her to the appellant, L. A. Armstrong, and his mortgages were of record. He was not, however, made a party to the Foley suit. It proceeded to judgment, and a decree was entered foreclosing the Scott mortgage against the two lots that had been allotted to Mrs. Wade. The 52-foot front one was sold, and purchased by the appellee, B. W. Foley; the other was then left unsold. The sale was confirmed and a deed made to him. He, being in possession, brought this suit to quiet his title, inasmuch as the appellant was claiming an interest in the lot by virtue of his mortgage.

As Scott only had a lien upon the 190-foot lot, and as the two lots allotted to Mrs. Wade represented her undivided interest in all the lots, clearly Scott only had a mortgage interest in the 52-foot front lot allotted out of the 190-foot lot, and the other lot set apart to her, equal to her undivided one-fourth interest in the 190-foot lot. In this proportion he became, as to their mortgage interests, what may, perhaps, be said to be a sort of tenant in common with the other mortgagee, the appellant, Armstrong, and the latter should have been made a party by the amended petition filed in the Foley suit. The partition proceeding did not, of course, extend the Scott mortgage beyond an equivalent in the lots set apart to Mrs. Wade. If a mortgagor have a greater interest in the property divided than is embraced by the mortgage, and the whole interest be allotted in severalty, the mortgage lien attaches to the whole land set off in the proportion the quantity mortgaged bears to the entire quantity allotted.

The appellant's answer filed in this suit, however, while it set up the filing of the amended petition in the Foley suit, that had been filed after the allotment, and alleged that thereby a new cause of action was asserted, to which he was a necessary part, failed to state the facts contained in the amended pleading. It merely gave the pleader's conclusion. A demurrer was, therefore, properly sustained to it on November 4, 1889. Two days thereafter the cause was submitted, and in the same length of time thereafter a judgment was rendered quieting the appellee's title. A motion was then made by the appellant to set aside the judgment and to file an amended answer, and on November 15th following a second amendment was tendered. They were rejected because they failed to aver that the lot in contest represented in value more than the interest Mrs. Wade held in the 190-foot lot that was mortgaged to Scott. It seems to us this objection was valid; that it rested upon the appellant to make this averment, and when made, to show it, if denied, because he

admits that the Scott lien on the lot purchased by the appellee was superior to his own, to the extent of Mrs. Wade's interest in the 190-foot lot; and this being so, he should show that he has suffered damage; otherwise he has no right to complain that he was not made a party to the Foley suit, and to claim that the judgment therein is, as to him, void.

It was, of course, not binding upon him, as he was not a party or privy to it; but when he asks that he shall not be affected by it, he must show that, if it be allowed to remain in force, he will thereby suffer injury; and his pleadings were defective in not presenting for issue this question by proper averment.

It said the property was sold in which he had an interest, without his being made a party. But if worth no more than the interest in the lot mortgaged to Scott, then, as it was to that extent the superior lien, he had no interest. The lot was sold for the mortgage debt, and the appellee has a deed to it. These amended answers did not aver that it did not bring its value, or that it was worth more than the mortgaged interest in the 190-foot lot. If this be so, it would be an idle ceremony, in which courts do not indulge, to annul the proceedings by which the appellee obtained his deed; and the appellant, having no right to complain, unless he had been injured, it rested upon him to aver his injury, and, if denied, to prove it. He complains that he was injured by not being brought before the court in the Foley case. He should aver in what way he was injured.

The appellant on November 15, 1889, seven days after the judgment was rendered, and when the court was about to adjourn for the term, presented a third amended answer, containing the necessary averment, but the pleading was not verified. This was necessary. It was not such an allegation of value as, under section 126 of the Civil Code, is never admitted and must be always proven. It went to the substance of the action. The amendment was refused. The appellant asked that the court be kept open until the next day, that he might have the pleading verified. This was also refused, and, in our opinion, the court in doing so did not abuse a sound legal discretion. The appellant had been allowed ample time to plead, and a limit in this respect is necessary to the dispatch of business and the end of litigation.

Judgment affirmed.

MARTIN V. RICHARDSON.

(*Filed Jan.* 29, 1891—*Not to be reported.*)

1. *Forcible Detainer—Traverse*—After the jury, in a proceeding of forcible detainer, had failed to agree, by consent the decision was submitted to three men, who found in favor of the plaintiff in the warrant, and this was entered by the justice of the peace as the judgment. An appeal was prosecuted from this judgment and was dismissed, because no traverse had been filed. *Held*—That a traverse was necessary to maintain an appeal in such case.

2. *Fraud*—The defense that appellant was by fraud prevented from filing a traverse is not available in the absence of proof to sustain it.

O. H. Waddle and G. W. Shadoan for appellant.

J. T. May and W. A. Morrow for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Pryor.

In this proceeding of forcible detainer the jury failed to agree, and the parties submitted the decision of their rights to three persons, who returned a verdict that the plaintiff in the warrant should have restitution. No traverse was filed, but an appeal taken from the judgment of restitution entered by the justice. The appeal was dismissed for want of jurisdiction, which was erroneous, because the circuit court can entertain appeals in such cases, whatever may be the value of the land involved or the value of its use. It was properly dismissed, however, because there was no traverse.

The appellant says that no opportunity was given him to traverse, and that he did not know, in fact, that the case had been decided for many days after the judgment had been entered.

Fraud is said to have been practiced by the appellee, but there is no testimony to that effect, but a question as to whether a traverse is necessary where the finding is by three instead of twelve men.

Judgment affirmed.

MILLER V. HAYDEN, &C.

(Filed Feb. 5, 1891.)

Injunction—Drainage—Surface water—Estoppel—M., the vendor of appellee and appellants, owning wet lands, entered into an arrangement by which they were to dig a ditch, passing from appellant's lands, through an elevation, into lands belonging to M., and extending the same through his lands to Panther creek, a natural stream, thus affording drainage for surface water from their lands. After completing the ditch through the elevation, vast quantities of water were drained upon M.'s land, doing him great damage, and M. threatened to sue appellants for causing said damage. Work on the ditch was abandoned, and the ditch became partially filled up by the caving in of its banks and the accumulation of fallen trees, &c., in same, and the accumulation of water on M.'s land thereby considerably diminished. M. afterward sold the land to appellee, and appellants shortly thereafter began cleaning out this ditch, when appellee obtained an injunction restraining them from doing so. The injunction was perpetuated and the order further directed that defendants should not *permit to remain open the ditch heretofore opened, nor shall the defendants permit any water to flow through said ditch on plaintiff's land. Held*—That the court properly enjoined appellants from opening the ditch so as to increase the flow or accumulation of surface water on appellee's land.

The fact that appellee knew of his vendor's consent to making a completed ditch does not estop appellee from complaining of the accumulation of surface water, resulting from the uncompleted condition of the ditch, so that it might escape into Panther creek. But in so far as the order was mandatory in its nature, requiring appellants to fill up said ditch so as to prevent any water from running through the ditch and accumulating on appellee's land, it was erroneous.

H. A. Williams and W. T. Owen for appellant.

George W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1876 the defendants in the court below and appellants

in this court were interested in draining what was muddy, wet land, and known as Grassy Flat. The appellee purchased land adjacent to or near that swamp, and there is testimony conducing to show that a remote vendor, while in the possession of the land sold the appellee, united with the other parties in interest for the purpose of digging a ditch that would drain this swamp land. There is an elevation between the swamp and the land of the appellee, and through this elevation the ditch had to be dug so as to cause the drainage. When through the elevation the land of the appellee was several feet lower than the land above, where the swamp was located. The ditch never reached the land owned now by the appellee, but then owned by his vendor, but was dug through the elevated ground to such a distance as caused the drainage from the swamp to overflow and seriously injure the land now in the possession of the appellee. The parties interested were endeavoring to cut a ditch in a southerly direction through the ridge to Panther creek, where the water from this swamp could flow into this natural channel without injuring the lands south of the ridge that were lower than the lands above. The ditch was cut through the ridge, and there the work stopped, and, as the proof conduces to show, for the want of means to complete it. The result of the failure to complete the work was the overflow of Mattingly's land (now owned by the appellee) and the destruction of his crop of tobacco and a part of his crop of corn. After this, Mattingly threatening to sue, the work was abandoned. The sides of the ditch caved in, trees and limbs of trees falling into it until in many places it was nearly filled up.

In the year 1885 the appellee became the owner of this Mattingly land, or parts of it, and in December, 1887, the appellants began to work on this ditch, by cleaning it out and removing the obstructions so that the water from the swamp might flow through it, and the appellee obtained his injunction preventing them from cleaning out the ditch, and asked that appellants, on final hearing, be compelled to replace the dirt and obstructions that had been taken from it. It is insisted by the appellants that Mattingly, who owned the land of the appellee when the ditch was being dug, consented that it should be done, and that the appellee, when he purchased, knew that the ditch had been dug, and all are, therefore, estopped from interfering with the appellants in their efforts to clean it out. It is apparent that the understanding between the parties, who owned these lands when the excavation was made, was that the ditch should extend to Panther creek, and in this way drain the lands both north and south of the ridge into that creek, and in this manner all the wet lands would be reclaimed. It is of vital importance to these appellants to have their land drained, but equally as important to the appellee to prevent the flow of the water from the appellants lands on to his lands. It is manifest that Mattingly's complaint was listened to at the time he threatened to sue for the injury to his crops, as the facts indicate that no effort has been made to extend the ditch, and those interested, including the appellants, have permitted the ditch to fill up as much as two and a half feet at many places, and there has been no complaint of an injury to the lands or crops south of the ridge, by reason of this ditch, for many years; or, at least, there is an absence of proof on that subject, which fact tends strongly to show that the filling of the ditch has lessened the injury to the lands south of its terminus. Besides, it appears that the entire lands now submerged with this standing water could be relieved of their burden by a small expenditure; and with so many interests in-

volved and with land of such value, no reason appears for benefitting the lands above the ridge at the expense and injury of the land owned below.

"An owner of land has no right to rid his land of surface water, or superficially percolating water by collecting them in artificial channels, and dischaging it through or upon the land of an adjoining proprietor." Gould on Waters, page 471, section 271.

In a well-considered case in 21 Iowa, 160, Livingston v. McDonald, it was held that a ditch constructed by the owner of land, which increased the flow of water on the lower land below, and in a different manner from which the water would have naturally flowed, was liable for the injury. This doctrine seems to be universally recognized, and, when applied to the facts of this case, it results that the chancellor, looking to the damage that would follow if the ditch was re-opened, properly entertained jurisdiction in granting the relief asked.

In perpetuating the injunction the chancellor has gone too far in his order to the appellants, mandatory in its character, by which the appellants violate the injunction, if they permit the ditch heretofore opened to remain open, made or cut. The language is, "*or permit to remain open the ditch heretofore opened. Nor shall the defendant permit any water to flow through said ditch on plaintiffs' lands.*" In order to obey this injunction the appellants would be compelled to fill up the ditch or to erect a dam, so as to prevent the flow of water on to the land of the appellees. They might have been required to replace the dirt and debris they had taken from the ditch, if that contributed to the flow of water; but it appears that the work had scarcely begun when the preliminary injunction was obtained, and the evidence does not show that any greater flow of water would pass through the ditch by reason of this attempt to move the dirt and logs that had filled it up.

It appears from the entire testimony that water still flows through this ditch, and to require the appellants to prevent it is not authorized from the testimony before us. It seems to have been an enterprise common to all the owners of land above and below this ridge, that divided the low land from the made land above, and after expending what money had been raised for the improvement, the scheme was abandoned and the ditch neglected for years, until it was nearly filled up. Mattingly, who owned the land at this time, consented to it, but with the understanding that it would be extended, and the appellees becoming the owners from the vendees of Mattingly, and knowing the condition of the ditch when they purchased the land, can only complain of the attempt or purpose of the appellants to clean out the ditch, so as to make it capable of carrying off the water in large quantities on to their land.

To require the appellants to stay the flow of water altogether, when the original owner of the land had participated in this scheme of draining, or at least consented to it, would be compelling the appellants, by their own labor, to enhance the value of appellees' land, when at the time the appellees purchased it the ditch had been dug and was conveying off small quantities of water from the land above, a fact well known to them, and one that, no doubt, entered into the contract, or was considered by them when they made the purchase. The injunction should have prohibited the appellants from clearing out the ditch, or from reconstructing it in any way, so as to increase the flow of water on appellees' land.

Judgment reversed and remanded for proceedings consistent with this opinion.

Judge Pryor delivered the following response to a petition for rehearing:

The effect of the judgment or order of injunction is not only to prevent the opening of the ditch by the appellants, but they are required to prevent the flow of water on the land of the plaintiffs. The language of the order is, "*or permit to remain open the ditch heretofore opened, or any of them permit any water to flow through said ditch upon plaintiffs' land.*"

This is broad language, and might subject the appellants to punishment for failing to obey the injunction. The injunction subserves the purpose intended, and we perceive no reason to apprehend future litigation, as the only error committed by the appellee was in obtaining a greater relief than he asked for.

Petition overruled.

COSBY V. COMMONWEALTH, FOR USE, &C.

(*Filed Feb.* 10, 1891.)

Liabilities of county judges and their sureties on their bonds—Guardian and ward—Section 14, article 1, chapter 48, General Statutes, reads as follows: "The court shall annually inquire into the solvency of sureties for guardians; and, if at any time it has cause to believe that the sureties of a guardian are insolvent, or in failing circumstances, it shall, after summoning the guardian, require him to give additional security."

By this provision it is mandatory upon the county judge to inquire, at least once a year, into the solvency of the guardian's sureties, and, if he has cause to believe that the sureties are insolvent, or are in failing circumstances, it is his duty to require the guardian to give additional security. And if at any time he has cause to believe that the sureties are insolvent, or are in failing circumstances, it is his duty to require such additional security. For a failure to perform this duty, the judge and his sureties are liable on his official bond; but if, upon making said inquiry, he, as a man of ordinary judgment, is deceived as to the solvency of the sureties, he should not be held responsible. The law has not prescribed the manner in which such inquiry shall be made, but that it shall be made is imperative. If, upon the annual inquiry, or at any other time, the county judge, as a man of ordinary judgment, has cause to believe that said sureties of the guardian are insolvent, or in failing circumstances, and fails to require additional security, he and his sureties will be liable on his official bond.

The reason for this salutary statute is founded on the duty imposed upon the State to protect infants, in their helpless condition, from losing their estates; and, for this purpose, county judges have been made the agents of the State.

Robertson, Smith & Robbins for appellant.

D. G. Park, Hargis & Eastin and George H. Alexander for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Bennett.

The appellee sued the appellants, as the sureties on the official bond of the county judge of Graves county, seeking to hold them responsible for the amount of money that went into the hands of appellee's guardian, and to which the appellee was entitled, but

which the appellee lost by reason of the insolvency of said guardian and his sureties, upon the ground of the neglect and careless failure of the said judge to annually inquire into the solvency of said guardian's sureties, and to cause the guardian to give additional security, there being cause to believe that said sureties were insolvent; and, by reason of said failure, the appellee lost his estate confided to said guardian.

Section 14, article 1, chapter 48, General Statutes, upon which the appellee relies, is as follows: "The court shall annually inquire into the solvency of sureties for guardians; and if, at any time, it has cause to believe that the sureties of a guardian are insolvent, or in failing circumstances, it shall, after summoning the guardian, require him to give additional security."

This court, in the cases of Daniels v. Vertrees, 6 Bush, 4, and the Commonwealth, for the use of, &c. v. Netherland's adm'r, 87 Ky., 195, decided, in the first named case, that, under the 4th section of article 1, chapter 48, General Statutes, the sureties of the county judge were responsible for any money belonging to the ward of the guardian which the latter failed to pay to his ward, provided the county judge failed to require the guardian to give security; and, in the latter case, that the sureties were responsible for any money that the guardian failed to pay to his ward, if his putative surety never signed, or authorized his name to be signed to said bond, and was released from liability thereon on that account.

Also in the case of Burdine, &c. v. Pettus, 79 Ky., 240, which was an action against the sureties of the county judge, under section 4, *supra*, for taking insufficient surety of the guardian, it is said: "If the judge, after hearing the testimony as to the sufficiency of the sureties, is satisfied that they are solvent, and the evidence is such as would satisfy one of ordinary judgment of that fact, he has discharged his duty; and, having accepted the bond, this presumption will be indulged until the contrary is made to appear."

According to the inference to be drawn from what is here said, and from what is said in Colter v. McIntyre, 11 Bush, 565, the rule seems to be that, if the county judge, in taking the sureties of the guardian, takes them upon such knowledge of his own, or upon the evidence of others, as should not satisfy him, as a person of ordinary judgment, that they are sufficient security for the forthcoming of the ward's estate, confided to the custody of the guardian, he and his sureties will be liable on his official bond for the ward's loss by reason thereof. Now, the question is, are the judge and his sureties on his official bond liable to the ward for the neglect of the judge to annually inquire into the solvency of the sureties of the guardian, and to require additional security, if he has cause to believe that the sureties are insolvent, or in failing circumstances, or if he, at any time, has cause to believe that the sureties are insolvent, or in failing circumstances, and neglects to require of the guardian additional security, whereby, in either case, loss inures to the ward?

It seems, that by said section, it is mandatory upon the judge to inquire, at least once a year, into the solvency of the guardian's sureties; and, if he has cause to believe that the sureties are insolvent, or are in failing circumstances, it is his duty to require the guardian to give additional security; and, if at any other time, he has cause to believe that the sureties are insolvent, or in failing circumstances, it is his duty to require such additional security.

Now, it is his specific statutory duty to inquire into the solvency of the sureties at least once a year; he has no discretion as to this

duty. Why was this duty imposed upon him? The answer is, that infants, having estates are, by reason of their inability to take care of the same, under the special protection of the State, and the State has made the county court its agent to confide such estates to the custody of prudent and safe persons, and to require of them solvent sureties that they will faithfully discharge their trust; and it is made the judge's duty, at least once a year, to inquire into the solvency of these sureties, and, if he has cause to believe that they are insolvent or in failing circumstances, to require the guardian to give additional security.

As said, the duty to inquire into the solvency of these sureties is mandatory, he has no discretion as to that duty, except as to the manner of making the inquiry; as to this, he can make the inquiry in any manner that will elicit the information with reasonable certainty. Now, it is generally held (and it seems to us to be sound), that if the law enjoins upon the county judge a duty like this, although leaving a discretion as to how it should be done, and he fails to do it, he and his sureties on his official bond are responsible for the damage that flows from such failure. And it is equally clear that, if he makes the inquiry as indicated above, and it should cause him, as a person of ordinary judgment, to believe that the sureties were insolvent or in failing circumstances, and he failed to require additional security of the guardian, whereby damage has ensued to the ward, he and his sureties should be held responsible therefor. The duty to thus require additional security, under the circumstances named, is as positively enjoined as is that of making the inquiry; but if, upon such inquiry, made as above indicated, he, as a man of ordinary judgment, is deceived as to the solvency of the sureties, he should not be held responsible. Also, if at any time, he, as a man of ordinary judgment, has cause to believe that the sureties are insolvent or in failing circumstances, and he fails to require of the guardian additional security, whereby damage is sustained by the ward, he and his sureties are responsible.

As said, the estate of the infant is under the special protection of the State, and the county judge is made its agent to provide for its protection by appointing a suitable person to be the custodian of the estate, and require of him security that he will faithfully discharge the trust; and, owing to the frequent loss of such estates by the reckless conduct of the guardian, and inadequacy or subsequent insolvency of the sureties, the Legislature enjoined the foregoing duties upon the county judge, and to hold that they are purely judicial, and the judge is not liable on his bond, except for malicious or corrupt abuse of discretion, would defeat the salutory object in view; but to hold that the duty is enjoined by law, and for the failure to perform such duty, or for a failure to exercise, in its performance, as much judgment and discretion as a person of ordinary judgment and discretion should exercise, similarly situated, whereby damage to the ward ensues, he and his sureties are liable on his bond, would meet the object that the Legislature had in view.

The judgment is affirmed.

STAMPER V. ARMSTRONG, &C.

(*Filed Feb.* 10, 1891—*Not to be reported.*)

Conveyance—Married women—A deed of land to "Lucy Armstrong and her heirs, and John Armstrong's heirs," did not vest any interest whatever in John Armstrong, and a deed for said land made by John Armstrong and

Lucy Armstrong, his wife, to appellant, but which was never lodged for record or delivered to appellant, did not vest in appellant any title whatever to said land. Said deed not having been executed pursuant to section 21, chapter 23, General Statutes, was invalid to pass the title of the married woman.

T. D. Theobold for appellant.

J. D. Jones and E. F. Dulin for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lewis.

March 2, 1876, the following deed was executed and duly recorded: "This indenture made * * between W. H. Armstrong and * wife, of the first part, * and Lucy Armstrong and her heirs, and John Armstrong's heirs, party of the second part, * * Witnesseth: That * in consideration of $300 paid *. the parties of the first part have * sold to the party of the second part a tract of land * * containing fifty-eight acres, to have and to hold the above described land, with the exception of twenty acres off south side of same, sold to H. B. Young, and two acres on the northwest side, sold to W. A. Brown. The remainder of the above described tract of land is to go to the said Lucy Armstrong and her heirs, and John Armstrong's heirs. The parties of the first part do by these presents sell and convey all their right, title and interest in and to the above described tract of land unto the party of the second part forever. The parties of the first part doth warrant and defend, all and singular, the appurtenances," &c.

John Armstrong had by his first wife three, and by his last, appellee, Lucy, nine children, and this action was brought by his widow and twelve children to recover of appellant, Stamper, the land mentioned, who is in possession, claiming under a deed to him from John and Lucy Stamper; and, upon final hearing, the chancellor rendered judgment in favor of the children for 12-13ths of the land, but in favor of appellant as to 1-13th the portion adjudged to have belonged to Lucy Armstrong.

By the deed from W. H. Armstrong and wife it was evidently intended to convey not the absolute title of the whole land to Lucy Armstrong, for it, in terms, is conveyed to her and her heirs, and to John Armstrong's *heirs*. John Armstrong was then living, and obviously the words "John Armstrong's heirs" were intended to mean and describe his children, and it would seem to follow, in the absence of an expressed contrary meaning, that the words "her heirs," used in the same sentence and connection, were intended to be synonymous with her children.

As the land seems to have been paid for with Lucy Armstrong's money, it is not reasonable to suppose it was the intention that John Armstrong's three children should take one-half the land. However, there seems to be no controversy between the twelve children as to their respective interests, nor any complaint of the judgment by which it was determined each of them was entitled to one-twelfth. Nor is there any question made as to either the character of estate or interest Lucy Armstrong has, it being consented she is entitled also to one-twelfth interest.

Though the deed from John and Lucy Armstrong is proved to have been executed and acknowledged before the clerk, it never was, in fact, delivered to appellant, Stamper, nor lodged in the

proper office for record, and, consequently, she was not divested of her title. The reason alleged for non-delivery of the deed is, that the purchase price was never paid. There is controversy as to how much was, in fact, paid. But it does not seem to us that question is material, for whatever was paid was received, before he died, by John Armstrong, who had no title to the land, nor any other interest, except in right of his wife, whatever that may have been.

As section 21, chapter 23, General Statutes, expressly provides that a deed of a married woman, to be effectual, shall be acknowledged and lodged in the proper office for record, it does not seem to us appellant, Stamper, acquired any title whatever by the deed to him from John and Lucy Armstrong. There is some question made whether the paper was purposely destroyed or mislaid after the death of her husband. But it does not make any difference what became of it, as it never was lodged for record nor delivered to appellant.

We, therefore, think the lower court erred in adjudging the one-twelfth interest of Lucy Armstrong to belong to appellant, and the judgment must be reversed on her cross-appeal; and as the children acquired, under the deed, the residue of the estate conveyed, the judgment in their favor on the appeal is affirmed.

KENTUCKY UNION LAND CO. V. ELLIOTT.

(*Filed Feb.* 12, 1891—*Not to be reported.*)

Partition—Parties to actions—In an action for the partition of land to which infants were necessary parties, and in which the extent of their interest is not stated, the judgment was erroneous; but a division having been made setting apart a portion of the land to the infants, if the division appears to be fair and just a new division will be unnecessary, as the guardian *ad litem*, who may be appointed by the court for the infant defendants, may in open court adopt the report.

W. B. Dixon for appellant.

J. B. White for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Pryor.

The objection to the proceeding below, which is a petition for the partition of land, is that the infant children of Isabel Gardner, who have an interest in the land sought to be divided, were not made defendants to the action, nor does it appear in the petition what that interest is. The case must, therefore, be reversed and the infants made defendants, and served with process as required by the Code. If the partition is equal and just, there will be no necessity for another division, as the one reported gives to Mrs. Gardner's children an interest. The guardian, after they have been served with process, may in open court adopt the report.

Judgment reversed, and remanded for proceedings consistent with this opinion.

HOOD V. TRUSTEES OF THE TOWN OF LEBANON.

(Filed Feb. 12, 1891—Not to be reported.)

Street improvements—Appellant, owning a large tract of land fronting on what is now known as Spalding avenue, in Lebanon, a large portion of which she has divided into lots and sold to others, now resists the claim made by the city against her for the cost of pavements made in front of said property, in pursuance of an ordinance authorizing said improvements to be made by the city, after failure of the property-holder to do the same, alleging as defense that said property is not composed of town lots, and that the street is not such in fact, but is only a turnpike kept in repair by the turnpike company. *Held*—That as the city limits have for a quarter of a century extended far beyond appellant's property, and the said property has been divided into lots, their uses and benefits, as well as the exercise of similar powers by the city over property beyond appellant's property, and having controlled said pike as a street for that time, demonstrate that said property may be classed as town lots, subject to the claim asserted for paving. The long use of said turnpike as a street, although kept in repair by the turnpike company, does not rebut the presumption that it is a street, because the evidence shows that said company makes said repairs in consideration of being permitted to charge toll on the same within the city limits.

Harrison & Belden for appellant.

John McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Holt.

The charter of the town of Lebanon gives its trustees the power to require the owners of lots within its limits to pave the sidewalks in front of them in manner as may be provided by the ordinance; and, in case they fail to do so for a certain time after receiving notice of the requirement, the town may have it done, the cost thereof to be a debt of the town upon the owner and a lien upon the lot.

The appellees complied with the statute as to appellant, but she is resisting the payment of the cost of the work upon the ground that one of the lots is, in fact, not a town lot, but a part of her farm, and that the road in front of it is a part of a turnpike, and not a street of the town.

It appears that she formerly owned about fifty acres of land fronting on the east side of what is now Spalding avenue. Her residence stands upon the portion of it nearest to the center of the town, fronts upon and is near to the avenue. Reserving a frontage of probably about two hundred feet, although the distance is not exactly shown, where her house stands, she sold to other parties seven lots, the first adjoining her residence lot, all fronting on the avenue, and the one adjoining the other. The next lot beyond them belongs to her, fronts on the avenue from one to two hundred feet, and is known as the "Barracks lot." Dwelling houses have been built upon all of the lots sold off the place, save one, and the appellant has a tenant-house upon the "Barracks lot."

An alley runs behind the lots that have been sold by the appellant, but it does not continue on in the rear of her residence or the "Barracks lot." They, therefore, are connected in the rear with the balance of the fifty acres unsold. That they are town lots, however, in the fair sense of the term, is, we think, too plain for argument.

Beyond the "Barracks lot," until the town limit is reached, the land fronting upon the avenue is laid off in lots, at least one, if not more, having dwellings thereon, while the same is true all along the other side of the street. Until 1865 the town boundary only included the residence lot of the appellant, and not the "Barracks lot." In that year, however, it was so extended as to include the latter and other territory beyond.

The division into lots in the manner stated; the situation of the two belonging to the appellant, and the use being made of them, indicate unmistakably that they should be regarded as town lots, and should bear their proportion of the burden incident to town government, in return for the benefit and increased value arising therefrom.

A turnpike entered the town at Spalding avenue, and by some arrangement between the town and the turnpike company, it was allowed to claim that its road extended within the town a considerable distance in order that it might maintain more toll-gates; and when the improvement was made, the cost of which is in controversy, it was keeping up the road or street in front of the "Barracks lot," and to a point between it and the residence lot of the appellant. It is, therefore, said that the town had no street in front of the former lot, and, having none, it could not build any pavement there. If this be so, then, of course, the easement of the turnpike company and the fee of the appellant, subject to the company's right, could not be divested and the town acquire the land as a street by the mere act of the Legislature extending the town limits, any more than such legislation of itself would make appellant's land town lots when it was not so before. Vested rights could not be thus destroyed. In the absence of agreement by the parties a condemnation by the town for street purposes would have been necessary.

It is abundantly proven, however, that the way had been known, treated and used as a street of the town for a quarter of a century or longer. It has either built, or compelled the adjoining lot owners to build, pavements in front of the lots, which the appellant sold off her home tract; also along some of the lots upon the same side of the street, and beyond the "Barracks lot," in the direction of the town limits, while upon the opposite side of the street this has been done as to all the lots to the town limits.

The arrangement between the turnpike company and the town seems, so far as shown, to have been merely that the company, for the purpose of enabling it to charge certain toll, was to keep the street in repair to a certain point.

Under all the circumstances the dedication of it as a street of the town must be presumed, and being so, the power of the town, when authorized by the Legislature, to compel the adjacent lot owner to build a pavement or to pay the cost of it, if the town should, by reason of his refusal, be compelled to build it, is established by a long line of decisions beginning with the case of the City of Lexington v. McMillan's heirs, 9 Dana, 513, or perhaps earlier.

There is, of course, not an unbounded right in this direction. It can not be done in utter disregard of the rights of the property holder. His property can not be confiscated under such a power or utterly destroyed, and still he be compelled to pay the cost of it being done. The power is, in effect, one of taxation, and under the guise of it property can not be confiscated. This can not be done without compensation. City of Louisville v. Louisville Rolling Mill Co., 3 Bush, 416.

The improvements must not only be useful, but be reasonable in character; but if so, the town or city may, by proper ordinance, regulate the material to be used, and the manner in which they shall be done. This is necessary for uniformity and a proper improvement of the streets of a town. The owner of property is presumed to have become such in contemplation of the exercise of such a power by the municipality.

Complaint is made that the pavement built is not such as the appellant was notified to build, and that she should not, therefore, be compelled to pay for it. It is suggested that if she had been required to build one like that which has been constructed, she might have done so; and as it is the exercise of a somewhat arbitrary power, she should have had the privilege. It appears, however, that the difference consists in its not having been made as wide at one point as the notice to the appellant required. This was occasioned, however, by her putting her fence farther out in the street, and she can not be heard to complain of a difference arising by reason of her own wrongful act.

Judgment affirmed.

L. & N. R. R. Co. v. Asher.

(*Filed Feb.* 12,' 1891—*Not to be reported.*)

Damages—Condemnation—Excessive verdict—Instructions—Appellee obtained a verdict and judgment against appellant for $3,000, in a proceeding to condemn a tract of land 3,160 feet long and 100 feet wide, for the purpose of laying its railroad track. The dwelling house and barn of appellee are situated near the right of way, and both are worth not exceeding $1,500. On the land sought to be condemned is a young orchard not old enough to bear. *Held*—That said verdict is excessive. The jury were authorized to find, in addition to the actual value of the land taken, how much the balance of the land has been or would be diminished in value by reason of the construction and prudent operation of the road; how much its location, with reference to the dwelling and barn, may lessen the value of the remaining tract, and if so, how much. A destruction of the orchard, or a part of it, will enter into the question of compensation. The jury should have been told that they must take into consideration and allow in damages the value of the land actually taken, and in arriving at that value they must consider its relative value to the whole tract; then they must ascertain the diminution in value, if any, that will actually follow the construction of the road through appellee's land.

W. M. Beckner and Thomas H. Hines for appellee.

Wilson & Rawlings, J. W. Alcorn and Wm. Lindsay for appellant.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Pryor.

The appellant appeals from a verdict and judgment assessing the damages that would result to the appellee by reason of the condemnation of a part of the appellee's land as a track for its branch railroad, known as its Cumberland Valley Branch. There seems to have been two verdicts in this case, one by a jury in the county court and the other by a jury in the circuit court, the first for $3,100 and the last for $3,000. The strip of land is 3,160 feet long and 100

feet in width. The commissioners fixed the damage sustained at $580. Real estate in the county of Bell had increased in value by reason of the location and construction of this road to the city of Pineville. When it reached the land of the appellee, it became necessary to construct the road through it. The tract of land had all been sold but about eighteen acres, and on this land stood the dwelling of the appellee that cost about $1,000, his barn that cost about $400, other outbuildings, and an orchard that was not old enough to bear fruit. Many of the witnesses fix the value of the whole land, with the improvements, at less than the sum awarded by the jury as damages, and, in our opinion, the verdict was excessive.

The road runs within thirty-three feet of the appellee's dwelling, and while it may inconvenience the appellee, or its proximity to the dwelling and barn may endanger the buildings by reason of sparks, &c., caused by the careless management or operation of the road when constructed, still, if by misfortune the buildings should burn or otherwise be destroyed, the value could not exceed more than one-half of the sum assessed against the appellant.

While the value of the strip of ground taken is not all the damages the appellant is entitled to recover, under the proof now before us, the jury have only to say how much the balance of the land has been or would be diminished in value by reason of the construction and prudent operation of the road. Its location with reference to the dwelling and barn may lessen the value of the remaining tract, and if so, how much.

The destruction of the orchard, or a part of it, will enter into the general estimate of damage. How much is the balance of the land worth on the day the assessment is made, without any railroad upon it, and how much would it be worth with the railroad upon it, and its enhanced value by reason of the construction of the road through it, is not to enter the question of damage. Would the road, if constructed, diminish the value of the land not taken, and if so, to what extent? The jury should have been told that they must take into consideration and allow in damages the value of the land actually taken, and in arriving at this value they must consider its relative value to the whole tract; then they must ascertain the diminution in value, if any, that will actually follow the construction of the road through appellee's land. What may or may not happen by an improper construction of the road, or by its negligent operation, are not matters that enter into the question of compensation.

This, it seems to us, embraces the whole law of the case. The verdict and judgment being excessive, and the instructions erroneous, it is reversed and remanded for a new trial in conformity with this opinion.

RUBELL V. BUSHNELL.

(*Filed Feb.* 14, 1891.)

1. *Decedents' estates—Liability of heirs*—In an action against an administrator for a settlement of his accounts and a distribution of the estate after the payment of debts, the sum of money adjudged as a distributable share to eight distributees was $203.33 each. After the distribution had been made to the distributees, three of whom were non-residents of the State, appellee, a creditor of decedent, obtained a judgment against the estate, a part of which was satisfied out of assets collected by the adminis-

trator after the distribution had been made, and the creditors, to obtain satisfaction of the remainder of said debt, instituted a suit against the five heirs, who were residents of the State, and obtained personal judgment against each for the amount each had received from the decedent's estate, from which appellants have prosecuted this appeal, alleging as error that the judgment against each should have been for only one-eighth of the whole debt. *Held*—That under section 434 of the Civil Code of Practice, as well as under sections 9 and 10 of chapter 44, General Statutes, this action is expressly authorized, and the court properly rendered personal judgment against appellants separately for the amount received in the distribution. These distributees, being compelled to pay such debt, may bring their action against the other distributees for contribution.

2. *Married women—Judgments*—A personal judgment may be rendered against the husband for the amount of money received in right of his wife, as distributee of her father's estate, but a personal judgment against the wife is void, and may be set aside in the lower court on motion made for that purpose.

John S. Jackman and Finley Shuck for appellant.

A. E. Willson and Burton Vance for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

This action was instituted against Hoffman, administrator, for a settlement of his accounts and for the purposes of distribution. After the payment of the claims of various creditors, there appeared to be a sum of money left for distribution, which, when divided, gave to each distributee the sum of $203.33. There were eight shares, or heirs, and some of the distributees non-residents.

Subsequent to these proceedings, under which distribution was had, the appellee, Bushnell, came into the case by a proper pleading, claiming to be a creditor of the estate, and, on the hearing of his claim, he was adjudged entitled to recover $1,600. Of this sum, other assets having been collected, Bushnell was paid of his judgment all but $785.57. The estate being then exhausted, the appellee filed his cross-petition against the distributees, alleging that they had received assets each to the extent of $203.33, and wanted a judgment for so much as would satisfy his debt. There were five of the distributees before the court, the others being non-residents, and a judgment *in personam* was rendered against them severally to the extent of $203.33 each, or enough to satisfy the judgment. The appellants maintain that the judgment should have been against each distributee for one-eighth of the judgment. Section 434 of the Civil Code provides: "Legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative." Section 10 of chapter 44, General Statutes, also provides: "The heir or devisee may be sued in equity by a creditor for any liability of the decedent," and section 9 of same chapter provides, "to the extent of assets received the heir shall be chargeable for the liabilities of the decedent," &c.

There can be no question of the liability where assets have been received, nor is it material, under the present provision of the Code, that it should appear that the personal representative has no assets. The right to sue is expressly given the creditor, and the only question is, where the liability is conceded, has the distributee received assets from the estate? If so, he becomes liable to the creditor to

that extent and may be sued for the whole sum received, and required to look to his co-distributees for contribution, if he has received assets to the extent of the creditor's claim.

This case is not like an assignment for the benefit of creditors by an insolvent, where all the creditors share pro rata. One creditor, not obtaining his pro rata, may compel contribution from the others to make him equal, and each creditor, therefore, should contribute. This was the case in Roberts v. Philips, 11 Bush, 11, but has no application here. If one of the distributees had received nothing in this case, the others would be required to contribute to him in proportion to the amount received by each, but here the creditor is entitled to the whole of his claim, and by the statute any distributee receiving assets may be sued, and compelled, under its provisions, to pay the whole judgment, if he has received assets sufficient. When this is done, then the question of contribution between the distributee paying the debt and his co-distributee arises.

The case of Ransdell v. Threlkeld's adm'r, 4 Bush, 347, decides that a joint judgment was improper in such a case, because each heir could only be required to contribute as much as he had received and no more. The distribution was made on the application of the feme coverts and their husbands, and the husband, by reason of his marital rights, will be presumed to have applied the money to his own use, nothing else appearing, and the judgment *in personam* against their wives is void, and can be set aside on motion, the petition and pleadings showing that they were married women.

We perceive no error in the record. They have no right to complain that they were charged interest.

Judgment affirmed.

PHELPS, &C. V. JONES.

(*Filed Feb.* 14, 1891.)

Judicial sales—redemption—Qualifications of commissioners—A sale of land made under a judgment for the satisfaction of a lien thereon, is invalid unless an appraisement has been made before the sale by appraisers who have been sworn by some officer authorized to administer an oath. In this action the report of the special commissioner, showing that he had duly sworn the appraisers, did not impart any validity to their action, as it does not appear from the record that he had qualified by giving the bond, and taking the oath prescribed by law.

B. L. D. Guffy for appellants.

P. F. Edwards for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Chief Justice Holt.

About the year 1883, a piece of town property, and also two other lots of land, containing four and fifteen acres respectively, belonging to the appellant, J. N. Phelps, were sold under execution, and bid in by the appellee, J. A. Jones, at much less than their appraised value.

The sale of the town property was made subject to a mortgage of one Smith, of which the appellee subsequently became the owner.

Phelps remained in possessi. n of the property, and in 1887 the appellee, having obtained a sheriff's deed for the fifteen acre tract, instituted a proceeding by notice, under section 9, article 12, chapter 38 of the General Statutes, to obtain possession of it.

A demurrer was filed to the notice, and it is contended that, according to the cases of Bunnell, &c. v. Thompson, 12 Bush, 116, and Sharpe v. Roe, &c., 13 Bush, 461, it should have been sustained, because it did not refer to any judgment, or state that the land had not been redeemed, or was not subject to redemption, or that the purchaser had obtained a conveyance.

These cases were, however, decided before the Legislature, by the act of March 23, 1882, amended the statute upon which this proceeding is based, and prescribed the form of the notice to be given in such a case, and which this court upheld in the case of McGhee v. Sutherland, 84 Ky., 198.

The notice in this case conformed to the statute, and the demurrer was, therefore, properly overruled.

The appellee also, in 1887, brought an action in equity, setting up that Phelps had a title of record to but a part of the four acres of of land; that as to the balance, he had an unrecorded deed, and praying that he be compelled to convey the land to him, by virtue of his execution purchase, or, if this could not be done, that then his lien for the amount at which he had purchased it under execution be enforced, and the land sold to pay it. Unquestionably he had such a lien, provided the amount so paid by him had not, in some way, been settled.

The appellee in the same year brought a third action to enforce a lien against the town property for his Smith mortgage debt, and the the amount at which he had bid it in at the execution sale.

The three suits were consolidated. The appellant, Phelps, claimed that the appellee bid in all the property at the execution sale for him, under an agreement between them that he might, at any time, redeem it by the repayment of the purchase money.

The appellee admits in his pleadings that he bought it at the request of the appellant, Phelps, but that the latter only had the privilege of retaining it by paying the sale bonds which the appellee had executed.

The appellant, Phelps, contends that at the time of the sale the appellee owed him several thousand dollars, and that in this way the land was redeemed.

Pending these suits the appellant, Phelps, claimed to have transferred the right to all the property, for value, to appellant, Priscilla Jones, who lived with him, and she asserted her claim.

The appellant, Phelps, and the appellee had heretofore had many transactions. The claim of indebtedness by the appellee to the appellant, Phelps, was in the form of an open account. It was all denied, and the evidence does not sustain it. The appellant, Phelps, in his own deposition says, substantially, that he can not say that any portion of it is correct.

He is quite old, and this may arise from bad memory; but if so, it is his misfortune. It is proven that, subsequent to the date of all the items, they had a settlement, which appellee testifies did not include the Smith mortgage debt, or what he had paid for the lands, and that Phelps fell in debt to him in the sum of $563.62, for which he executed a note to the appellee, which is exhibited, and shows it was given on settlement.

The appellant, Phelps', statement is inconsistent. At one time he maintains that he was to have the land whenever he repaid appellee

his money, and at another he says that the appellee was really paid when the sale was made, by reason of a large indebtedness from him to the appellant.

The lower court rendered a judgment for the appelle for his Smith debt, and what he had paid out under the execution sales, with interest; directed a lien to be enforced therefor against the property, and this disposition of the merits of the case was correct.

The property having been sold under the decree, and purchased by the appellee, the appellants filed exceptions to the report of sale. They claim that the sale was not advertised, as directed by the judgment; that the property was not appraised before the sale; that no opportunity was offered any one to take a less quantity of it and pay the debt, and that the special commissioner, who made the sale, had not qualified by taking oath and giving bond for the proper performance of his duties.

It is unnecessary to consider all the objections to the sale. No evidence was offered as to them by either side. The special commissioner, who made the sale, does not appear to have taken any oath or given any bond for the proper performance of his duties. The statute provides:

SEC. 10. The parties or their attorneys may be permitted by the court to select a receiver or commissioner in any action or proceeding, to perform the duties of the master commissioner.

SEC. 11. Before acting, such receiver or commissioner shall be sworn and execute bond with surety, in the same manner and the same in substance as is required of a master commissioner.

SEC. 13. Their bonds must be to the Commonwealth, and they may be put in action the same as the bonds of the master commissioner. General Statutes, page 941.

The wording of these sections make them apply where the special commissioner is selected by the parties or their attorneys; but yet the court appoints him. In this case it only appears that the court appointed the special commissioner. Why it was done is not shown. There is no other statutory provision relating to the qualification of special commissioner; and, in our opinion, it was intended to apply to all cases where they are appointed to make sales of property. The act of the Legislature of January 12, 1878, evidently does not apply to such cases.

It is unnecessary to consider, however, whether the mere fact that a special commissioner did not take the proper oath and give bond, would or would not be ground to set aside a sale.

The act of the Legislature of April 9, 1878, giving the same right to a debtor to redeem his land sold under decrees, as when sold under execution, provides that before its sale "the commissioner or officer, whose duty it may be to sell the same, shall cause it to be valued, *under oath*, by two disinterested, intelligent housekeepers of the county, not related to either party." General Statutes, page 835.

The original report of the commissioner is signed by him as such officer, and says that the appraisers were sworn by him. Conceding that a special commissioner, when properly qualified, could swear the appraisers, yet he certainly can not do so if he himself has not qualified; and, unless sworn, they can not make a valid appraisement, and it is a necessary condition to a sale.

It is true in this case the commissioner, by an amended report, says he, as an examiner, swore them; but this is in conflict with the original report, and, while the amendment would control in the absence of any other showing, yet the appraisements show that the appraisers were sworn by the person acting as commissioner.

They are so certified by him. Under this state of case we can not presume, from the mere statement in the amended report, that the appraisers were sworn by him as an examiner.

At the execution sales in 1883 the total appraisement of the property was $1,850. The valuation at the commissioner's sale was $950, and the property realized but $665. Under these circumstances we are unwilling to presume that the debtor has not been prejudiced by the sale, the validity of which is now in question, and the judgment confirming it is reversed, with directions to set it aside; and if the judgment be not satisfied, order another sale. Before so doing, if there be any money on hand arising from the receivership over the property, credit should be given for it.

The other judgments appealed from are affirmed, and cause remanded for further proceedings consistent with this opinion.

FAULKNER V. FAULKNER.

(*Filed Feb.* 17, 1891—*Not to be reported.*)

Divorce—Restitution of property—Upon a decree granting a wife a divorce and giving to her the custody of the only child, the husband complains, on appeal, because a small amount of personal property was not ordered to be returned to him, to which he was entitled. *Held*—That the judgment of the chancellor will not be disturbed in view of the fact that the burden of supporting the child now rests on the wife, and she is equitably entitled to have the household furniture and other personalty as part compensation.

R. J. Breckinridge and J. B. McFerran for appellant.

Charles H. Rodes for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Pryor.

In this case a judgment was rendered severing the marriage relation, and the husband, who is now the appellant, is complaining of the chancellor for his refusal to allow him certain property, that by reason of his right as husband vested in him the title. The property claimed by him is of but little value, and as the chancellor has placed on the appellee the burden of supporting the offspring of the marriage—a burden the appellee desired to assume—it was but proper that this small amount of personalty should be given to the appellee to aid in supporting the child.

The husband had nothing, and while the wife has been released from any moral obligation to support him longer, and has only the child to maintain, it is but equitable that the household furniture and the other personalty should be made to contribute to the support of the mother and child.

Judgment affirmed.

HARRISON, &C. V. LEBANON WATER WORKS.

(*Filed Feb.* 17, 1891.)

Appeals—Parties to actions—Verification—Final orders—H. and L. joined as plaintiffs in an amended petition, and, on motion made requiring them to verify their pleadings, H. appeared and made verification to same, but L. refused to verify same, whereupon the court directed that the pleadings as to L. be treated as if they had not been filed. The case was continued, and at the subsequent term the court made an order, reciting that the order entered at the last term as to L. finally disposed of and put the case out of court, and refused to rule the defendants to answer, from which orders H. and L. have prosecuted this appeal. *Held*—That a rule having been issued against L., based on an affidavit filed, as required by subsection 4, section 117, Civil Code of Practice, the court properly treated the pleadings as not filed as to him, after he refused to verify same. Such order was final as to him, from which he could appeal. The order entered refusing to require the defendants to answer the petition as to H., and treating the action as out of court, was a final order prejudicial to H., and a reversal on his appeal is ordered.

W. B. Harrison for appellants.

Samuel Avritt for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought against appellees, the trustees of Lebanon, and the Lebanon Water Works Company, by appellant, Lanham, with whom were united as plaintiffs Cambrow, Ballard and Edmonds; but they subsequently withdrew from the action.

November 28, 1888, there was filed in court an amended petition, in which it was stated: "Lanham and W. B. Harrison now unite in amending the petition. The said Harrison is hereby made a plaintiff, and adopts the statements in the original petition and in the amended petition filed in this case within the last five days."

December 10 appellees made a motion that the plaintiffs verify their petition, and thereupon, as recited in the order, "came W. B. Harrison, one of the plaintiffs, and verifies said petition."

December 11 a motion was made, based on an affidavit required in such case, for a rule against appellant, Lanham, to verify the petition and amended petition; and he having refused to obey the rule issued on that motion, an order of court was made December 12, in substance, that said pleadings be treated in regard to him as if they had not been filed, to which Lanham excepted, and December 13 the action was, by order of court, continued. But December 14 an entry was made showing that W. B. Harrison, styled plaintiff, produced his bill of exceptions, which was signed, enrolled and ordered to be filed.

At the March term, 1889, was entered the following: "The court being of the opinion that the order made at the last term of this court as to the plaintiff, Lanham, finally disposed of and put the case out of court, refused to rule the defendants to answer, and orders and adjudges that there is no case in court. To which ruling of the court the said Harrison excepts and prays an appeal," &c.

The statement filed with the transcript shows both Lanham and Harrison as appellants; but the first question to be considered is whether an appeal will lie in behalf of either.

By section 368, Civil Code, a judgment is defined "a final determination of a right of a party in an action or proceeding;" and section 513 provides that "a judgment rendered in the circuit court may be reversed, vacated or modified either by it or by the Court of Appeals." Section 763 is as follows: "Neither a void judgment, nor a judgment against a defendant who shall have been only constructively summoned, and shall not have appeared in the action; nor any judgment which can be set aside, or modified by the court which rendered it, upon motion made after the term during which it was rendered, shall be reversed or modified by the Court of Appeals, until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled."

A final order or judgment, from which an appeal will lie to this court, either terminates the action itself or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. M. & L. R. R. Co. v. Punnett, 18 B. M., 48; Turner v. Browder, 18 B. M., 826; Applegate v. Applegate, 4 Met., 236; Helm v. Short, 7 Bush, 625.

By subsection 4, section 117, it is provided that on motion of a party who files his affidavit, stating his belief that an adverse party, whose pleading has been verified by a person other than himself, knows that a statement thereof, in the affidavit mentioned, is untrue, and that the motion is not made for delay, the court, if such statement be material, shall require such adverse party to verify the pleadings; and if he fail to do so within a reasonable time, shall treat it, with regard to him, as if it had not been filed.

The order of court made upon failure of Lanham to verify his pleading is, we think, in conformity with and operates, as was intended by that section, to terminate the action as regards him, and, moreover, to put it out of the power of the court, after the expiration of the term, to place him in his original condition. For the only causes for which a court may modify or vacate its judgment, after expiration of the term during which it was rendered, are prescribed in sections 414, 516 and 517, none of which apply in this case.

It has been distinctly held that an order refusing to permit persons filing petitions for that purpose to be made parties, may be appealed from. Berry v. Hamilton, 1 Bush, 361. And we do not see why an order, having the effect of dismissing an action as to one or more plaintiffs, or one operating to deprive one or more defendants of the benefit of an answer filed, should not as well be appealed from, for it is in one case as much as another a final determination of the action as regards the particular party or parties affected by such order.

In our opinion the judgment complained of by appellants is subject to revision by this court, but we see no error in it as to Lanham.

Subsection 4, section 117, was evidently intended as qualification of that part of subsection 3, which provides that a joint pleading of several parties, who are united in interest, may be verified by either of them; and, therefore, the pleading of a party, whether filed by him alone or jointly with others, is to be treated in regard to him as a nullity, if he refuses to verify it when the opposite party files the affidavit mentioned, and the statement or statements alleged to be untrue are material, as seem to be the case here.

But Harrison had become a party, plaintiff, before the order was made in reference to Lanham, and did not lose his standing in court, nor could be prejudiced by that order. For, though he did not file

a petition, nor enter a formal motion to be made a party, he united in and verified the amended petition, in which it is stated he was a party, and without objection he was treated and named in various orders of court, and in the bill of exceptions. as a party, plaintiff.

Notwithstanding the order made December 12, 1888, was final and effectual as to Lanham, it did not, it seems to us, have the effect, as said by the lower court in the judgment at the March term, of finally disposing of and putting the case out of court; for not only was an order of continuance made December 13, but the bill of exceptions was produced by Harrison and signed by the judge December 14, 1888.

In our opinion, as Harrison has shown he has an interest in the subject of the action and in obtaining the relief demanded, he had a right to be joined as plaintiff, and having become a party of record, without objection of the defendants, he may maintain the action, and, consequently, the judgment of March, 1889, was erroneous and prejudicial to him.

The judgment is affirmed as to appellant, Lanham, but reversed on the appeal of Harrison, and cause remanded for answer by the defendants and further proceedings consistent with this opinion.

DUNCAN'S EX'ORS V. OWENSBORO WATER CO.

SAME V. SAME.

(*Filed Feb.* 17, 1891—*Not to be reported.*)

Pleading—This case involves the sufficiency of pleadings, the principles of which were determined in the case of *Paducah Lumber Co. v. Paducah Water Supply Co.*, 11 *Ky. Law Rep.*, 738.

Hays & Williams for appellants.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The questions involved in these two cases arise on a demurrer to the petitions.

The case of the Paducah Lumber Co. v. Paducah Water Supply Co., 11 KY. LAW REP., 738, and in Duncan v. the present appellee, 12 KY. LAW REP., 35, held that the petitions were good, and the demurrer to each should have been overruled. These cases hold that if the appellee was negligent in the discharge of his duty, and that but for such negligence the loss to the appellants would not have occurred, the appellants are entitled to recover.

The judgment in each case is reversed, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

TRAVIS V. DAVIS' EX'OR.

(*Filed Feb.* 19, 1891—*Not to be reported.*)

Homestead—Pre-existing debt—The vendor of land, on the same day he executed a deed to the vendee, who now claims it as a homestead, received from the vendee his promissory note evidencing the vendee's prior indebtedness to him. *Held*—That the homestead was properly subjected to the payment of said note.

Wm. M. Fulkerson for appellant.

Stewart & Stewart for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Pryor.

The appellant purchased of Wm. Davis a tract of land, intending it for a homestead, and paid to Davis all, or nearly so, of the purchase money. He owed Davis at the same time about $450, for which he executed his note, payable in twelve months. The transactions all took place on the same day. Davis is seeking to make the land purchased of him by appellant liable for his debt, and the chancellor, rendering a judgment of sale, he has appealed.

It is insisted that, because Davis made to the appellant a general warranty deed to the land, that he is estopped now to attempt to subject it to the payment of his debt. We are unable to perceive the force of the argument, or the manner in which the covenant of warranty is broken by the attempt of the creditor, who is the vendor, to make his debt out of it. It does not involve the question of title under a better or an adverse claim, but the only question that can be raised, is: Can this land be made liable for the debt? It is claimed as a homestead, but the debt evidenced by the note existed before the homestead was acquired; and, therefore, under the plain letter of the statute, it may be subjected to sale.

An attempt has been made to show that there was some agreement by which the vendor had waived his right to proceed against the land for this particular debt, but there is an absence of proof in support of this defense. Davis is dead, and two or more witnesses state that they heard him say his intention was not to annoy the appellant about this debt or have his land sold to pay it. These statements cause no estoppel, and certainly are not evidence, in the absence of other testimony showing an agreement upon a consideration that would prevent the creditor from collecting his debt in the manner prescribed by law.

Judgment affirmed.

MOSELEY V. BIVINS.

(*Filed Feb.* 19, 1891.)

Homestead—Debts existing prior to payment of purchase money—Under section 16, article 13, chapter 38, General Statutes, providing that lands claimed as a homestead may be subjected to the payment of debts or liabilities, existing prior to the purchase of the land, or erection of improvements thereon, it is held in this action that the word *purchase*, as used in the statute, was intended to be understood and applied in the sense of acquisition of a homestead by fully paying for it; and, therefore, the same, which was bought on a credit

can be subjected to the payment of a debt, not existing at the time, to the extent of purchase money paid after it was created.

The rights of creditors, and the moral obligation of debtors, sanction such construction, and there is no difference in principle or effect between purchasing and paying for a homestead, with means that ought to have been applied to the payment of a pre-existing debt, and paying wholly, or partially, after creation of a debt, the purchase price of a homestead, even if it was bargained for prior to existence of the debt. Nor is there any difference in principle between paying for improvements after the existence of a prior debt, and paying for the land.

The case of Griffin v. Proctor, 14 Bush, 571, is overruled.

Weir, Weir & Walker for appellant.

Geo. W. Swope for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is, whether land occupied and claimed as a homestead, but bought on credit, can be made subject to payment of a debt not existing at the time, to the extent of purchase money paid after it was created.

Section 16, article 13, chapter 38, General Statutes, provides that the homestead exemption shall not apply to sales under execution, attachment or judgment, at the suit of creditors, if the debt or liability existed prior to the purchase of the land, or erection of improvements thereon.

It is manifest determination of the question depends upon the meaning given to the word *purchase*, as used in that section.

It seems to us, considering the rights of creditors, the moral obligation of debtors, and the reason for adoption of the section, the word was intended to be understood and applied in the sense of acquisition of a homestead by paying fully for it. For ownership of land can not be absolute; but, as said in Farmers' and Drovers' Ins. Co. v. Curry, 13 Bush, 312, is conditional, and held in trust for the vendor until the purchase price is paid. Hence, the original homestead act of 1866 provided, in the language of section 9 as it now stands in the General Statutes, that a homestead should not be exempt from enforced sale for payment of purchase money due thereon. But it was thereby, in express terms, made exempt from sale under execution, attachment or judgment, to pay any debt created subsequent to June 1, 1866. So that a homestead, whether paid for in full, or bought on credit, would, in the course of time, under operation of the statute of 1866, have come to be exempt from all debts and liabilities whatever, without regard to date of their creation, except those for purchase money, and such as were secured by mortgage. And to remedy that defect, an amendment was adopted March 1, 1876, which is embodied in section 16 mentioned. The underlying principle of that amendment is, that the homestead of a debtor shall not be exempt from payment of any just debt or liability, except when he has paid, or to the extent he has paid therefor, prior to the creation of such debt or liability. For there is no difference in principle or effect between purchasing and paying for a homestead with means that ought to have been applied to the payment of a pre-existing debt, and paying wholly or partially, after creation of a debt, the purchase price of a homestead, even if it was bargained for prior to the existence of the debt.

In one case, as well as in the other, the means used by the debtor to pay for the homestead may have been either directly from, or else looked to and relied on by, the creditor when the deed was created; and, in both alike, it would be unjust to the creditor to give legal immunity for such unfair or treacherous conduct of the debtor. Nor is there any reason for subjecting a homestead, to the extent of improvements erected thereon, after creation of a debt, to its payment, as is expressly provided by section 16, that does not equally apply for making it liable to extent of purchase money paid after a debt is created. For if, in the latter case, the debtor might be hindered or delayed in acquiring absolute ownership, he would, in the other, be prevented having full enjoyment of the land as a homestead.

In our opinion, according to proper construction of the statute as amended, he is entitled to neither, unless procured honestly and without prejudice to the rights of existing creditors.

The conclusion reached in Griffin v. Proctor, 14 Bush, 571, seems to be adverse to the view now taken. There the debtor, being in possession, though having only a title bond for the land claimed as a homestead, borrowed money, part of which was used in the payment of the purchase money, and it was held that occupation of the improved premises, under the contract of purchase, was the acquisition of a homestead right as against subsequent creditors, and the fact a portion of the money borrowed was applied in payment for the land, did not make any difference.

The error of that position, as it now seems to us, is in assuming that under the statutes, possession of land, claiming it as a homestead without having paid all, or, it may be, any part of the purchase price, exempts it from sale to pay subsequent debts, though they may be for money used to pay for the identical land, or for money advanced or credit given upon the faith visible means of the debtor would be used to discharge the indebtedness, that were afterwards used to fortify himself with a homestead exemption against his creditors.

We think the statute ought not to be so used or construed, and, consequently, the doctrine of the case referred to is overruled.

Though the judgment appealed from was on demurrer to the petition, appellee filed an answer alleging the payments made of the purchase money were proceeds of exempted personal property. But though, if true, that allegation would be a defense, no issue was made in regard thereto. And, consequently, for the error of the lower court in sustaining the demurrer, the judgment must be reversed, and cause remanded for proceedings consistent with this opinion.

IRVINE V. IRVINE, &C.

(*Filed Feb.* 21, 1891—*Not to be reported.*)

Wills—Conditional devise—This case involves the construction of a will by which the testator gave to his widow during life his real and personal property, and provided that if his son, the appellant, would take charge of the farm and care and provide for the testator and his widow during their lives he should have the property at the death of the widow, but in case of failure to provide for the widow, absolute power of disposition of the property was given to the widow. After the death of the widow the other children of the testator resist the claim of the son named in the will on the ground that he failed to perform the condition precedent to entitle him to the prop-

erty. *Held*—That the judgment of the chancellor, finding against the claim of appellant, will not be disturbed, as there was evidence showing that he failed to provide for the widow as directed by the will.

J. D. Taylor and E. W. Hines for appellant.

Geo. L. Husband for appellees.

Appeal from Hickman Court of Common Pleas.

Opinion of the court by Chief Justice Holt.

The will of Samuel A. Irvine provides:

2. "I will and bequeath unto my wife, Annexa Irvine, all the property, both real and personal, of which I may die seized and possessed of, to have and enjoy the same during her natural life.

3. "It is my will and desire that my son, Richard Burton Irvine, shall reside with me during my natural life, and after my death during the natural life of my wife, and to take charge of and support myself and wife during the time of our lives, and after the death of my wife I will and bequeath to my said son, Richard Burton Irvine, the tract of land on which I now reside, in Hickman county, Ky., and all other property that may be on hand at the death of my said wife. I am owing a note to Mr. S. Morrow for about $81, with about thirteen years interest, which my son, Richard, is to pay off and satisfy. Now the clear understanding and intent of this will is that my son, Richard Burton Irvine, is to take care of and support my wife and myself during our natural lives, said Richard to have the use of my land, stock, &c., during that time, and if he, my said son Richard, shall faithfully discharge that duty, and pay off the Morrow note, then, at the death of my said wife, my son, Richard, is to have and to hold all the real and personal property of which I may die seized and possessed of. Now (if) my son, Richard, shall at any time during the life of my said wife fail to support and take charge of her in the proper manner, or shall leave or abandon my wife on my said farm, then I will and bequeath my wife to have full power to sell my said land or any part thereof she may think proper for her support and comfort, with full power to my said wife to sell and convey said land in the event that she is not properly cared for and supported by my said son, Richard."

It was executed on August 3, 1877, and the testator died in the fall of 1878. His widow survived him, and died in January, 1886.

He had been twice married. By his first wife he had three children, one of whom died without issue; and eight by his last wife, one of whom also died without leaving issue.

This action was brought, in November, 1886, by the heirs at law of the testator, save one, against the devisee, Richard B. Irvine, who was then in possession of the eighty odd acres of land named in the will, and which constituted the home place of the testator, asking a rejection of Richard's claim to it under the will, and that it be divided among the heirs at law of Samuel A. Irvine.

They claim that the devise never became effective because of Richard's failure to comply with the conditions upon which he was to have the property.

The testator had but little property aside from the land, and it is not of much value. He had never advanced but little estate to his children, and all of the parties to this action are comparatively poor.

It is urged that the condition upon which Richard was to have

the land was a condition subsequent, and not a condition precedent; and that, therefore, even if he has failed to comply, he can not be deprived of the property, unless there was a demand for performance, which is not alleged.

In our opinion, however, the support and care of both the father and mother during their lives was a condition precedent to the vesting of the estate in the appellant.

The will, after providing that he shall perform this duty, says: "And after the death of my wife I will and bequeath to my said son, Richard Burton Irvine, the tract of land on which I now reside. * * * The clear understanding and intent of this will is * * if he, my said son Richard, shall faithfully discharge that duty and pay off the Morrow debt, *then, at the death of my said wife*, my son, Richard, is to have and to hold all the real and personal property of which I may die seized;" and then the will provides that if the devisee shall fail in the prescribed duty or abandon his mother upon the farm, then she shall have full power to sell and convey it, or any of it as she may see proper, for her support, showing conclusively that the testator did not intend the right to vest in the son until the death of the mother.

It was evidently the expectation of the testator that his wife and son would continue to reside upon the farm during her life.

He should not, however, be deprived of it, if their doing so became for any reason impracticable or fairly unreasonable, provided he continued to care for and support her during her life.

The object of the testator was to provide a home and support for himself and wife during their lives. This could have been his only object in providing, if the son supplied them, he, at the death of the mother, was to have the property. This was the reason for the preference among his children. There is nothing showing that his affections had in any way been alienated from his other children, and he had never advanced them any thing.

All the surrounding circumstances support the evident purpose of the conditional devise.

The question next arises, has there been a substantial compliance?

The children are, in the main, the witnesses. Their evidence is very conflicting. It shows that about the time of the making of the will Richard took charge of the farm and remained there with the old people until his father's death, about a year after, with the exception, perhaps, of some temporary absences. He had the use of the farm and cared for them.

After the death of his father the mother and son continued to live there for about a year, when another son, Robert, and his wife came there to live, and Richard went elsewhere to work and live. After a while Robert left, and another married son, Edward, and his family, took his place for a time, at the end of which the widow left the place and went to live with a married daughter, where she remained five or six years and until her death. When she went to her daughter's the appellant rented the land to a stranger.

There is testimony tending to show that all this occurred by agreement between the appellant and his mother.

He says that her health was bad; that she was unable to do the house work and he was unable to hire a person to do it; that she needed womanly care and he was unmarried; that the farm was worn and impoverished by long and constant cultivation and insufficient to furnish them a living, and that these circumstances required a change. He is, to some extent, supported in this statement.

There is testimony counter to all this, however, and the matter is, at least, in equipoise.

He appears to have rented the land upon shares after he left the place, and to have given the landlord's portion, or the most of it, to his mother. But evidently the testator did not intend that one of his children should have his entire estate at the death of his wife, if that one merely rented out the land and gave the rent to the mother.

The appellant probably furnished his mother some necessaries of life, but it is doubtful if the rent he received did not equal all he gave to her.

It is evident her desire was to live at the home place. This is amply proven. She doubtless consented to the changes through the son's persuasion, but remained unsatisfied until her death It is questionable from the testimony whether she or the appellant paid the Morrow debt.

The lower court considered all the evidence. The judge doubtless knew the witnesses. His conclusion is, of course, entitled to weight, and after a reading of the testimony we do not feel at liberty to disturb his finding upon the facts, that the appellant did not comply with the conditions upon which he was to have the property.

Judgment affirmed.

ABELL V. ABELL.

(*Filed Feb.* 21, 1891—*Not to be reported.*)

Lien—Purchase money—Mortgages—The holder of a note secured by a mortgage lien on land is preferred to the holder of a prior purchase-money note executed by the mortgagor, where the deed fails to state the amount of purchase money unpaid.

Rives & Spalding for appellant.

Thompson & McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

The controversy in this case is between the widow of George Abell, deceased, and Lizzie Abell. The father of George and Lizzie Abell conveyed to George Abell a tract of land, and took his note for the purchase money. No lien was retained in the conveyance to secure its payment. Lizzie Abell, under the will of her father, became entitled to the note, and is now asserting a lien on the land for which the note was given. There is no dispute as to its being a purchase-money note, that fact being admitted by the pleadings, and in a former adjudication, in which George and Lizzie Abell were parties.

The conveyance was made when the revised statutes were in force. The widow, who claims dower, and Lanham, who is a mortgagee from her husband, assert that Lizzie Abell has no lien on the land, but must be classed with the general creditors. We think that such has been the ruling of this court in a number of cases. The case of Neal v. Davis, 17 B. M., 113, was overruled, and numerous adjudged cases found since then, holding that as between the vendor and the

vendee, where the deed failed to state the amount of purchase money due, the vendor waived his lien, and none existed for any purpose. These decisions were under the revised statutes; but now, under the general statutes, the vendor, as between himself and his vendee, has a lien for the purchase money whether the amount due is stated in the deed or not; but as to *bona fide* creditors and purchasers, the lien is lost if it fails to show what part of the consideration remains unpaid.

In this view of the question raised it follows that the chancellor erred in holding that the appellee, Lizzie Abell, had a lien, and the judgment is, therefore, reversed for proceedings consistent with this opinion.

Chapman v. Stockwell, 18 B. M., 650; Long v. Rusk, 2 Bush, —; Maupin v. McCormick, 2 Bush, 206; Gritton v. McDonald, 3 Met., 252.

BOWLING'S ADM'R, &C. V. SHEPHERD.

(*Filed Feb.* 21, 1891.)

Decedent's estate—Property set apart to widow—A debtor's lands were sold under executions, but no deed was made to the purchasers. After the death of the debtor his widow brought an action to settle his estate as an insolvent estate. The court adjudged that the purchasers were entitled to a lien on the property, subject to the dower right and one-third of the rents and profits while the estate was in the hands of the receiver, to which there was no objection by the creditors; but they object to the court allowing as a claim, payable out of said land, of equal dignity with their debts, the claim of the widow for $197, to make up a deficiency of personal estate on hand. *Held*—That a deficiency of personal estate can not be made up out of land belonging to decedent. Such is evidently not the meaning of the statute.

E. F. Dulin and J. D. Jones for appellants.

R. C. Burns for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Bennett.

B. F. Shepherd's real estate was sold under executions in favor of the appellants' intestates, which was purchased by them, but no deed was made to the purchasers. Thereafter, B. F. Shepherd and the purchasers having died, the appellee, widow of B. F. Shepherd, in an action to settle B. F. Shepherd's estate, as an insolvent estate, claimed out of the real estate the value of her dower in said real estate in money, and the value of the personal property which she was entitled to have set apart to her, but which was not on hand. The lower court allowed the appellants a lien on said real estate for the respective amounts of their executions, subject to the value of the appellee's dower and one-third of rents while said real estate was in the hands of the receiver, to which the appellants do not except. The court also allowed the appellee about $197 in lieu of personal property not on hand, to be paid out of the purchase money of said real estate, and to be of equal dignity with the lien of the appellants, to which the appellants except.

The court seemed to go upon the idea that the statute, exempting in favor of the widow certain articles of property, if on hand—if not, their value "in other property or money"—included real estate

as well as personal estate. This is certainly not so, for the real estate descends directly to the heirs at law, the title to which, *eo instanti* with the death of the intestate, passes to said heirs; and it is presumed that if the Legislature had meant to subject this estate to the payment of the deficiency of personal estate required to be set apart to the widow, appropriate words would have been used for that purpose. But the words employed do not mean that. The exemption in favor of the widow is certain articles of personal property, and the expression, "other property," certainly refers to personal property that may be on hand.

The levy of said executions was valid, but the proceedings thereafter had were irregular; consequently, the court only allowed a lien on the land, to which the appellants did not except, but only excepted to the action of the court in reference to said matter of $197, which was error, and the judgment as to that matter is reversed and remanded for further proceedings consistent with this opinion.

BOARD OF TRUSTEES MORGANFIELD PUBLIC SCHOOL V. THOMAS, &C.

(*Filed Feb.* 24, 1891—*Not to be reported.*)

Constitutional law—Schools.—An act of the Legislature, authorizing the establishment of a public school district in a described boundary, for the purpose of aiding the common schools and affording better educational facilities for the white children of said district, is not unconstitutional, because it provides for the application of the portion of the school fund due said district, under the control of trustees to be elected for said district, as all white children in said district have the privilege of attending said school. The consent of the white voters may be taken as to the establishment of said district and as to raising of additional sums of money by taxation in aid of said school. The constitutionality of said tax, as a discrimination against negroes, does not arise in this case. The prohibition of the use of text books relating to any sect or religion is not objectionable.

Hughes & Hughes and J. W. Marshall for appellant.

Chapeze, Spalding & Adair for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge Lewis.

April 19, 1886, "an act to establish a public school in Morganfield, in Union county," was passed, by which territory embraced within a described boundary was made a school district, under control of a board of trustees named, and their successors, styled the Board of Trustees of the Morganfield Public School, and to be a corporation with power to buy such real and personal estate as necessary for school purposes.

March 24, 1888, an act amending the original one was passed, by which it was provided an election should be held as soon as practicable, at which to submit to the legal white voters of the district the proposition to accept provisions of the act of 1886 and amendment; and that, in case of a majority of votes being in favor of it, there should be, on the first Monday in August thereafter, elected five trustees to succeed those named in the act.

It appears the board of trustees did submit to the white voters of the district, so created, a proposition which, as described in the

printed notice of election, was "adoption of the charter granted by the Legislature of Kentucky to establish a system of common schools in the town of Morganfield," a copy of the acts mentioned accompanying the notice, and a majority of the legal votes cast were in favor of the proposition. But no election of trustees, as provided for, was thereafter held, for, June 28, 1888, this action was instituted by appellees, citizens and tax-payers of the district, for an injunction restraining appellants, the board of trustees named in the act, from proceeding further to carry out its provisions. The superintendent of common schools of Union county, and trustees of Union Academy were also made defendants and called on to interplead, but it does not seem they, or either of them, have filed any pleading in the case. By an amended petition the trustees of the colored school of the Morganfield common school district were made defendants, but they did not appear to answer. Appellants filed answer, but to it a general demurrer was sustained, and judgment rendered perpetuating the injunction prayed for in the petition.

There is no allegation by appellees that the acts of appellants have been without or in violation of the provisions of the statute. But the ground upon which the judgment appears to have been based and counsel insist upon affirmance is, that it is unconstitutional.

The manifest design of the statute was, by additional taxation within the district thus created, to have better school buildings, higher branches of education taught, and longer school terms than the annual share of the common school fund, to which the district will be entitled, would alone afford; and to that end the board of trustees was empowered, upon acceptance of the provisions of the statute by a majority of voters, to issue and sell bonds of the district of a limited amount, and apply the proceeds to the purpose of the school, and in purchasing property and erecting buildings. Provision was also made for levy and collection of taxes not exceeding a rate fixed, to be applied to payment of current expenses of the school, and principal and interest of the bonds.

It has been expressly held by this court that the General Assembly has the power to establish a system of education, in a particular district, in aid of common schools, by which a tax is imposed that the school may be taught the entire year, or the higher branches of education brought within reach of all the children, provided there is, at the same time, taught ordinary branches, and the school is free and open to all. Legislative power has also been recognized by this court to change the boundary, or to create out of one or more, or parts of existing districts, a new one; and when title to school property is not vested in or does not, by the change, revert to an individual owner, it has been held to belong to the district in which it may be situated, if used for school purposes. The power to authorize local taxation for erection of school buildings has been so often decided to exist, it is no longer an open question. Newman v. Thompson, 9 Ky. Law Rep., 199; Board of Trustees of Harrodsburg v. Harrodsburg, E. D., Ibid., 605; Fitzpatrick v. Board Trustees of Mt. Sterling, P. G. S., 10 Ky. Law Rep., 12; Williamsburg G. S. District v. Webb, &c., 11 Ky. Law Rep., 456.

Article 11 of the Constitution provides that the fund therein mentioned, together with any sum thereafter raised in the State by taxation or otherwise, for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools. It has been, therefore, held the Legislature can not, by special acts, appropriate portions of the school fund to particular counties; for the Constitution provides for election of superintendent of public in-

struction, and though his duties may be prescribed by statute, it was manifestly intended a general superintendence of the common school system is to be entrusted to him and no other agent. But as all other officers necessary to the successful conduct of the system are created, and their powers and duties fixed by statutes, it would seem legislative power exists to authorize trustees of a district, in which what is called a graded school may be established, to receive and pay out the common school money, to which it may be entitled, just as trustees of any other district might be empowered to do, provided such graded school be established and kept in aid of common schools.

It is, however, contended by counsel that there is nothing in the act we are considering which makes the school provided for a common school, nor subject to common school laws. But it seems to us the general purpose of that act is to aid the common school of the district, by affording educational facilities which would not be otherwise in reach of many children, and was intended and can be carried out in entire harmony with, and subordinate to, the common school system. The territory laid off is in terms described as a school district. By section 11 all white children, over six years of age, within the district, shall have equal right of admission to the school, and no fees or tuition shall ever be charged; and, moreover, payment of the share of common school money, due that district, can not be made to the trustees until all the conditions prescribed by the general law exist and are complied with. In fact, construing the act according to the fair import of language used, and in connection with the general law, as should be done, no greater sum than the district would otherwise receive from the common school fund can ever be drawn by the trustees, nor any part of it diverted from the purpose for which the common school system was established. Such being the case, we do not see wherein the letter or reason of the Constitution is violated by the act.

It, therefore, is only necessary to consider some provisions of the act specially objected to. By section 25 the interest of the Union Academy in the school building and grounds in Morganfield is made to vest in the public school created by the act. The trustees of that academy are made parties to the action, but do not set up claim to the property, and it is, therefore, unnecessary to now consider the validity of that section of the act; for, whether it be or not valid, it may be stricken out without impairing the statute, or affecting the general design of it.

It has heretofore been decided by this court to be competent for the Legislature to create graded schools for the benefit of white children, where only property of white persons is taxed for the purpose; and the common school system has for years been conducted without question upon the plan of separating the two races. Moreover, the trustees of the colored common school of Morganfield, though made parties to the action, do not appear to complain, nor does any one else of the negro race do so; and whether their constitutional rights are invaded is not now a necessary subject of inquiry.

Section 12 provides that no catechism or other form of religious belief shall be taught or inculcated in, nor shall any class book be used or adopted for said school which reflects upon any religious denomination; nor shall any class or classes be so conducted as to interfere with the religious belief or practice of parents or pupils.

It seems to us that section is in harmony with the accepted and long-recognized theory upon which the governments, both Federal and State, are founded; and it is especially applicable to proper and

successful conduct of the common school system, the name of which implies common benefits of free schools, secured by common burdens upon all alike, without regard to or giving special advantages or privileges to any particular form of religious belief, which would very soon destroy the usefulness of the system.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

JOHNSON V. COMMONWEALTH.

(*Filed Feb.* 26, 1891—*Not to be reported.*)

Criminal law—Rape—Appeals—The Court of Appeals, in consideration of a conviction for rape, is not authorized to reverse the judgment, because in the judgment of the court there is not enough evidence to sustain the finding of the jury. The only question to be considered is, whether there is any evidence to support the verdict. In this case no objection is urged to the instructions, and while the evidence to sustain the charge is slight, the verdict of the jury will not be disturbed.

2. *Indictment*—The caption of an indictment is headed "Circuit Court" without giving the name of the county. This is a substantial compliance with section 122, Criminal Code, when the body of the indictment shows that it was found by a grand jury of Fayette county and presented and filed in the Fayette Circuit Court, the court having jurisdiction of the offense.

Geo. Denny, jr., for appellant.

P. W. Hardin and Chas. J. Bronston for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Holt.

This is a conviction for rape.

The accused demurred to the indictment because the caption of it fails, in part, to name the court in which it was presented. It is headed "Circuit Court" merely, without giving the name of the county in which it was found.

Section 122, of the Criminal Code, provides that an indictment must contain the title of the prosecution, specifying the name of the court in which it was presented and the name of the parties.

The form for an indictment prescribed by section 123, which it provides shall be substantially as therein set forth, gives the name of the county as a part of the style of the court.

It is undoubtedly the proper practice to do so; but it appears in this instance from the record that it was found by the grand jury of Fayette county, and the orders show that it was presented to and filed in the Fayette Circuit Court, which was the proper court for such a proceeding.

The irregularity is not, therefore, ground for reversal. It is not suggested that there was any other legal error. It is conceded by the silence of counsel that the jury were properly instructed, but it is insisted that this court should reverse the judgment upon the merits.

The punishment awarded is a severe one. Fifteen years confinement in the penitentiary. There are some circumstances proven in the case, which, to our minds, render it very doubtful whether the conviction is a just one.

The accused, who is a colored man, had, upon the day before the night upon which it is charged he committed the offense, came to the county of Fayette, from an adjoining county, upon business for his employer. He stopped to stay all night at the house of a gentleman to whom he had a note from his employer.

A colored woman lived in a cabin in the yard of this gentleman, and she claims that during the night the accused got in at a window of her abode, and by threat of personal violence had carnal connection with her. She testifies in substance that the first she knew of his presence he was sitting upon the side of the bed with his hand upon her person. She then made no outcry, but merely asked who it was, and then, as she says, the accused threatened to kill her with an open knife, which he had in his hand, if she did not submit; that he then laid the knife on a table in the room, after which he got in bed and had carnal intercourse with her.

She testifies that she made no outcry through fear: but, according to her own statement, no threat of violence was made until after she inquired as to the identity of the person, and but little resistance was offered by her.

The singular part of her story is, however, that her bastard baby, a year old, was sleeping upon her right arm, and a girl ten years of age, who was the baby's nurse, was also sleeping in the same bed, and neither of the children wakened until after the accused left the cabin.

To constitute the offense there must be force, or putting in fear, or an actual resistance of the will upon the part of the female.

If there was not consent upon the part of the complainant, it is strange that the transaction could have taken place and the other persons in the same bed remained sleeping.

The jury, however, considered the evidence and returned a verdict of "guilty;" and as there is some evidence to support the finding, we have no power to interfere. The circumstances to which we have alluded, and which create doubt in our minds as to the guilt of the appellant, can only be considered upon an application to the proper authority for executive clemency.

Section 340 of our Criminal Code provides that a judgment of conviction may be reversed for *any error of law* appearing in the record, if, upon consideration of the entire case, this court is satisfied that the substantial rights of the accused have been prejudiced.

This court has no revisory power over a verdict in a criminal cause, merely because the evidence preponderates against it.

The fact that in our opinion there is not *sufficient* testimony to support it, is not a reversible error. The only inquiry under the law this court can make as to the evidence in the exercise of its appellate jurisdiction, is whether there is any testimony conducing to show guilt. Vowells v. Commonwealth, 83 Ky. Rep., 193.

Guided by this rule, we feel compelled to affirm the judgment below, and it is, therefore, so ordered.

CARTER BROS. & CO. v. MARTIN, &C.

(*Filed March* 3, 1891.)

Husband and wife—Wife trading as feme sole—Fraud—A creditor, after return of *nulla bona*, seeks to subject a storehouse and lot to the satisfaction of his debt. The wife, having no property whatever, was empowered by

decree of court to trade as a *feme sole*. After such decree was rendered, her husband, being a good business man, owning a storehouse on which a mortgage for a considerable sum existed, took charge of the store and conducted, in the name of his wife, the business of selling groceries and other goods, besides conducting a saloon in the building, while his wife gave the business no attention whatever, devoting her entire time to her household duties. From the profits of the business conducted by her husband the mortgage debt on the storehouse was paid off, and a farm was purchased and paid for, besides the stock of goods was greatly increased. The husband was, during a part of the time, postmaster, receiving $150 a year. *Held*—That the business was conducted with the fraudulent intent of protecting the earnings, made by the labor and attention of the husband to business, from the reach of his creditors. The object of the statute authorizing a married woman to trade as a *feme sole* seems to have been grossly violated in this case, and the profits arising from the business will be subjected to the payment of the husband's debts; the storehouse and goods are, therefore, subject to said claim.

Dulaney & Mitchell for appellants.

Wright & McElroy for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

The appellants, Carter Bros. & Co., obtained a judgment in the Warren Circuit Court against C. S. Martin for the sum of $561.80, with interest from the first of January, 1887, and the costs. An execution was issued on the judgment, and a return of *nulla bona* made by the sheriff. This action was then instituted to subject to the payment of this debt a storehouse and lot in the possession of C. S. Martin and his wife, A. A. Martin, and the claim to relief resisted on the ground that the property in controversy belonged to the wife, and not to the husband, and if not the property of the wife, that she held the benefit of a mortgage lien upon it superior to that asserted by the plaintiffs.

The wife, A. A. Martin, was made a *feme sole* by a judgment of the Warren Circuit Court, at its February term in the year 1871, her husband being a party to the action, and that judgment now in full force.

At the time the judgment was rendered the wife had no estate whatever, and the husband owned the storehouse and lot, and the dwelling house with a mortgage upon it, or the storehouse and lot, for $1,000 to one Gossom. They had a family of children, and, from the testimony before us, the husband was possessed of excellent, if not superior, business qualifications. He was postmaster for eighteen years in the little village of Oakland, where the property is located, from which he derived a revenue to aid in the support of himself and family, amounting to $150 per annum. This was the pecuniary condition of the husband and wife at the time the wife was made a *feme sole*.

As soon as that judgment was rendered C. S. Martin, the husband, purchased a stock of goods, valued at $400 or $500, and began merchandising in the name of his wife, having also made the purchase in her name. He also ran a saloon in her name, from which he realized a profit of about $150 per month, and continued to run it until the local option law went into effect, and when that was does not appear. They have accumulated a farm containing about sixty acres, paid off the mortgage debt to Gossom, and now have a

stock of goods valued at $700.. In the meantime they have raised a family of children, some of whom were large enough to aid in conducting the store.

The wife confined herself to the conduct of her household affairs and took no part in the management of the saloon and storehouse, but the whole of it was operated, managed and used by the husband, in the name of the wife, and the accumulations invested and expended in the same way. The mode of transacting the business was notorious and known to the neighborhood, and nothing concealed as to the rights of the parties, and still the husband, whose legal and marital obligations placed him at the head of his family and required him to support and maintain them, was the meritorious cause of these accumulations of property, and for many years devoted his time and his experience in business to the active control of what, in fact, was his estate, and not that of the wife.

The statute under which the wife is made a *feme sole*, or rather the proceedings under it, are *ex parte*, and while this action is not an attack upon that judgment, it does not stand in the way of subjecting the property of the husband, although in the wife's name, to the payment of his debts. There was an object in view in enacting that statute. It was to enable married women with property, having thriftless and improvident husbands, to manage and control it and the proceeds for her own use, and the fact that the husband may have had an agency in improving or increasing the wife's estate by rendering personal service in its control, would not authorize the chancellor to appropriate it to pay his debts; or where the husband, by reason of his habits, is unable to make a living for his family, the wife, the facts showing that she is better suited to be at the head of the household, may be made a *feme sole;* or where the wife has an estate and the husband becomes insolvent, the estate and its proceeds may be controlled by the wife for her own use. In all such cases the claim of the wife to control her estate appeals directly to the chancellor, and she may avail herself of this statute for the better security of her property.

In this case the wife had no estate, and the husband owned none but the lot in controversy, with the incumbrance upon it of the Gossom debt. The husband was insolvent, and the wife, if the claim of the creditor is denied in this case, has, in effect, said to the chancellor, I want my husband to be placed in such a condition as to enable him to conduct a store, saloon and other business transactions in my name, and the accumulations applied to my use, to the exclusion of his creditors. I own no estate, but this is the object in view.

Such is the result of these business transactions, as appears from the testimony of the husband himself; and if these facts had been presented to the chancellor as they have been made to appear by the creditor in this case, no judgment would have been rendered permitting the wife to trade as a *feme sole*.

It is not a question as to how far the husband may go in rendering personal service to the wife in the control of her estate, but the inquiry is, can the wife, without any capital whatever, claim the accumulations of property arising by reason of the business capacity of the husband, devoted through a long period of years in the sole management and control of the business, to the exclusion of his creditors? He made a purchase of a few hundred dollars' worth of goods, in his wife's name, that grew to a business, in a few years, of $7,000 or $8,000; kept a saloon, out of which he made $150 a month; was postmaster, from which he secured a like amount per year;

and during that whole period the wife gave the business no personal attention, but devoted her time to the duties of her household, while her husband made every dollar by his own energy and application to business.

The claims of creditors, existing when this judgment was rendered, may be barred by time, as against the wife, but no limitation is relied on in this case, the appellant becoming a creditor since the judgment of 1871 was rendered. In our opinion the storehouse and lot should have been subjected to the payment of his claim. The title is in the husband. He paid the mortgage debt out of the proceeds of the store, and it does not inure to the wife's benefit as against the husband's creditors.

The judgment below is, therefore, reversed and cause remanded, with directions to subject the storehouse and lot to the payment, first, of appellants' claim, and then the claim of the wife, as between the husband and wife there is no issue affecting her rights.

Judgment reversed and remanded for proceedings consistent with this opinion. The ten-dollar execution lien has a preference over both claims.

KENTUCKY SUPERIOR COURT.

KALFUS V. KALFUS.

(*Filed April.* 8, 1891.)

1. *Husband and wife—Decree to trade as feme sole—Right of wife to sue husband*—A decree of court conferring upon a married woman the rights and privileges of a *feme sole* as authorized by chapter 52 of the General Statutes, does not empower her to sue her husband in an action at law. In the absence of language making it clearly manifest, it can not be presumed that the statute was intended to make such a striking innovation of the rules of the common law, and one so much opposed to public policy. In this case it is held that a wife empowered by a decree of court to contract, and to acquire and to hold property, and authorized to "sue and be sued" as a *feme sole*, can not maintain an action at law against the husband upon a promissory note executed to her by him.

1. *Same*—A statute is not presumed to make any alteration of the common law further or otherwise than the statute expressly declares.

Rozel Weissinger for appellant.

Jas. R. W. Smith for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Presiding Judge Barbour.

This is an action at law by a wife upon whom the chancellor had conferred the rights and privileges of a *feme sole*, as authorized by

chapter 52, General Statutes, against her husband upon a promissory note executed by him to her.

The husband, in addition to questioning the right of the wife to institute such an action, pleaded an accord and satisfaction. The facts, as found by the court to whom the law and facts were submitted, and which were the basis of the judgment for the wife, were these: The husband, who owned valuable real estate, conveyed one-half of it to the wife. After being empowered as a *feme sole*, the wife engaged in business and became involved in debt. The husband also being in debt, they executed a deed of trust to the Louisville Safety Vault and Trust Co., conveying to it the real estate referred to (one-half of which, as we have said, was the wife's, and the other half the husband's), the company assuming to pay all their debts, and repay itself out of the rents of the property; after which it was to reconvey to the husband and wife. This total indebtedness exceeded $3,400, more than two-thirds of which was the wife's. When the conveyance was made, the wife asserted no claim against the husband on account of the note, nor was the note reported as one of her assets. It is clear that when the deed of trust was executed, each was endeavoring to be relieved of his or her indebtedness, and the fair inference (in view of the fact that the husband's debts were so much less than hers, and that he had surrendered all his property to aid her in her financial distress) is, that the parties intended to, and did treat the note in controversy as settled. But the majority of the court are of the opinion that, while this inference could have been drawn, it does not necessarily follow from the facts, as stated, and they are, therefore, not prepared to say that the finding of the judge was clearly against the evidence.

The important question remaining is, can the wife, who has been empowered to contract, to acquire and hold property, and who is authorized "to sue and be sued," as a *feme sole*, sue her husband in an action at law? Perhaps, under a liberal construction of the statute, disregarding what we conceive to be the policy of the law in regard to the marriage relation, the question might be answered affirmatively, and some of the cases made use of expressions which would seem to sustain this construction, as in Morel v. Haller, 7 KY. LAW REP., 122, where the court says: "In regard to all business transactions between the husband and his wife, relieved of disabilities by decree, they are strangers." Similar expressions are found in other cases. But they were all cases where creditors of the husband or wife were seeking to subject property to their debts. The court was discussing, not the effect of the statute upon the marital relation, but the effect of the powers conferred by the statute upon the wife, as it related to her property where it was sought to be subjected by creditors.

The question here presented was not considered. We, therefore have no authority in this State directly in point. Shall we then give to the statute, following the letter, a construction in derogation of the general policy of the law, in regard to the relation between husband and wife, or shall we give to it a construction in accord with that policy? Where the Legislature intends to make such a striking innovation of the rules of common law, as is here contended for—one so much opposed to public policy, and the peace and happiness of the conjugal relation, it should use such language as will make it clearly manifest.

True, if the statute was not intended to authorize such suits as this against the husband, he might, by express words, have been excluded from its operation; but it is also true, and, we think, more

reasonable to suppose, that, if the Legislature had intended to include such suits, it would, in view of the general policy of the law, have used language clearly denoting such intention.

"In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act." 9 Bacon's Abridgement. Section 16, chapter 21 of the General Statutes, which provides that "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary, its provisions are to be liberally construed, with a view to promote its objects," in nowise militates against Bacon's rule, as applied to the facts of this case, for we insist that the construction we shall give to the statute is promotive of its objects.

Referring again to cases in this State: In Hackett v. Metcalfe, 6 Bush, 353, the court likened the powers of the wife under a deed conferring upon her a separate estate in property, and the right to deal with it as if she were a *feme sole*, to the powers which the chancellor might confer upon her, as provided by the statute under consideration. From this it is fair to argue that the relative rights of the husband and wife, under the power conferred upon her by the chancellor, are of the same character, though they may be greater in degree, as those she has in relation to her separate estate, which has been created by deed. In Matson v. Matson, 4 Met., 262, the wife sued the husband in an ordinary action to recover the possession of slaves which were her separate property, but the court, notwithstanding the Code (Meyers' Code, section 49), provided that "where the action concerns her separate property, the wife may sue alone; and where the action is between herself and her husband, she may sue or be sued alone," held that the action could not be maintained —that she could only sue in equity, and then must allege special circumstances which would justify the interposition of the chancellor. Though the court laid great stress upon the idea that the husband, having the possession of the slaves, was acting in the character of trustee to the wife, any other rule than is announced in that case, which is applied in the case of a wife claiming property as her separate estate, under a contract, or the case of a wife empowered under the statute to act as a *feme sole*, would result injuriously to the most important relationship that can be assumed by individuals. If the wife can sue the husband, he can sue her—on every occasion of domestic discord, or of imaginary difference in regard to their property, the one or the other can appeal to the law, and still she does not have all the rights of a *feme sole*, for she can not testify for herself.

"The most obvious considerations of public policy, to say nothing of the reciprocal rights and duties pertaining to the relation subsisting between the parties," forbids such a construction of the statute as is insisted upon for the appellee, and we can not give our assent to a rule which would be so fruitful of evil consequences. Counsel for appellee says that "the person of all others from whom the wife should be protected, is the husband." If this statement is true, it would be better for the Legislature to abolish the relationship; but we can not believe in such pessimistic views.

It was not intended by the statute that the relationship between the husband and wife should be imperiled. Its sole purpose was to

provide a mode for the protection of the wife's property—to enable her to secure it against her husband's creditors, and against his improvident or wrongful acts; and, whenever the contest comes between them, the chancellor, and he alone, is able to secure to the wife the required protection.

This construction is not discordant with the reason and spirit of the statute, but avoids the evil consequences which would follow if the other construction was adopted, and in nowise affects the force of the statute as a protection to the wife.

The following cases, construing statutes somewhat similar to our statutes, sustain our view: Peters v. Peters, 42 Iowa, 182; Libby v. Libby, 74 Me., 186; Barton v. Barton 32 Md., 214; Smith v. Gorman, 41 Me., 405; Freethy v. Freethy, 42 Barb (N. Y.), 641.

In our opinion the action is not maintainable. The demurrer to the first paragraph of the answer should have been overruled, and the judgment is, therefore, reversed, and the cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

COX, &c. v. GRIFFITH.

Filed January 28, 1891. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Reversal of judgment—Restitution by plaintiff—Res adjudicata*—In an action brought for that purpose, the court adjudged that a mortgage, executed by two defendants upon land owned by them jointly, was made in contemplation of insolvency, and the commissioner having reported the claims against the mortgagors, his report, there being no exceptions, was confirmed, and the proceeds arising from the sales of the property were distributed among creditors. Upon appeal, the Court of Appeals reversed the judgment as to one of the mortgagors, and in order that she might, as far as possible, be placed in *statu quo*, directed that judgment be rendered in her favor against the plaintiffs for the value of her land, which was sold, subject to a credit by the amount of such claims paid out of the proceeds as she justly owed, this expression being used in the opinion: "The claims allowed creditors were reduced, in effect, to a judgment." The creditors, who were not parties to the action, but had merely filed claims which were allowed and paid, were not parties to the appeal. Upon the return of the case the court allowed the defendant, as to whom the judgment had been reversed, to contest the claims which had been allowed against her upon the former hearing, and in rendering judgment against plaintiffs for the value of the land refused to give them credit by the claims upon which defendant was not liable. *Held*—That this was proper. The question as to defendants' liability upon the claims was not *res adjudicata*, and the opinion of the Court of Appeals, taken as a whole, shows that the court did not intend to so decide.

2. *Same*—All of the plaintiffs are liable to appellee, whether or not they were asserting claims against her. Although those who were asserting claims against her co-defendant alone may not have received the benefits which her own creditors received, they were instrumental in procuring the

erroneous judgment against her, and the test of their liability is not the benefits received from her estate, but the injury inflicted upon her.

Wadsworth & Son, Cochran & Son and Edward W. Hines for appellants; W. O. Harris for appellee.

ROUSS v. REID.

Filed January 28, 1891. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Private instructions by court to jury*—After the jury had retired for deliberation, it was improper for the court in the absence of, and without notice to, the parties or their counsel, to give information to the jury upon a point of law, in response to an inquiry from one of their number, and for this action of the court a new trial should have been granted.

2. *Measure of damages*—In this action by a merchant to recover damages of defendant for his failure to deliver to plaintiff, at Glasgow, Ky., a stock of goods purchased in New York, the measure of damages is the difference between the contract price of the goods in New York and their market value in Glasgow, at the time they were, by the terms of the contract, to be there delivered, less the freight from New York to Glasgow. The jury had no right to consider the profits which it was supposed that plaintiff could have made on a resale of the goods at Glasgow.

J. W. Jones and E. W. Hines for appellant; Lewis McQuown for appellee

HOUSE & BENNETT, &c. v. GEBHART, &c.

Filed January 28, 1891. Appeal from Kenton Chancery Court. Opinion of the court by Judge Young, affirming.

1. *Assignments for creditors—Settlement of estate*—Where a debtor has made an assignment for the benefit of his creditors, a creditor may bring a suit to have the estate settled by the chancellor, and, in the absence of any evidence as to his motive in instituting the suit, it is to be presumed that he did so for the purpose of facilitating the settlement of the estate.

2. *Same—Attorney's fees*—It is the duty of the assignee to employ able and experienced counsel, and they are entitled to be paid a reasonable compensation out of the estate for their services. But the attorney for the assignee in this case is not entitled to be paid any fee in the suit by a creditor to settle the estate; he is only entitled to be paid for his services up to the institution of the suit.

J. P. Tarvin for appellants; Tisdale & Gray for appellees.

NORTHWESTERN MUTUAL INSURANCE CO. v. DAVIS.

Filed January 28, 1891. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Right to file amended pleading*—In an action upon a policy of fire insurance, the principal defense was that, after the delivery of the policy, the plaintiff had, without the consent of the company, built an ell to the insured house, and that the fire originated in this ell. Upon appeal a judgment in favor of plaintiff was reversed, for the reason that the reply failed to deny that the fire originated in the ell. Upon the return of the case to the lower court the plaintiff was, upon payment of costs up to that time, allowed to file an amended reply denying that the fire originated in the ell, the plaintiff stating as a reason for filing the amendment, that he was not present when the house caught fire, and that since the first trial he had learned that the fire originated in the main building. *Held*—That the court did not abuse a sound legal discretion in allowing the amendment upon the payment of costs up to that time.

2. *Failure to make proofs of loss—Waiver of objection*—While the failure to make proofs of loss was relied upon as a defense, yet as no instruction was asked upon that point, there can be no reversal upon that ground.

Thomas, Fogle & Harrison for appellant; Thompson & McChord and Samuel Avritt for appellee.

DAVIS & PETERSON v. NORTHWESTERN MUTUAL INSURANCE CO.

SAME v. STANDARD FIRE OFFICE OF LONDON.

Filed January 28, 1891. Appeals from Marion Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Fire insurance—Addition to building*—In these actions upon fire insurance policies the court held upon a former appeal that, if the fire originated in an addition made to the insured building after the policy was issued, the plaintiffs could not recover either for the loss of the building or for the loss of goods which were in the building. *Held*—That that opinion is the law of this case, and as the evidence is conflicting as to whether the fire originated in the main building or in the addition, a verdict for defendants can not be disturbed upon the ground that it is against the evidence.

2. *Same*—Evidence offered by plaintiffs tending to prove that the addition did not increase the risk was properly rejected.

3. *Additional insurance*—Insurance procured upon the addition, after the policy upon the original building was issued, was as much a violation of a provision in the policy forbidding additional insurance as additional insurance upon the original building would have been.

J. R. Thomas, W. B. Harrison and J. D. Fogle for appellants; Thompson & McChord and Samuel Avritt for appellee.

NEELY v. COMMONWEALTH.

Filed January 28, 1891. Appeal from Hardin Circuit Court. Opinion of the court by Judge Young, reversing.

Jurisdiction in criminal cases—The circuit court did not have original jurisdiction to try appellant upon the warrant issued by the judge of a police court. The only way in which the circuit court could have acquired jurisdiction would have been upon an appeal by defendant, after a trial and conviction in the police court.

John L. Scott for appellant; P. W. Hardin for appellee.

HOPKINS v. NEGLEY.

Filed January 28, 1891. Appeal from Henderson Circuit Court. Opinion of the court by Judge Young, dismissing.

Appellate jurisdiction—As the only complaint of appellant, plaintiff below, is that the court allowed a certain credit on the note sued on, which makes his judgment $95 less than he would have obtained if the credit had not been allowed, the amount in controversy upon appeal is less than $100, and, therefore, no appeal lies.

R. H. Cunningham for appellant; Brown & Ward for appellee.

COMMONWEALTH v. PULASKI COUNTY A. AND M. ASSOCIATION.

Filed January 28, 1891. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *A corporation may be punished* for the unlawful and wrongful acts of its officials or agents done in pursuance of authority derived from it. Therefore, an incorporated fair association is liable to indictment for suffering gaming on its grounds.

2. *Suffering gaming—Repeal of statute*—As the amendment of March 25, 1886, to article 1 of chapter 47, General Statutes, provides a punishment only for those who set up, carry on and conduct machines and contrivances used in betting, or who aid and assist in so doing, it is not inconsistent with, and, therefore, does not repeal sections 7 and 10 of that article, which prescribe penalties for permitting and suffering such things to be done.

Wm. Herndon for appellant; O. H. Waddle for appellee.

BROWN, THOMPSON & CO. v. HUNT.

Filed February 11, 1891. Appeal from Logan Circuit Court. Opinion of the court by Junge Young, affirming.

1. *Sale of note—Failure to deliver*—In an action upon a promissory note the defendant, for answer, alleged that plaintiffs had sold him a note upon his brother, for which he agreed to pay a certain sum, a part of which he paid in cash, and for the balance executed the note sued on; that plaintiff agreed, as a part of the contract, to deliver to him the note against his brother on the next day, but never had delivered it. He pleaded the amount he had paid as a counter claim. Plaintiffs claimed that the defendant did not buy the note on his brother, but had assumed to pay it. *Held*—That the fact that the obligor in the note defendant claimed to have purchased was insolvent, did not give the plaintiff a right to recover or defeat defendant's right to recover on his counter-claim. It was not a question as to whether defendant had been damaged by the failure of plaintiffs to comply with their contract.

2. *Same*—The finding of the jury that there was a purchase by defendant of the note against his brother, and not merely an agreement to pay it, is not palpably against the evidence, and, therefore, the court can not disturb the verdict upon that ground.

John P. DuBoise and Edward W. Hines for appellants; W. F. Browder for appellee.

KENTUCKY CENTRAL R. R. CO. v. ANSON.

Filed February 11, 1891. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Railroads—Killing of cattle on track*—In this action against a railroad company to recover for the negligent killing of cattle by its cars, the allegation "that the defendant, by its agents and servants, so carelessly and negligently managed and operated the engine and cars that the same run over and killed said cattle," was equivalent to an averment that the cattle were killed by the neglect of the defendant's agents and servants.

2. *Same*—The defendant's witnesses having given it as their opinion that the train, running at the speed it was, could not have been stopped from the time the cattle could have been first seen in time to avoid killing them, it was competent for plaintiff, for the purpose of contradicting those witnesses, to prove that upon a former occasion, and at the same place, he saw a train of cars with more coaches than the train which killed his cattle, going in the same direction, running at the same rate of speed and under the same conditions, stop in time and for the purpose of avoiding the killing of cattle which were at the same place his cattle were when killed.

R. H. Tomlinson and Breckinridge & Shelby for appellant; W. G. Welch for appellee.

LEE v. SIMPSON, &C.

Filed February 11, 1891. Appeal from Adair Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming on original and cross-appeal.

1. *Construction of devise*—A testator devised to his son, J., $100 per year, "to be paid to him by my executor, but to be increased in case of sickness or death." After directing that his estate be divided into four equal shares and disposing of three of those shares, the testator provided that the sum devised to his son, J., was "to be paid out of the remaining one-fourth part which the executor shall retain in his hands for that purpose." *Held*—That J. took nothing by the will except $100 a year, to be increased in case of his sickness or marriage, and the title to one-fourth of the estate was vested in the executor for that purpose only. Whatever remained of this one-fourth, at the death of J., passed as undevised estate to the heirs of the testator, leaving nothing which the creditors of J. can reach.

2. *Consolidation of suits*—Two suits having been consolidated and treated as

one in the lower court, the defendant being before the court in one of the cases, it is too late to object in this court, for the first time, that the warning order in the other case was void, and that, therefore, he was not before the court in that case.

3. *Attorney's fee*—A creditor of one of the heirs who was a party to a suit for the settlement of a decedent's estate, having made no objection in the lower court to the payment of an attorney's fee out of the estate, will not be heard to complain in this court.

R. B. Dahoney for appellant; James Garnett and Edward W. Hines for appellees.

GLOVER & DURRETT v. FUQUA.

Filed February 18, 1891. Appeal from Daviess Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Partnership—Notice of withdrawal of partner*—A partner retiring from a firm must see that persons who have had dealings with the firm have reasonable notice of the dissolution, otherwise those who continue to deal with the firm can hold him liable as a member of the firm.

2. *Same*—If one of two partners, upon withdrawing from the firm, consents that his co-partner may continue to do business with certain customers in the firm name, he makes himself liable as a partner, so far as such customers are concerned, unless it was agreed between him and them that he was not to be bound.

In this case a preponderance of the evidence shows that by an agreement between the plaintiffs and the retiring partner sought to be charged, the latter was not to be liable as a member of the firm.

Sweeney, Ellis & Sweeney for appellants; Weir, Weir & Walker for appellee.

INSURANCE COMPANY OF NORTH AMERICA v. FORWOOD COTTON COMPANY.

Filed February 18, 1891. Appeal from Jefferson Court of Common Pleas Opinion of the court by Judge Yost, affirming.

1. *Fire insurance—Arbitration as to amount of loss*—A clause in a policy of fire insurance, providing for the appointment of appraisers if the parties can not agree as to the amount of loss, does not apply where the company denies all liability, and there is no disagreement as to the amount of the loss. Moreover, if the company does not require an arbitration, and take such steps to secure it as are pointed out in the policy, it waives its rights in that respect.

2. *Proofs of loss—Waiver*—A failure to furnish proofs of loss within the time fixed by the policy, will not bar an action on the policy if such proofs are furnished prior to the institution of the action.

3. *Same*—A provision in a policy of insurance that no action shall be brought within sixty days after proofs of loss are received by the company, does not apply where the company had waived proofs of loss, and proofs were made, notwithstanding such waiver.

4. *The powers of an agent of an insurance company* are prima facie co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. One who deals with an insurance agent has the right to presume that he has power to waive the proofs of loss in the absence of notice as to a limitation upon his powers in this respect.

5. *It is not necessary to prove an express agreement to waive proofs of loss*: it may be inferred from the acts of the insurer. The advice of the agent to the assured not to send in his proofs of his loss, together with a promise that arrangements would be made to pay the loss, amounted to a waiver of proofs.

6. *Waiver is a question of fact*—Where the evidence is conflicting, waiver is question of fact to be submitted to the jury.

B. F. Buckner for appellant; Abbott & Ruttledge for appellee.

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KENTUCKY COURT OF APPEALS.

MONTGOMERY COUNTY v. TIPTON, &C.

(Filed Jan. 31, 1891—Not to be reported.)

1. *Roads and passways—Appeals—Parties to actions*—This is an appeal prosecuted by a county from a judgment of the county court establishing a new county road. *Held*—That there is no law authorizing an appeal by the county in such case. The action of the county court in establishing a new county road is an evidence of its necessity, from which the county can not appeal. A county having no right to prosecute an appeal can not authorize another to do so for its benefit.

2. *County attorneys*—The law does not require a county attorney to resist an application to the county court to establish a new county road.

E. C. Orear, J. L. Elliston and J. H. Hazelrigg for appellant.

Young, Mitchell & Young and E. W. Hines for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The county court of Montgomery county, on the application of James D. Tipton, established a county road that, in the opinion of that court, was necessary for the use of the public. The case is now in this court on the appeal of the county, the appellant claiming that the road should not have been opened and that the proceedings were irregular.

The county court has entered an order saying, in effect, that the road was necessary for the convenience of the public, and if the county has the right to an appeal, and we find no provision of the statute or Code authorizing it, the merit of the controversy is with the appellant.

The statute provides that the county attorney shall oppose the

wrongful alteration or discontinuance of a public road, and in 8 Bush, 444, in the case of Kimberlin, it was held that the county attorney might appeal in the name of the Commonwealth. There is no provision requiring the county attorney to oppose the opening of a new road, and while we think such a duty is incumbent upon him, when the county court determines the necessity for the road and establishes it, no appeal should be allowed unless directed by the county court, conceding that the right of appeal exists in behalf of the county. The statute provides that it shall be the duty of the county attorney, when directed by the county court, to institute and conduct suits, motions and prosecutions of every description, before any of the courts of this Commonwealth, in which the county is interested. Article 3 of chapter 5, section 7.

In this case the county court wants the road established, and, in our opinion, the appeal in such a case should be dismissed.

Judge Pryor delivered the following response to a petition for rehearing:

Counsel were surprised to learn of the practice in this court of dismissing an appeal when the party has no right to prosecute it. An examination of this record will show that, in the month of February, 1890, more than one year before this case was decided, a motion was made to dismiss the appeal because the county of Montgomery had no right to prosecute it or authorize D. W. Chenault to do so, and the order, under which the county attorney prayed the appeal, was then filed, and is an exact copy of the order now filed with the petition for a rehearing. If the county has no right to appeal now, can it confer on Chenault the right to appeal in its name?

Petition overruled.

LONGDALE IRON CO. V. SWIFT'S IRON AND STEEL WORKS, &C.

(*Filed Feb.* 3, 1891.)

Fraudulent conveyances—Assignments—Proof of claims—Appellant instituted this action against appellee and H., and their respective assignees, for the benefit of creditors, alleging that before the assignment it sold and delivered to appellee 625 tons of iron; that said sale was made to appellee through H., who was an active managing member of appellee company, and that said sale was made when H. knew that the company was insolvent and appellant was ignorant of its financial condition, and that said sale, being fraudulent, asked that the same be set aside. No answer was filed by defendants, but the lower court was of the opinion that said claim must be treated as controverted, and, therefore, required to be proved before the relief would be granted. *Held*—That the provisions of section 8, article 11, chapter 44, General Statutes, does not apply to claims against estates which have been voluntarily assigned for the benefit of creditors; therefore, a failure to deny the allegations of the petition entitled plaintiffs to the relief sought. An assignee, for the benefit of creditors, does not occupy the position of an innocent purchaser for value; therefore, all equities existing against the assignor were available against the assignee.

O. W. Root and A. T. Root for appellant.

C. J. Helm for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Bennett.

The appellant alleges that on the 15th day of June, 1887, it sold and delivered to the appellee, the Swift Iron and Steel Works, 625 tons of iron; that the sale was by E. L. Harper, as the agent of the appellant; that said Harper was an active and managing member of the appellee, and knew, at the time of the sale and delivery, that the appellee was hopelessly insolvent and was unable to pay for said iron, and the appellant sold the same to appellee with the design to defraud, all of which the appellant was ignorant at the time of said sale and delivery; that on the 21st of the same month the appellee made an assignment of its property for the equal benefit of creditors, &c., and said Harper did likewise. The appellant asks that said sale be set aside. The appellee and its assignee and Harper and his assignee were made defendants, and were served with process. They did not controvert the allegations of the petition.

The lower court seemed to think that said allegations stood controverted by law, as are the claims against estates that are assigned by operation of law. By section 8, article 11, chapter 44, General Statutes, a denial of said claims is not necessary; but they must be proven, else not allowed. But in the case of Dobyns v. Dobyns' assignee, 79 Ky., 95, it was held that said statute did not apply to claims against an estate voluntarily assigned for the benefit of creditors. It seems, in such case, that the assignee stands in the shoes of the assignor, and as an action against the latter would be taken for confessed, if not controverted by answer, so, likewise, it would be taken for confessed against the voluntary assignee; and as the petition set forth a sufficient cause for setting the sale aside (Lane, &c. v. Robinson, 18 B. M., 623), there was no proof of its allegations required.

In the case of Gibson v. Moore, &c., 7 B. M., 92, and Lane v. Robinson, 18 B. M., 623, it was decided that the vendor of property fraudulently purchased could maintain an action against the fraudulent vendee to set the sale aside and have the property restored to him, provided the rights of innocent purchasers for value, and without notice of the fraud, had not intervened. In the Gibson case the creditors had attached, and thereafter, by agreement, the property was sold to them, without notice of the fraud, but conveyed to one of their number in trust, in satisfaction of the debts. This court held that the creditors, in that state of case, were innocent purchasers for value. If an individual creditor were, in good faith, to buy a piece of property from his debtor in payment of the indebtedness, he would be a purchaser for value, which would preclude antecedent equities of which he had no notice. This is because such purchaser, being equally innocent with other creditors, has perfected his right—acquired the legal title for value, and without notice—which will hold as against the mere equities arising in favor of the other creditors by reason of the fraud of the debtor.

But this court, in the cases of Chenault, &c. v Bush, 84 Ky., 528, and the Bank of Commerce v. Payne & Viley, 86 Ky., 446, decided that an assignee, for the equal benefit of creditors, was not a purchaser for value; that the assignment did not preclude the assertion of antecedent equities that could have been asserted against the assignor; that as such assignment of itself did not divest the creditors of any rights, or cause them to relinquish any rights, they were not purchasers for value. According to these cases, the appellant is entitled to assert its equity against the appellees, and its petition

not having been controverted by answer, its allegations should be regarded as true.

The judgment is reversed, and the case is remanded with directions to proceed according to this opinion.

WRIGHT'S ADM'R V. NORTHWESTERN MUTUAL LIFE INS. CO.

(*Filed Feb.* 5, 1891.)

1. *Insurance—Estoppel of company by acts of soliciting agents*—In an action on a policy of life insurance, the company seeks to avoid its liability on the ground of misrepresentation by the assured, made in his application, as to his occupation or employment. Two soliciting agents of appellee took the application to the mother of the assured, who responded to all the questions asked by them, which answers one of them wrote down in the application. In response to the question as to the occupation of the assured, she responded that he was in the employment of a railroad company, engaged in its yards. The answer to this question was written "laborer." The application thus written out was taken to the assured, who signed it without reading. *Held*—That the acts of the soliciting agents in preparing said application estops the company from relying upon the misrepresentation as a forfeiture. Public policy requires that insurance companies shall be bound by the acts of their agents done within the scope of their employment, and their duty will be presumed to embrace all matters entrusted to their care.

2. *Burden of proof*—In this action the company, having relied in its answer on a plea of forfeiture, which appellant avoids by his reply, the burden of proof rests upon him to establish the avoidance of the forfeiture, and he was, therefore, entitled to the closing argument.

W. P. D. Bush for appellant.

Forman & Cason and Barnett, Miller & Barnett for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Lewis.

For the recited consideration of a written application and statements therein, referred to and made part of the contract, payment of $188.09 made, and the same sum agreed to be paid annually for fifteen years, appellee issued, April 18, 1882, a policy by which it agreed to insure the life of Wm. Wright in the sum of $3,000.

It appears that Rebecca Wright, his mother, originally intended to be named as beneficiary of the policy, though issued to him; and to her, in Cynthiana, where she resided, Gillman & Rankin, soliciting agents, presented the blank form of application and propounded all the questions, and by her were all the answers given, though written out by them. After she had signed the application it was taken to Lexington by one of the agents, and for the first time presented to and, without further interrogation, signed by him.

But upon receiving the application, thus made out, at its principal office in Milwaukee, Wis., sent through and countersigned by Robinson & Owen, general agents, at Louisville, appellee declined to insure for benefit of Rebecca Wright during life of her husband; and thereupon the application was altered by erasing her name, and the policy issued for benefit, as well as in name, of Wm. Wright, though it was delivered to and the first premium paid by her.

He having died in November, 1882, from injuries received while

employed in the yard of a railroad company, at Lexington, appellant, administrator of his estate, brought this action to recover amount of the policy. But judgment is resisted upon the grounds that the assured violated a clause of the policy forbidding his engaging in switching, coupling or uncoupling railway cars, and of a misrepresentation made in respect to his occupation, which was stated in the application to have been that of laborer.

Upon trial of the action there was evidence showing that when Gillman & Rankin read to Rebecca Wright the question of Wm. Wright's occupation, she stated to them he was an employe of a railroad company at Lexington, and working in its yards; but, nevertheless, one of the agents directed the other to write as her answer the word "laborer," saying it would cover all, and it was accordingly so written, and now appears in the application. That evidence was, however, contradicted by witness for appellee; and thus the main issue of fact was made and submitted to the jury by the following and only instruction given:

"The jury should find for the defendant, unless the jury find from the evidence that the defendant, company, at the time of the delivery of the policy, or find that the defendant, company's, general agents, Robinson & Owen, or either of them, at the time of the delivery of the policy in the proof described, knew, or had information, that the decedent, Wright, was engaged in switching, or coupling, or uncoupling cars in the railroad yards, in which case the jury should find for the plaintiff in the sum of $3,000."

The purpose of requiring answers to the numerous and comprehensive questions contained in an application for a policy of life insurance, is to enable the company to avoid taking risks it would not do with full knowledge of the actual situation and condition of the applicant; and, in order to prevent possible injury to the company by false answers to the questions, the application is made part of the contract, and right reserved to refuse payment of the policy in case any material statement made by the assured turns out to be false. But one party to a contract, however explicit its stipulations and conditions, can not, after receiving full benefit of all he was entitled to from compliance in good faith by the other, avoid performance of his part upon the ground of misrepresentation, when he was not in fact deceived, nor any attempt made to deceive him.

Although the questions were not put to nor answered by Wm. Wright, but by his mother acting for him, yet if the agents were informed by her of his actual occupation, the company is as much bound thereby, if at all, as if he had given the information; and while it is doubtless true that the company would not have issued the policy if the answer of Rebecca Wright, in respect to his occupation, had appeared in the application as some of the witnesses testified on the trial she made it, it is equally manifest the policy would not have been accepted nor any premium paid if either Rebecca Wright, who paid, or Wm. Wright, for whom it was paid, had believed a forfeiture would or could be legally claimed upon the grounds now relied on as defense to the action.

As then, if what is stated in avoidance of the forfeiture be true, a condition exists which neither the insured nor—as must be assumed—the insurer anticipated, or intentionally caused, one or the other party must suffer on account of the misconduct of Gillman & Rankin. Whether it shall be the personal representative of the insured or the insurer depends upon the extent to which the latter can be fairly and legally made to answer for the acts of its soliciting agents, there being no question of the correctness of the principle

contained in the instruction of the lower court when applied to either the company or its general agents.

In Mutual Benefit Insurance Co. v. Davis, 87 Ky., 541, it was held that the doctrine of estoppel applied whenever the agent of a life insurance company, having knowledge of the facts, so explains the meaning and effect of an answer as to cause the applicant, acting in good faith, to believe it sufficient, and accordingly make it as appears in the application, or, as was the case in this instance, to adopt it as indited by the agent himself.

The modern and, we think, correct doctrine is to regard the description of the risk, though nominally proceeding from the insured, as the act of the company, when its agents by a false or erroneous statement of what the application should contain, or taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. Ronley v. Empire Insurance Co., 36 N. Y., 550; May on Insurance, page 165; Hartford Insurance Co. v. Haas, 87 Ky., 533.

The rule by which to determine the responsibility of an insurance company for acts of its agents, as laid down in Insurance Co. v. Wilkinson, 13 Wall, 222, upon authority of cases cited, and approved by this court in Phœnix Insurance Co. v. Spiers and Thomas, and other cases, is as follows: "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal."

It seems to us, considering the amount of business entrusted to and done by soliciting agents of insurance companies, the circumstances under which and persons with whom it is generally done, and the opportunities they have, and temptation put in their way by the companies, to overreach those desiring, or rather those whom they persuade, to insure, the rule mentioned would be nearly inoperative if not made to apply to them as well as general agents; for a large, if not the largest, portion of the business and consequent profits of life insurance companies, is obtained by them. They are empowered to solicit and receive applications, which, every company well knows, can not in many, if not most cases, be made out intelligibly by applicants without their advice and instruction; and, moreover, as pay for their services is made to depend upon commissions on premiums collected, they have a direct interest in making each application conform to requirement of the company, which may be and is often done by explanation and assurances that are deceptive, yet relied on by the insured. We think not to make an insurance company responsible for acts and declarations of its soliciting agents, in the matter of preparing applications, would not only give it undue advantage of ill-informed and unsuspecting persons, but be an invitation to both the company and its agents to take it; and, consequently, the instruction in this case should have been made applicable to soliciting as well as general agents.

As by the issue of fact presented in the instruction the verdict of the jury was made to depend upon the sufficiency of the plea in avoidance of forfeiture of the policy, the onus was upon the plaintiff in the action, and it was error to deny to him the right to conclude the argument.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

SWOPE v. SCHWARTZ.

(*Filed Feb.* 5, 1891—*Not to be reported.*)

1. *Pleading*—A reply that is evasive and not responsive to an answer may properly be adjudged defective on demurrer.
2. *Ejectment—Parties and privies—Res adjudicata*—The vendees of parties are such privies of their vendors that they can rely for either defense or title, in actions of ejectment upon former adjudications settling questions of title in favor of such vendors.

E. W. Hawkins for appellant.

George Washington and R. W. Nelson for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

This is an action of ejectment by the appellant, Swope, against Schwartz. The two paragraphs of the answer makes this defense: That one Lapmeyer owned the land in controversy, and sold it to Miller and others, executing a conveyance and then taking a mortgage to secure the unpaid purchase money. That the Millers failing to make payment, a suit in equity was filed to foreclose the mortgage, and in that action the Millers, by an answer and cross-petition, set up as a defense title in the present appellants, and made Swope, &c., defendants. That the present appellants filed a reply to the cross-petition, in which they asserted their title, and Lapmeyer, from whom the appellee derived the title, filed his reply, denying the title in the present appellants. That on the hearing of that case a judgment was rendered for Lapmeyer, and from that judgment the case was brought to this court and affirmed.

The reply denies, indirectly, that there was any such proceeding, but admits that Swope, &c., the present appellants, were incidentally parties to the action. The reply is evasive, and not responsive to the answer, and, therefore, the demurrer was properly sustained. Besides, the record is filed with the answer, and made part of it in the case of Swope v. Lapmeyer, that was brought to this court by Swope, &c., and affirmed in October, 1879, in which the question of title was raised.

It is argued that no issue was made between Lapmeyer and Swope in that action. An issue was made by the cross-petition of the Millers, who were defending under Swope's title, and to this cross-petition both Swope and Lapmeyer filed replies, and set up the manner of holding by each. Depositions were taken, as well as written evidences of title, by both Swope and Lapmeyer, and the title adjudged to be in Lapmeyer. All the parties treated the cross-petition of the Millers, and the replies to it by Miller and Lapmeyer, as raising the distinct issue, and Swope, who it is now claimed had made no issue with any one as to the title, brought the case to this court.

The present appellee, having purchased of, and entered under Lapmeyer, can rely on this adjudication, had in October, 1879, between Lapmeyer and Swope, as a bar to the recovery, in absence of some fact alleged, avoiding the effect of that judgment.

It is argued that Schwartz, not being a party to that action, can not make the defense. The privity between the vendor and his vendee enables the latter to make any defense that his vendee could have made on the issue as to the title; and, as the appellants have litigated that issue with Lapmeyer, the question can not now be re-opened as to Lapmeyer's vendee.

Judgment affirmed.

FUESTON V. COMMONWEALTH.

(*Filed Feb.* 7, 1891.)

Criminal Law—Evidence—This is an appeal from a judgment of conviction of appellant for manslaughter. There were a large number of persons engaged in the difficulty on either side, and several were killed and wounded. The weapons used were pistols. Appellant was jointly indicted with seven others for killing one John Lawson. There is no positive proof that appellant fired a shot, and the proof as to his having a pistol is conflicting. The appellant introduced a witness who testified that he saw the accused before and during the fight, and that he had no pistol. Upon cross-examination he said he did not see appellant have John Lawson down or shoot at him. He was then asked if he did not state before the grand jury in Whitley Circuit Court that he saw appellant shoot John Lawson, which he answered in the negative. After the close of the testimony for appellant the Commonwealth, over his objection, introduced a member of the grand jury, who testified that witness had stated before the grand jury that he saw appellant put pistol against John Lawson and shoot. *Held*—The admission of this testimony to the jury, doubtless, induced them to consider it as direct testimony establishing the fact that appellant shot the deceased. This was erroneous and prejudicial to appellant. The court should have told the jury that the testimony of the member of the grand jury was competent only to contradict or discredit the testimony of the witness who testified before them.

Scott & Violett, James Andrew Scott and Eversole & Brown for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Holt.

In a desperate conflict between several of the Fuestons and Partons upon the one side, and several of the Lawsons and Roses upon the other, John and Ewell Lawson and James Fueston were killed, and several others wounded. The weapons used were pistols, and many shots were exchanged. The testimony, as might well be expected, is very conflicting.

The appellant, Beth Fueston, was jointly indicted for murder with seven others, for the killing of John Lawson, the deceased having also taken part in the difficulty. James Fueston, who was killed, was a son of the appellant. The latter has been convicted of manslaughter, and now appeals from a sentence of twenty-one years in the penitentiary.

As the case must be remanded for another trial, and as others may yet be tried for having taken part in the tragedy, we shall refrain from a discussion of the evidence, save so far as is necessary to a due consideration of the questions raised by this appeal.

The difficulty occurred at a church, which appellant was in the habit of attending, and where religious services were being held. The appellant came there with his wife and daughter, and also some neighbors, who, however, do not appear to have been engaged in the trouble. It was in hot weather, and he was in his shirt-sleeves. He then, apparently, had no weapon. The testimony is conflicting as to whether he, at any time during the difficulty, had a pistol. Some witnesses say he did, and some that he did not. Assuming, however, that he did, yet there is no positive evidence that he shot the deceased, John Lawson. After a careful examination of the record we fail to find that any witness says so. The deceased was shot twice. Several witnesses swear positively who fired one of the shots, but who fired the other does not appear by any positive evidence. The son of the appellant appears, according to the latter's testimony, to have been first killed, and in his immediate presence. There is testimony showing that, at the commencement of the shooting, the appellant grabbed the deceased, and in the scuffle they went over a bank; and one witness says that, after they did so, he saw smoke, as if from a pistol, at the point where they then were, and this statement is possibly confirmed by another witness. But what may well be termed "the battle" had then become general; the parties were then scattered about, and the firing was going on upon all sides. The deceased himself had a pistol, which he had been firing at some one. He was seen at another point, after the scuffle, with the appellant, and then it was that several witnesses say he was shot, at least once.

As to these matters there is, perhaps, some conflict of evidence; but when both the State and the accused had closed their testimony in chief, there was no evidence tending to show that the appellant either shot or shot at the deceased, save the circumstances just detailed.

The vital question was whether he had done so, or had aided or encouraged those who did do so, and we have said this much as properly leading up to the consideration of the competency of certain testimony.

The accused introduced one Wm. Jackson as a witness. He was an eye-witness of the difficulty. His testimony was, doubtless, regarded as material by the accused, and so it appears to us. He testified as to various matters, and among them that he saw the accused "before and during the fight. He had no pistol." Upon cross-examination he said: "Did not see Beth Fueston have John Lawson down or shoot at him." He was then asked: "Did you state before the grand jury in Whitley Circuit Court that you saw Beth Fueston shoot John Lawson?" The witness answered, in effect, in the negative.

After the accused had closed his testimony the Commonwealth was permitted, over his objection, to introduce a member of the grand jury and prove by him that Jackson stated before it that "he saw Beth Fueston put pistol against John Lawson and shoot." It can not well be doubted but what this evidence was effective in the way of a conviction. It was unquestionably very damaging to the appellant's cause. Certainly the Commonwealth had no right to prove as a substantive fact, or as matter in chief, that Jackson had said he saw the accused shoot Lawson.

The witness had testified, upon his examination in chief by the accused, that the latter had no pistol. Conceding that this was equivalent to saying that the accused did not shoot the deceased, yet the testimony of the grand juryman was, at most, only compe-

tent by way of contradiction of Jackson's testimony; but it was allowed to go to the jury without their being told that it was only to be considered for that purpose. Upon the peculiar facts of the case, in view of there being no positive testimony that the accused had shot or shot at the deceased, this should have been done. It doubtless was received by the jury as substantive testimony that the accused shot him. It was, in effect, evidence in chief upon the part of the State.

The court was bound, as it no doubt intended, to afford the appellant a fair trial, but this, we think, was not done for the reason indicated. This testimony was introduced after the defense had closed its evidence, and when it was likely to be very effective with the jury. It was proven as the statement of an eye-witness to the tragedy, made not long after its occurrence, and coming as it did, without restriction from the court as to its effect, the conclusion is almost, if not quite, irresistable that the jury regarded it in determining the question whether the accused actually shot the deceased.

To have insured a fair trial the lower court should, upon the circumstances of this case, have instructed the jury how and for what purpose they could consider this testimony.

The whole law of the case was properly given to the jury, but for the error indicated the judgment is reversed and cause remanded for another trial consistent with this opinion.

McCORMACK V. CROW.

(*Filed Feb.* 5, 1891—*Not to be reported.*)

Construction of deed—Passway—A deed containing a clause granting to party of the second part a passway from the corner of his orchard to a named road, is construed to refer to a passway leading from the corner of the orchard the shortest distance and most practicable route to the road named, when due regard is had to the location of the land, its condition for travel, and the interests of all parties concerned.

J. P. Sanderfer and H. D. McHenry for appellant.

J. E. Fogel for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Lewis.

In the deed from appellant to appellee, conveying two tracts of land, is this clause: "Also the right of private passway for second party, fifteen feet wide from corner of second party's orchard up the creek to Hartford and Livermore road."

The dispute in this case is as to the particular corner of the orchard the passway shall begin, appellant contending the verbal agreement and understanding was it should be the northwest, while appellee says it was to be the northeast corner.

The testimony is somewhat conflicting as to what was the agreement, but a fair construction of the deed in connection with the situation of the land through which the passway is to be located, it seems to us, justified the judgment of the court.

The route contended for by appellant is nearly twice the distance of the other, and can not be made passable, according to the evi-

dence, without the expenditure of money amounting to nearly half the purchase-price of the land conveyed, whereas the other is comparatively direct, and, as fixed by the court, practicable. As either will answer the description contained in the deed, that one should of course be adopted which a reasonable construction of the instrument requires, having due regard to the rights and interest of each party; and as one is almost impracticable, the other must necessarily be considered the route contemplated; and it being so determined by the lower court, the judgment is affirmed.

TRIMBLE V. MCCORMICK, &C.

(*Filed Feb.* 7, 1891—*Not to be reported.*)

1. *Deed construed to be a mortgage—Parol evidence*—The lands of a debtor having been sold to satisfy debts of a large amount, and the purchaser having failed to comply with the terms of sale, appellant, who held another debt against the debtor, complied with the terms of sale and conveyed the lands to the wife of the debtor in consideration of payment of a sum of money and the execution of notes in amounts large enough to satisfy the debts for which the land was sold, and appellant's debt, interest thereon at ten per cent. being contracted for. After payment of the greater part of said debts by a sale of the larger part of said land, the title to the residue was conveyed to appellant, who permitted the debtor and his wife to remain on it for a while, until he finally sold it to a third party and dispossessed the occupants. In an action by the debtor and his wife, claiming that the deed made to appellant was intended as only a mortgage, *Held*—That the conduct of the parties, as shown by the evidence, satisfies the court that the conveyance was intended merely to secure to appellant the payment of the money owing him. Parol evidence is competent to show that a deed was intended as a mortgage.

2. *Finding of facts*—The lower court having determined from a contrariety of evidence the amount of rents chargeable for the use and occupation of the tract of land in controversy, that finding, not being palpably against the evidence, will not be disturbed on appeal. Nor will the amount of balance of debt and interest be disturbed, the basis of calculation being correct.

3. *Usury—Forfeiture*—The penalty of forfeiture of entire interest prescribed for collecting interest in excess of the legal rate, having been repealed, the amount of legal interest may be collected.

Wood & Day for appellant.

Thomas Turner and C. Cyrus Turner for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

A tract of land belonging to E. N. McCormick having been sold to satisfy executions for about $5,000, and the bidders being unable to comply with the terms of sale, J. G. Trimble, to whom he also owed a debt of about $2,100, was induced to do so, and July 17, 1874, he received a deed for that land, and also other parcels conveyed to him by E. N. McCormick and wife, N. A. McCormick, amounting altogether to about 320 acres. But on the same day, evidently in pursuance of a previous arrangement, he re-conveyed the whole to N. A. McCormick in consideration of her agreement to pay to him

the entire amount of the executions and of his debt on E. N. McCormick, together with costs and interest at ten per cent. up to that time, July 17, 1874, and three notes were then executed by her, one for $2,373, due at date; one for $3.000, due October 1, 1875, and the third for $3,000, due October 1, 1876. The amounts of the second and third notes were fixed by counting interest at the rate of ten per cent. per year on the principal of each from date to maturity, and all of them were made to bear interest at that rate from maturity until paid.

It was at the time agreed between them that he was to furnish her, from time to time, money with which to conduct her farming operations; and it appears he did continue to make advances of money until December, 1883, when she re-conveyed the land to him, the deed therefor being in terms absolute. But in November, 1884, two parcels of the land were sold to Ledford and Horton, one of 100 and the other 93 acres, and the proceeds applied to payment of her indebtedness to him. There had been sold previous to December, 1883, another parcel to George McCormick, so there was left about 44 acres which appellees, McCormick and wife, continued to occupy until March, 1886, when by writ of forcible detainer they were dispossessed, and appellant, Trimble, has since occupied it.

This action was brought by appellees in June, 1886, to have the deed of December, 1883, treated and adjudged, in effect, a mortgage, and to recover a balance alleged to be due E. N. McCormick as a full and fair settlement of the transactions between her and appellant, Trimble; and, upon a final hearing, the chancellor determined and adjudged the deed mentioned to operate as a mortgage; that appellant convey to her title of the 44 acres upon payment of $1,110, found due by her to him upon settlement and adjustment of all their accounts, but that the land was subject to be sold in default of her paying that sum.

There is no room for dispute about the purpose each party had in view when the transaction of July 17, 1874, occurred. Trimble held a debt of $2,100 he desired to secure, but which it does not appear from this record he could certainly have done otherwise; for the land of E. N. McCormick had been sold, and he was evidently in failing circumstances, and title to the other parcels of land conveyed to Trimble seem not to have been in E. N. McCormick, at least they were incumbered by claims of others. So that appellant accomplished, by the arrangement, the double purpose of securing a pre-existing debt and safely investing his surplus money in such manner as to yield ten per cent. interest.

The purpose of appellees was, by aid of advances appellant agreed to make and their own efforts, to relieve their land, or as much of it as possible, from incumbrances. Thus the prime object of one party was ten per cent. interest on his money, which the land could not be made to yield, and of the other to preserve from sale and sacrifice all, or at least enough, of it for a comfortable home; and that each clung to his purpose so tenaciously and patiently for over nine years, goes very far to sustain the allegation of appellees that, notwithstanding the deed of December, 1883, the land was intended by both parties, and agreed between them, to be held by appellant merely as security for what she owed him, and the deed was to operate simply as a mortgage; for, at the date of that deed, the money was still safely invested, and certainly as remunerative as ever. The change of that purpose, on part of appellant, if not caused by, followed soon after, the sales to Ledford and Horton, the proceeds of which, when paid to him, reduced the debts against

appellee, according to the commissioner's report, to about $1,280, from which not a very large amount of usury could be expected.

Though the deed was not made until December, the contract for conveyance of the land by appellee was entered into November 22, 1883, by the terms of which it was agreed that if N. A. McCormick should find a purchaser for the land and make sale by March 1, 1884, for more than $40 per acre, Trimble was to make a deed to such purchaser and have the proceeds arising from the sale, and account to her for the excess over $40 per acre by giving credit on any of the unpaid notes he held against her, if the notes amount to that sum. Though appellant was in a position to dictate the terms of that agreement, and evidently intended to secure, beyond peradventure, the payment of the debts and interest, it is manifest the agreement, fairly construed, entitles appellant to no other interest in the land than necessary to secure payment of his debts, and to no more of the proceeds, in case of sale, than necessary for the same purpose. It is true the contract contains a stipulation Trimble was to have possession by March 1, 1884, but he did not take or claim compliance therewith. On the contrary, appellees continued in possession until 1886, and in November, 1884, negotiated the sales to Ledford and Horton, and the proceeds thereof were applied to payment of the debts, which were thereby reduced to the sum mentioned, much less than the value of the 44 acres left unsold.

The evidence, independent of the construction we have given the contract, shows satisfactorily that the parties intended and agreed the deed of December, 1883, to have effect merely as a mortgage. In our opinion appellee has, as adjudged by the lower court, a right to reconveyance of the 44 acres, upon payment of the balance due to appellant, and the only real question is as to the amount she owes him. It appears appellant, at the end of each year subsequent to 1874, made and furnished to appellees a statement of accounts between them, showing the balances left after deducting payments made during the year from the notes and from advances by him, and counsel contends that, as appellees did not object then, they are now precluded, as well as barred by limitation, from calling in question the correctness of those statements.

We do not consider the statements as final or binding on appellees; nor are they barred by the five or ten-year statute of limitations; for the right of an obligor exists, whenever a note is sued on, to put in issue the amount actually due, and to show he has made more and other payments than he has credit for. However, there is dispute about comparatively few items of account between the parties; and, without going into detail, we think the evidence fully justifies the conclusion of the commissioner—whose reports are very clear and satisfactory—and chancellor as to the disputed claims presented by appellant as well as appellees.

Three grounds are relied on for reversal on the cross-appeal. The first relates to the amount with which appellant is charged for rent of the 44 acres, from 1886 to date of the judgment. As is generally the case, where value of service or property has to be fixed by witnesses, there is a contrariety of evidence before us on that subject, and, unless palpable mistake has been made and injustice done, which is not apparent to us in this case, it is never safe for this court to set aside both the report of the commissioner and judgment of the court, as would have to be done.

Second. We do not perceive, nor has counsel indicated, where the commissioner in his calculations compounded interest "on the credits when the partial payments were less than the interest then

accrued." The amount of the note due at date being fixed on by the parties at the time, it became necessary, in order to determine whether the other two—one due October 1, 1875, and the other October 1, 1876—or either of them, was given for the proper amount, to deduct the amount of the first note from the whole amount agreed to be due on July 17, 1874, and, dividing the remainder into two parts, calculate interest on one half, at ten per cent., to October 1, 1875, and on the other half to October 1, 1876. But the credits were not, as argued, applied by the commissioner in his calculation to the aggregate accrued interest of the second and third notes; but, after the one first due was paid off, the payments, as made, were applied exclusively to the interest and principal of the one next falling due, which, it seems to us, was the correct mode of applying partial payments.

Third. The forfeiture of the whole interest in case of the lender of money charging more than the rate authorized by the act of 1871, which was ten per cent., is in the nature of a penalty, and, upon the repeal of that act, section 4 thereof became inoperative, and, as has been well settled by this court, the penalty could not thereafter be enforced. It results that appellant is entitled te collect the rate of interest agreed on by the parties July 17, 1874, which was ten per cent., without incurring a forfeiture of any part of it.

Perceiving no error in the record, the judgment is affirmed on both the appeal and cross-appeal.

Chief Justice Holt not sitting.

PILCHER V. GEGAN, &C.

(*Filed Feb.* 7, 1891.)

Attorney's fee—Res adjudicata—Splitting cause of action—Estoppel—Appellant, as attorney for appellee, recovered possession of a tract of land, but did not reserve a lien in the judgment on the land for his fee as attorney. He afterwards made a sale of said land for his client, assuring the purchaser that the land was unencumbered, except by a debt named. Appellant then instituted an action in a justice's court to recover of his client a fee of $50, a trial of which resulting adversely to appellant, he instituted his action in equity to recover a fee of $250, and asserting a lien on the land for same. *Held*: That the action in the justice's court is conclusive of appellant's claim for a fee. A party will not be permitted to split up the same cause of action, and thus harass the debtor. Neither can appellant assert his lien on the land as against the purchaser. His assurances of title, made at the time of sale, estops him from asserting his lien.

Lane & Burnett for appellant.

James R. W. Smith for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellant, as the appellee's (Annie E. Gegan) attorney, recovered the possession of the tract of land in controversy for her, but failed to expressly reserve a lien in the judgment upon the land for his fee as attorney. In a few days after the judgment was rendered, the appellee, Gegan, sold the land to the appellee, Stevens, and the appellant, as the attorney of the appellee, Gegan, prepared

and delivered a deed to the appellee, Stevens, for the land, assuring him that the title was good, and unencumbered, except a lien of $100 in favor of Straus and others. Thereafter the appellant sued the appellee, Gegan, in the justice's court, for fifty dollars, his fee in said case.

The justice's record is: "Judgment for defendant, Annie Gegan, and judgment for the defendant against the plaintiff on counter-claim for $28.95." This judgment, standing in full force, is conclusive that the case was heard, and judgment rendered upon the merits of the case, and the appellant will not be heard to contradict the record by saying that he dismissed his case, without prejudice, for the purpose of bringing an action in the chancery court for the full amount of his fee, $250.

The justice's record being conclusive of the fact that the appellant's claim for $50 attorney fee in said case was heard upon its merits, the question arises, can the appellant sue for a larger amount in the chancery court? The answer is, that the law will not permit a party who has sued for a part of an entire demand to sue for the residue in another action. This rule seems to be uniform. Bancroft v. Windspear, 19 Wend., 297; Fisher v. Foley, 6 Hill, 543; Marble v. Keyes, 9 Gray, 221.

But, it may be said the justice's court did not have jurisdiction of the full amount of the appellant's claim. The answer is, that the entire cause of action was the appellant's right to an attorney's fee, and he gave the justice's court jurisdiction of that matter by bringing his action therein to recover $50 for said service; and, to allow him to split the entire cause of action into many causes of action, and to harrass the defendant with a separate action on each, would be a travesty upon legal justice.

But the agency of the appellant, as indicated in the sale of the land to the appellee, Stevens, without disclosing and reserving his lien, estops him from now asserting it.

The judgment is affirmed.

ROSS V. SWEENEY, TRUSTEE, &C.

SWEENEY, TRUSTEE, &C. V. ROSS.

(*Filed Feb.* 7, 1891—*Not to be reported.*)

Homestead—Family—Liens—The owner of about 230 acres of land, consisting of three tracts, and used and recognized as one farm, executed a mortgage upon one of the tracts containing 117 acres upon which he lived. This land was sold in a suit to enforce said mortgage debt; but, prior to said sale, the mortgagor had executed a mortgage upon the remaining two tracts, containing about 112 acres; but, prior to the execution of the last named mortgage, he had sold about forty-five acres of said land and given the purchaser a title bond for same, and placed him in possession thereof, retaining a lien for about $400 unpaid purchase money.

After these transactions were had, the mortgagor executed a deed of trust for the benefit of creditors, only reserving exempt property. After the execution of this deed, the grantor moved on the tract of land remaining, containing about sixty-five acres, and lived in a cabin on it, claiming it as a homestead. His wife having died before moving into said tract, he continued to reside there with his widowed daughter and her child until this controversy arose in settlement of the trust estate. *Held*—That the debtor was entitled to claim his homestead in the sixty-five acre tract, subject to the

mortgage debt, although said tract was connected with the tract he formerly occupied as a homestead, by a lane or private passway about 190 yards long, the three tracts having been considered and used by him as one farm for more than fifteen years. The fact that he removed to the cabin after the debts were created, did not prejudice his creditors.

The widowed daughter and her child, having a natural and moral claim for support and maintenance upon the debtor, constitute a family within the meaning of the statute of exemptions. The mortgagee is not entitled to a lien on the forty-five acres held under title bond, nor does his lien extend to the unpaid purchase money owing on said tract, the same being a fund for the benefit of the general creditors.

R. H. Tomlinson for appellant, Ross.

H. C. Kauffman and Wm. Herndon for Sweeney, &c.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor.

There are two questions involved in this appeal. The one as to the right of homestead, and the other as to a claim of preference by one creditor over another by reason of an alleged lien.

One of the appellants, Wm. A. Ross, was the owner of a tract of land upon which he lived, made up of three several tracts, containing in all about 230 acres. On one of the tracts, containing 117 acres, he lived with his family, his wife and children. He executed a mortgage on this tract, in the year 1883, to Kinnaird, and, in the year 1888, this land was sold under a judgment to foreclose, and in this way the appellant was deprived of all right to homestead in this particular tract. In 1886 he mortgaged the two remaining tracts, containing 112 acres, to his co-appellant, Sweeney, but, at the date of that mortgage, he had sold, by title bond, to David Ross, 45 acres of this 112 acres, and received part of the purchase money, and David Ross was in the actual possession when the mortgage to Sweeney was executed.

In the year 1887 Wm. A. Ross, the owner of this land, made a deed of trust to his co-appellant, Sweeney, for the benefit of creditors, reserving his homestead. In November, 1888, Ross, the debtor, moved on to what was left of the 112 acres, and, with his family, lived in a cabin on this remaining land, about sixty-five acres. His wife had died before he removed there, but he had with him his daughter and grandchild, who had lived with him since the birth of each. A suit was filed to settle this trust, and the appellant asserted his claim to a homestead. This claim is resisted on two grounds: First, that he was not a housekeeper with a family; and, second, that his homestead was in the land sold to Kinnaird, and that moving on to the sixty-five acres after the debts were created, he is in no condition to claim a homestead. The testimony shows that the appellant had owned these several tracts of lands for fifteen or twenty years, and that he had used them all as one farm, although purchased by him at different times. The parcel mortgaged Kinnaird is separated from the other two parcels, that adjoin each other, but the whole is connected by a private passway or lane that leads from one to the other—the lane being only 190 yards long. With his land thus located, he has used it as one tract during the entire period; and the proximity of the one to the other is such that both were, doubtless, used, and should be considered as one as much so as if a public road had separated or divided this land. They, in fact, by reason of this

private passway, were all united as one, and should be regarded as adjoining each other.

The appellant had with him his daughter and her child, who were without means, and relying on their daily labor and the aid of their father for support and maintenance. He was under a natural and moral obligation to support both. They were members of his family. The daughter's husband had left her penniless, and she had the right to look to her father for care and protection. Under the circumstances the chancellor should have allotted the homestead in the sixty-five acre tract, subject to Sweeney's mortgage.

The appellant, Sweeney, who is the trustee for creditors, says that when he took the mortgage on the 110 acres, that included the sixty-five acres, and the forty-five sold David Ross, he did not know that the latter had purchased any part of this land; and, inasmuch as David Ross still owed $433 on this forty-five acres, that, by reason of his mortgage covering the whole tract, he has, as the estate is in trust, a lien on this purchase money note that should be enforced as against the general creditors.

The land certainly belonged to David Ross, who was in the actual possession under his bond for title, and the mortgage created no lien upon the land that could, in any manner, have affected the real owner. The mortgage on the land has no priority over a lien upon the purchase money notes, in the hands of a vendee, as against creditors. The mortgagee takes what is left. His claim is subordinate to the lien for the purchase money, and a transfer of the notes for the land would pass to the assignee; or, in case of insolvency, the notes, evidencing the lien, would go to the general creditors. The mortgagee takes the land subject to the incumbrances against it, and his want of knowledge as to the superior liens can not affect the rights of others.

In our opinion, therefore, the judgment on this branch of the case must be affirmed. On the appeal of Wm. A. Ross, the judgment is remanded for proceedings consistent with this opinion.

RICKETTS v. L., ST. L. & T. R. R. CO.

(*Filed Feb.* 7, 1891.)

Revocation of deed—A grantor of land, by deed to her son, reserved the right to revoke same by making a deed of revocation, and having same acknowledged and recorded in the office of the county clerk, during the life-time of the grantor. The grantee conveyed to a railway company the right of way for its road, upon which the road was constructed, and afterwards, the grantor having made deed of revocation, instituted this action to recover damages of said company. *Held*—That said action could be maintained. The reservation was not contrary to public policy, nor did the deed pass to the grantee a fee-simple estate. The power of revocation was not in the nature of a condition subsequent, but was notice that affected all parties dealing with the property, informing them of the infirmity of the title. Although the deed of revocation may have been an instrument not required by law to be recorded, yet it depended for its validity upon the intention of the grantor, evidencing the exercise of the power of revocation.

Lewis & Son and Kendall & Moreman for appellant.

Helm & Bruce for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Chief Justice Holt.

December 15, 1884, the appellant, Agnes Ricketts, executed to her son, James Ricketts, a deed to a tract of land, which contained this provision:

"I hereby reserve to myself the power to revoke and annul this conveyance at any time during my natural life, by a deed or other instrument under seal, signed and acknowledged by me as deeds of land are required by the statutes of Kentucky to be signed and acknowledged, which said revocation, to be valid and effectual, must be lodged for record in the said county clerk's office, of Meade county, in my life-time. In the event of my exercising the said power of revocation herein reserved, the property and title to said land to re-invest in me as it exists at the time of the execution of this deed, any attempted deed, alienation or incumbrance thereon, by the grantee herein, to the contrary notwithstanding."

The grantee accepted the deed, on the day of its acknowledgment, by a written acceptance indorsed upon it.

March 24, 1887, James Ricketts, for a nominal money consideration, and in view of expected benefits to arise from the building of the railroad, granted by a proper deed to the appellee a sixty-foot right of way through the land, and it thereupon proceeded to and did construct its road through it. If this grant was not subject to a power of revocation by Agnes Ricketts, by virtue of the deed from her to her son, then the right of the road, by virtue of the deed from the son, is unquestioned.

August 6, 1889, she executed, in conformity to the provision in the deed from her to her son, what is termed in this record "a deed of revocation." It was acknowledged by her before the county clerk of Meade county, and by him recorded. She then brought this action against the appellee for damages, claiming that it had unlawfully entered upon the land and constructed its road The action was dismissed upon a demurrer to the first paragraph of the reply, which asserts the validity of the revocation, and this is the only question presented by this appeal.

It is insisted for the appellee that the deed to James Ricketts invested him with the fee, and that the revocation clause was an attempt to impose a condition subsequent, which is void, first, because it is contrary to public policy; and second, because it is impossible of execution.

The ground upon which it is assailed as being against public policy is, that it will enable the parties to the deed to defeat the rights of the grantee's creditors. In other words, that after becoming indebted the grantor will exercise the power of revocation and thereby divest the grantee of property which would otherwise go in satisfaction of the claims of his creditors. This ground can not be maintained. The deed is notice to the condition of the reserved power. If they trust the grantee upon the credit of the estate thus granted, they do so knowing the risk, because the deed gives them notice of it. Such a condition has always been known to the law of conveyancing. Coke says that grants may be revoked by virtue of a power expressly reserved in the deed. 3 Coke, 25.

The condition was not, therefore, unlawful upon this ground, and the second one remains to be considered, and which is the one mainly urged. If the condition annexed to a conveyance be *subsequent*, the estate passes, although the condition is never performed,

or, by reason of illegality, is incapable of performance. Myers v. Daviess, 10 B. M., 397.

Blackstone, in speaking of such conditions, says: "If they be impossible at the time of their creation, or afterward become impossible by the act of God, or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee-simple on condition that, unless he goes to Rome in twenty-four hours, or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself), or unless he kills another, or in case he aliens in fee, that then, and in any of such cases, the estate shall be vacated and determined; here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal or repugnant."

It is asserted that applying this rule to the conveyance from the appellant to her son, the fee vested in him, and that the condition in the form of a revocation, as therein provided, was impossible of execution. This is claimed upon the ground that the deed provided that the revocation should be by an instrument to be acknowledged by the grantor before the county clerk, and recorded by him as in case of a deed to land, and that our statute does not authorize the acknowledgment and recording of such an instrument. It is true the county clerk has no power in the matter, except as given by our statute, and it does not expressly authorize him to take the acknowledgment and record an instrument like that in question. Where, however, a grantor has reserved a power of revocation, and which, in the absence of particular provision as to the manner of its enforcement, under the old rule could have been carried out by reentry merely, or now by proper notice to the grantee, it seems to us that it would be a sacrifice of substance to form to hold that the right was lost because the grantor, in providing as to the mode in which it should be done, has provided something as to the mere form of the revocation, which the law does not recognize. This should not deprive him of the right to which both he and the grantee have assented. If so, it would defeat the intention of the parties to the conveyance.

Even if the act of the county clerk had no legal efficiency, yet it having been done, and as provided in the deed, which reserved the power, it should operate to carry out the intention of the parties, and of which every one had notice by the recording of the deed. It should not be regarded as illegal, and, therefore, rendering void the power of revocation. The provision that the revocation was to be acknowledged and recorded should not so far be regarded as of the essence or substance of the right as to defeat it, even if the statute does not authorize the acknowledgment and recording of such an instrument.

The deed, however, referred to a revocation which might thereafter be acknowledged and recorded in like manner as the deed itself, and the revocation should be regarded and treated as part and parcel of the deed. In this view we think the power existed in the clerk to take the acknowledgment and record the revocation.

The demurrer to the first paragraph of the reply should have been overruled, and the judgment is reversed with directions to do so, and for further proper proceedings.

MILLS V. HUNT, &C.

(Filed Feb. 12, 1891—Not to be reported.)

Fraudulent conveyances—A person having received a conveyance from his brother of his interest in estate descended to them, and having paid a fair value for same, besides showing a desire to retain the homestead and support the minor children of the family, will not be disturbed in the title to the interest so purchased, as no fraudulent intent to hinder or delay creditors was shown.

John E. DuBose for appellant.

Wilbur F. Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted to set aside a conveyance made by B. W. Hunt to his brother, G. W. Hunt, in fraud, as is alleged, of the rights of creditors. There was a return of *no property*, and hence the power of the chancellor to cancel the deed, if the facts alleged are sustained by the testimony. The father of the appellees lived in Logan county, and, at his death, owned a valuable tract of land, upon which was an incumbrance by mortgage of four thousand dollars. He left several children surviving him, and the appellee, G. W. Hunt, it seems, purchased of the adult children their interest in this land, and among them the interest of his brother, B. W. Hunt. The mortgage was foreclosed and the land sold and purchased by G. W. Hunt, who was desirous of owning the homestead, and of securing to the minor children their interests, subject to this lien. He seems to have paid the mortgage debt off, or nearly so, and there is nothing in the record showing that he had no means with which to make these purchases—in fact, his compliance with his contract negatives any such conclusion, where there is an entire absence of proof showing that he was buying this land for some one else. There is nothing unreasonable in the purchase by him of his brother's interest; but, on the contrary, his entire conduct shows his purpose to own all the homestead. He swears he paid his brother in cash, and it is not attempted to be shown that he was obtaining the land for less than its value. That the two brothers, while in Texas, may have acted badly in reference to business transactions, is not competent, even in determining the issue made in this case.

The brothers may now live together, or the vendor may still be on the farm, yet the evidence of fraud is wanting. Fraud will not be implied by reason of the relation of the parties, and, while such a fact may lessen the effect of their statements, when other circumstances exist pointing to fraud, still, when the ability to pay is shown, and the purchase by one of a family of the entire homestead and a compliance with his contract, or a readiness to do so, slight circumstances should not be taken hold of to cancel a transaction that is both natural and reasonable, and what, under the circumstances, the party charged with the fraud ought to have done.

Judgment affirmed.

REED v. REED, &c., TRUSTEES, &c.

(Filed Feb. 19, 1891.)

Wills—Probate—Executors and administrators—A testator, where will was duly probated, having devised his property in trust to his two brothers, with power to sell without the interposition of a court of equity, a sale of real property by them vests in the purchaser a perfect title, although the heirs may appeal from said order of probate within five years.

In matters of probate county courts are vested with general and exclusive jurisdiction; its action, being in the nature of a proceeding *in rem*, binds every one until it is reversed or annulled. After the probate of a will, executors or trustees thereunder are vested with full power to discharge all duties imposed upon them.

Section 28, chapter 113, General Statutes, construed.

J. G. Simrall for appellant.

Temple Bodley for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Holt.

Leander S. Reed died testate on September 20, 1890. The will gives his three infant children his estate in equal portions after the payment of his debts. It selects a guardian and trustee for each of the two daughters, and a guardian for the son. It appoints his two brothers, P. B. and J. D. Reed, his executors, with full power, without the intervention of a court, to sell and convey any of his real estate, as they may deem best. They qualified as such representatives, after the will had been duly probated, and in December, 1890, sold to the appellant, S. S. Reed, by written contract, a portion of the real estate. He refuses to accept a deed thereto and pay therefor upon the sole ground that, as the heirs at law of the testator have five years, from the probate of the will in the county court, within which they may appeal to the circuit court and annul it, the conveyance from the executors will not certainly invest him with a good title. In other words, that he will, during that period, stand in the attitude of a *lis pendens* purchaser, holding a title subject to be defeated by the setting aside of the will.

This question was not determined in the case of Arterburn's ex'ors v. Young, &c., 14 Bush, 509. There the will of Conrad Young was probated on May 23, 1860. The devisee mortgaged the land, and, the lien being enforced, Arterburn purchased it at the decretal sale on March 29, 1875. No appeal was taken from the order of probate until April 19, 1875, a period of about fifteen years. The will having, upon the appeal, been set aside, some of the heirs at law of Young sued Arterburn for the land. This court, *contra* to the decision of the lower court, held that they could not recover, but based its opinion upon the fact that when the land was mortgaged and the sale made, the time had expired within which an appeal could be taken from the order of probate, and that clearly, therefore, the purchaser could not be regarded as a *lis pendens* one. The opinion in the case expressly says that the effect of a judgment of probate is not determined. Now, however, the question is directly presented.

Our statute provides: "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the

jurisdiction of the court, until the same is superseded, reversed or annulled;" and this has been the law in this State since 1797. General Statutes, chapter 113, section 28.

The probate of a will is an *ex parte* proceeding, and essentially one *in rem*. It determines the *status* of the property. The order of probate, while it remains in force and not superseded, is binding not only upon the interested parties, but is valid as to all the world.

It was said in the case of Mitchell, &c. v. Holder, &c., 8 Bush, 362: "It has been repeatedly held that the probate or rejection of a will by the proper court, having the case regularly before it, was, like a sentence *in rem*, conclusive while it remained in force in the same and all other courts, and between all persons, whether formal parties to the record or not."

It is well settled that the acts of an executor done under a will, which is subsequently set aside, are valid as to every one. Public policy requires this rule.

In Moore v. Tanner's adm'r, 5 Monroe, 42, it is said: "The grant of probate is a judicial act, and when done by a court of competent jurisdiction is, until repealed, conclusive in all other courts." Thus in Toller's Law of Executors, page 76, it is said: "So long as the probate remains unrevoked the seal of the ordinary can not be contradicted, for the temporal court can not pass a judgment respecting a will in opposition to that of the ecclesiastical court, and, therefore, if a probate under seal be shown, evidence will not be omitted that the will was forged, or that the execution of it was procured by fraud, or that the testator was *non compos mentis*, or that another person was executor, for these are points which are exclusively of spiritual cognizance." Again, on page 77, the same author says: "It has been determined that payment of money to an executor, who had obtained probate of a forged will, was a discharge of the debtor of the intestate, although the probate was afterwards revoked and administration granted to the next of kin." See also Williams on Executors, page 251, and Jones' ex'or v. Jones, 14 B. M., 373.

The probate proceeding, being in the nature of one *in rem*, it may be likened to an action against a non-resident, where his land is attached and sold. Although he may subsequently appeal and reverse the decree as erroneous, yet the purchaser can not be disturbed.

Greenleaf on Evidence, section 550, says: "Where the decree is of the nature of proceeding *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world."

In the case of Tibbatts, &c. v. Berry, &c., 10 B. M. 474, this court said: "The two cases on Wells' will (5 Litt, 273, and 4 Monroe, 152) and the case on Singleton's will (8 B. Monroe, 340), and other cases, recognize and establish the principle that, under our system for probate of wills, and, indeed, as necessarily flowing from it, the probate or rejection of a will by the proper tribunal, having the case regularly before it, is, like a sentence *in rem*, conclusive while it remains in force in the same and all other courts, and between all persons, whether formal parties to the record or not; and that the proceedings for the probate of wills is in the nature of a proceeding *in rem*, presenting the question of will or no will, not as a mere question of property, which can be effectually decided only between the parties to the record and their privies, but as an abstract question, the decision of which, by a competent tribunal having the question properly before it, is, while it stands, binding upon all the world."

This doctrine is more fully considered in the case of Wood's adm'r v. Nelson's adm'r, &c., 9 B. Monroe, 600. There the will was admitted to probate in February, 1844. The executor qualified and proceeded to execute it. In October, 1844, proceedings were instituted to annul it, and this was done in July, 1846. In August, 1844, however, the executor had sold the land. It was contended that, as it appeared there never had, in fact, been any will, that all of the executorial acts were void; but they were held valid.

Under our statute a county court, in a matter of probate, is not one of limited, but general and exclusive jurisdiction, subject to appeal; and so long as its judgment probating a will remains in force, the acts of the executor are valid and binding upon every one.

The rule declared in Debill v. Foxworthy, 9 B. M., 230, that "a purchase made during an abatement of the suit, if afterwards revived and prosecuted to a decree, without culpable negligence, or after a final disposition of the case in the court below, and before a writ of error is prosecuted, is subject to the final disposition of the cause, and the purchaser is considered as having purchased *pendente lite*," does not apply in a case like this one, where the proceeding, by virtue of which the executor acts, is, in its nature, *in rem*.

The will has been duly probated; the executors have properly qualified, and have full power under the will, as devisees in trust, to sell and convey the property. No objection is now being made to the will, and, in our opinion, a deed from them will vest in the appellant a perfect title.

Judgment affirmed.

BROWN'S ADM'R V. MATTINGLY, &C.

(*Filed Feb.* 21, 1891.)

Decedent's estate—Distribution—Set-off against creditors of heir—In an action to subject the interest of a son in the real and personal estate descended, to the satisfaction of a debt of the son, the administrator pleaded as a set-off that the son was indebted to the estate of the decedent in a sum greater than the value of his interest in said estate. *Held*—That the plea of set-off was a sufficient defense, as it is well settled that the claims of a decedent against a distributee is a preferred claim against the interest of said distributee in both the real and personal estate descended, and his creditors can not occupy any better attitude than the debtor himself.

S. T. Spalding for appellant.

J. P. Thompson for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, by their separate actions, which, however, were tried together, attached the interest of J. A. Brown that he owned, as one of the heirs in the personal and real estate of W. S. Brown, the appellant's intestate, to satisfy their claims against J. A. Brown. J. A. Brown's co-heirs were not made parties to said action. The appellant, as W. S. Brown's administrator, and J. A. Brown, by warning order, are the only defendants to said actions.

The appellant resists the right of the appellees to subject said interest, upon the ground that J. A. Brown was, at the time of W.

S. Brown's death, indebted to him in a larger sum than the value of said interest which he relied upon as a set-off to the appellee's claims.

The lower court seemed to think that the appellant could not rely upon J. A. Brown's indebtedness to W. S. Brown's estate as set-off to the appellant's demands, upon the ground, it is supposed, that the appellees, as creditors of J. A. Brown, obtained by their attachments a right to J. A. Brown's interest in said estate, superior to that of the appellant as administrator.

It is well settled that an administrator may plead, as a set off, a distributee's indebtedness to his intestate's estate against the distributee's interest therein. Waterman on Set-off, &c., page 234, sums up the rule as follows: "The right of the executor or administrator to retain, in such cases, depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share, while he retains in his own hands a part of the fund out of which that and other legacies or distributive shares ought to be paid, or which were necessary to extinguish other claims on that fund. In other words, the legatee or distributee, in such cases, seeks to obtain a portion of the fund which the testator, or the letters of administration have placed in the hands of the executor or administrator to pay debts and legacies or distributive shares; while such legatee or distributee is himself a debtor to the estate, and by withholding payment, diminishes the fund to that extent. And it is against conscience that he should receive any thing out of the fund, without deducting therefrom the amount of that fund, which is already in his hands as a debtor to the estate."

It can not be doubted that had J. A. Brown sued for his distributive share of the personal estate in the hands of the appellant, the latter could have plead his indebtedness to the estate as a set-off. And it seems clear that the appellees, as creditors of said Brown, in seeking to subject his interest as distributee to their demands against him, have no greater right, as regards the appellant's right to a set-off, than J. A. Brown had. They, as such creditors, can subject his interest in said estate precisely as he could have done; but their right is not superior to his as against the right of the appellant. And it is seen that said Brown's right is subject to the appellant's right to a set-off by the sum that said Brown was indebted to his intestate. Nor did the appellees acquire a superior right to that of the appellant by reason of their attachments. The appellant's plea of set-off is a defense that extinguishes Brown's right to any distributive share in the estate, and there is no saving in behalf of his creditors; nor do their attachments give them an equity superior to the right of appellant, it existing at the time the attachments were obtained.

But it is said that the right of set-off by the administrator only applies to the extent of extinguishing the distributee's interest in the personal estate; and as the land descended directly to the heirs, it was right to sustain the attachments to the extent that they were levied upon J. A. Brown's interest in said land. It may be (a point, however, that we do not decide) that the appellant, as administrator, had no right to rely upon the set-off, except to the extent of extinguishing the distributee's interest in the personal estate. But it is clear that the distributee's interest in the real estate should be extinguished to the extent of the amount he has received from the ancestor, so far as it exceeds his interest in the personal estate. He stands in the attitude of having received so much from the estate, and if his distributive share in the personal estate is not equal to the

amount thus received, the real estate ought to be held to be charged with the payment of the remainder, in the division, and he to receive that much less. This is the only equitable rule. Were it otherwise the one heir might virtually get a double or a treble portion. From what has been said the case must be reversed, with directions to overrule the demurrer, and to order the heirs to be made parties and allowed to defend, and for further proceedings consistent with this opinion.

LUCAS, BY, &C. V. HUNT.

(*Filed Feb.* 26, 1891.)

1. *Malicious prosecution—Burden of proof*—In an action for malicious prosecution, where the petition alleges malice and the want of probable cause, and the answer specifically states facts which, if true, would only constitute a denial of the want of probable cause, the burden of proof rests on the plaintiff to establish both malice and want of probable cause, by competent evidence, and he is, therefore, entitled to the concluding argument to the jury.

2. *Overruled case*—Brown v. Morris, 3 Bush, 81, overruled in part.

Dulaney & Mitchell for appellants.

Rodes, Settle & Rodes for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

This was an action for malicious prosecution, and the only question is as to the burden of proof.

Was it on the plaintiff or the defendant? If the case had been submitted without any testimony, the verdict would have been for the defendant. The essential averments of want of probable cause and malice are found in the petition, and both denied by the answer. The appellee relies upon facts, affirmatively pleaded, constituting, as is alleged, probable cause for having the appellant arrested on a charge of felony, and admits the release or discharge of the appellant by the examining justice. That trial and discharge was only *prima facie* evidence of a want of probable cause, and, although insufficient to authorize the case to go to the jury, on that single issue, the issue as to malice, so essential to the recovery, had to be made out; and, while the jury might have decided that the *unlawful* arrest, or the facts leading to it, showed malice on the part of the defendant, still the plaintiff was entitled to introduce other evidence showing a want of probable cause, as well as additional testimony establishing the fact of malice. The facts pleaded affirmatively by the appellee were, in substance, a denial of the want of probable cause, and left the case as if there had been a general traverse of the facts constituting the cause of action. The burden can not be shifted from the plaintiff to the defendant by a general traverse, or by a special plea denying malice and averring probable cause. Such a plea only puts in issue the truth of the facts alleged in the petition. This court so held in the case of Duffey v. Carey, from the Jefferson Circuit (MS.)

A specific denial of the essential averments in an action for malicious prosecution, or a statement of facts inducing the arrest of the

plaintiff, that, if admitted, would show probable cause, is not like an action for slander, where the speaking of the words are admitted and the charge made alleged to be true. In stating, by way of defense, that there was probable cause, and the facts upon which it is based, and that no malice existed, although in the nature of affirmative matter, the plea at last only denies the averments of the petition, leaving the burden of making out the case with the plaintiff. The law may imply malice from an admitted fact, still the plaintiff may, if he wishes, show express malice by other acts and declarations of the defendant connected with the arrest. Ullman v. Abrams, 9 Bush, 738. The case of Brown v. Morris, 3 Bush, 81, in so far as it conflicts with this view of the question, is overruled.

The plaintiff being entitled to conclude the argument, a new trial is ordered and the judgment reversed.

LIN V. COMMONWEALTH.

(*Filed Feb.* 26, 1891—*Not to be reported.*)

1. *Criminal law—Indictment*—It is no objection to an indictment for stealing a heifer that the accusatory part of the indictment charges the offense of "grand larceny," instead of cattle stealing.

2. *Trial*—The fact that the verdict of conviction was rendered a few minutes before twelve o'clock on Saturday night, the last day of the term, and the prisoner sentenced, is no prejudicial error, it appearing that he was defended by able counsel, and had the attendance of his witnesses and a fair trial afforded him.

3. *Evidence*—The exhibition to the jury of the hide of the heifer alleged to have been stolen, or one corresponding to it, was competent evidence for the Commonwealth.

Ewell & Smith for appellant.

P. W. Hardin and A. H. Clark for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted for grand larceny, in appropriating, by taking to his own use with a felonious intent, &c., one heifer, the property of James Kelly, and convicted.

There are various grounds for a reversal. The first is: That the indictment should have accused the appellant of cattle stealing, and not of grand larceny. We perceive no reason why one may not be guilty of larceny in stealing hogs or cattle, and the failure in the accusatory part of the judgment to charge the offender with hog stealing or cattle stealing is no ground of demurrer or in arrest of judgment.

The argument for appellant is devoted principally to the refusal of the court to continue the case, or the haste in which trial was had. It was on Saturday, the last day of the term, and the verdict was rendered shortly before midnight, and the prisoner sentenced. Whether it was standard or sun time seems to be in doubt; but, whether the one or the other, the court will not reverse on such ground. The testimony in the first place leaves but little doubt as to the guilt of the accused. His witnesses were present. He was defended by able counsel, and the case conducted under the eye of an

impartial and enlightened judge. The trial was properly conducted, and the accused would scarcely have been convicted of such an offense if innocent. The only question being as to the guilt or innocence of the accused, there could not have well been an error in the instructions. The defense attempted to show that the accused was so located when the theft was committed as to have rendered it impossible for him to have been guilty, and his counsel complain that some instruction ought to have been given on this particular branch of the case, and as to the identity of the accused. The question of guilty or not guilty embraced both propositions. If he was not the man, the jury must acquit; or, if he was so situated on the night of the theft as to make it impossible for him to have been present, the jury must also acquit; yet it was not necessary for the court to have said that to the jury in so many words. Did the accused take the heifer with a felonious intent, was the issue. The jury heard all the evidence before them, and returned a verdict of guilty, under the usual instructions, giving to the accused the benefit of the reasonable doubt.

It is argued that the hide of the heifer, or one corresponding with it, was not competent as identifying, or rather corroborating, the testimony of the State in the effort to connect the accused with the felony. We think it was competent; and the refusal by the court to permit the witness to state that, in identifying cattle, it was difficult to distinguish one from the other, by reason of the similarity of the marks upon them, was not prejudicial, and, if competent, was a mere opinion that the jury entertained as well as the witness, and that counsel used, no doubt, in argument. The conduct of the attorney for the State is complained of, but his action was not excepted to; and, if it had been, we see nothing in the manner of conducting the case that was improper. We think sufficient time was had in which to try this case, and the proof of guilt is well shown.

Judgment affirmed.

JOHNSON V. COMMONWEALTH.

(*Filed Feb.* 26, 1891—*Not to be reported.*)

Criminal law—Instructions—On the trial of appellant on the charge of burglary, it being proven that appellant was found in possession of the stolen property and gave a reasonable account of how he came by it, it was not error to refuse to give an instruction requiring the Commonwealth, by direct evidence, to show the falsity of his statement, as there were other facts shown that would establish his guilt; besides, such an instruction would have given undue prominence to a particular fact, which, in view of all the facts proven in the case, was not absolutely essential to conviction.

James A. Chiles for appellant.

P. W. Hardin and Charles J. Bronston for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, Alonzo Johnson, was, by separate indictments, charged with three offenses of housebreaking; one as to the house of W. W. Fleming, one as to that of George B. Kinkead, and another as to that of John Barkley. A conviction has been had and

an appeal taken in each case. They involve, substantially, the same questions, and will, therefore, be considered together.

The evidence in each case shows that some one broke into the houses, about the same time, and took therefrom a variety of property; that the accused was found in possession of it, but claimed to have obtained it from a certain shoemaker, who had left the vicinity under a criminal charge. The appellant had, however, previously told to certain parties a different story as to how he came in possession of it. In the Kinkead case it was also proven that the property had been brought by the accused to his house concealed in sheets or blankets. Also, that after he was arrested the owner of the Kinkead property said to him, that if he had gotten his property he would especially like for him to return some mathematical instruments, on account of certain associations connected with them; that the accused replied that the shoemaker's wife claimed them, and that he, therefore, had, after getting them from the husband, returned them to her. It was, however, shown that he had in fact sold them to one Hunt for a trifle, telling him at the time that he had had them for a long time and had no use for them.

In the Barkley case it was also proven by a servant that she returned to the house from a temporary absence, when none of the other members of the household were at home, and hearing a noise in the house watched for the cause, and saw the accused leave the place with some of the stolen property. Her description of the accused, as to his beard, as he then appeared to her, is somewhat variant from that of one or two other witnesses, who describe it as then worn by him, according to what appears to be a rather indistinct recollection upon their part; but she testifies that the accused is the man who was in the house. In this case it is also proven that among the property taken was a scarf-pin, and when the accused was arrested it, at first, was not found, but was subsequently forced from his mouth by choking him.

We have evidence, therefore, of a series of housebreakings occurring about the same time. The accused is found recently afterward in possession of all the property taken, it amounting to a large quantity of various articles. Some of the property he concealed in bringing it to his house, and when charged with the crimes he concealed at least one of the stolen articles. He gave inconsistent accounts of how he acquired the property, and sold a portion of it at an unreasonably low price. These circumstances render it morally certain that the accused is the guilty party. In addition, however, in one of the cases a witness testifies to having actually seen him in one of the houses.

The circumstances proven in each case show, in our opinion, the doing of the act, and that it was done by the accused. At least there is evidence to support such a finding by the jury, and this is all that the law requires. It is said: "Where the charge is burglary, it is alleged that mere possession of the stolen goods *unaccompanied with other suspicious circumstances*, is not enough to give *prima facie* evidence of the burglary." 1 Wharton's Criminal Law, section 729.

Even as to the Fleming case, however, the fact that some one broke into the house and took certain property is proven. The stolen articles are found in the possession of the accused at a recent date after the commission of the crime, and with other property, the fruit of other housebreakings that occurred about the same time. The accused gives contradictory accounts as to how he got possession of them. He tells some persons before his arrest that he ob-

tained them from one person, and upon arrest he says he got them from a different party. Therefore, even in the Fleming case, the possession of the stolen goods is accompanied "with other suspicious circumstances," and which are of such a character as to point out the accused, to a moral certainty, as the party who also broke into that house.

In Farris v. Commonwealth, 12 KY. LAW REP., 592, this court said: "The testimony showed the breaking of the storehouse by some one, and the possession, *not long after*, by the accused of some of the stolen property;" and while the conviction in that case was reversed for error in instructing the jury, yet if the only question had been whether there was evidence sufficient to support the finding, it is evident it would have been sustained.

Complaint is made that it was the duty of the prosecution to have had the property in court at the final trial. No such demand was then made by the accused, and there is no reason why it should have been required in these cases. There was no dispute as to the identity of the property, or the ownership of it, or as to its having been taken when the housebreaking occurred.

The court was asked by the appellant to instruct the jury that if they had a reasonable doubt as to the identity of the prisoner with the person who did the breaking, they must find him not guilty. The instruction was refused, and properly, because the court had already so told the jury in the instructions it had given to them. They had already been instructed if they believed beyond a reasonable doubt that *the accused* broke the dwelling-house of the owner of the property and took it, then they would find him guilty; and if they had a reasonable doubt of his guilt, they should acquit him.

The instruction asked, that if, when arrested, he gave an explanation of how he came by the property, then it was incumbent upon the prosecution to show its falsity, or the jury must acquit, was properly refused. This would have made the entire case turn upon one single circumstance, and one arising from the appellant's own statement. The guilt of the prisoner might have amply been shown without the State offering any evidence relative to it.

It is true that it is a general rule, where theft is shown and the accused is not connected with it by any evidence save that he is in possession of the stolen property, and he gives a *reasonable* account of how he came by it, the prosecution should, by direct evidence or circumstantially, show its falsity; but an instruction based upon this idea and directing acquittal if the prosecution merely failed to disprove the statement of the accused himself, would certainly not have been proper upon the facts of either of these cases. The guilt of the accused is manifest, and no error of law appears.

The judgment in each case is, therefore, affirmed.

LAPE'S ADM'R V. JONES, &C.

(*Filed Feb.* 28, 1891—*Not to be reported.*)

***Trustee's compensation—Attorney's fee*—The compensation of a trustee not having been fixed by the grantor in the deed creating the trust, the amount of compensation named by the trustee, on application made to him by two of the beneficiaries for the purpose of fixing same, will not be disturbed on an appeal, as it is considered as an evidence of the willingness of the trustee to discharge his duties for the sum named.**

A trustee, who having, on account of mental and physical infirmity, become unable to manage the trust, and who makes no resistance to the suit brought by the beneficiaries for his removal, was entitled to the services of an attorney in making his settlement, as the evidence shows he, for a long time, managed a vast estate with great care and fidelity to the interests of the beneficiaries. The services of said attorney should be paid out of the trust estate.

John S. Ducker for appellant.

George Washington for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Lewis.

In 1882 James Taylor conveyed his estate, which was very large and valuable, to W. H. Lape in trust to sell, collect proceeds and distribute among his descendants, in the manner directed in the deed, as an executor might have been empowered and directed by his will. Lape accepted the trust and discharged the duties thereof until March, 1888, when he became mentally and physically incapable of longer doing so; and in April one of the beneficiaries of the trust commenced this action, to which all of them became parties, for his removal and appointment of another as trustee in his stead, which was done by judgment rendered in May.

No agreement was made at date of the conveyance in regard to the amount of compensation to be paid Lape for his services; but it was recited in the deed he was to receive a fair compensation, and suggested that, in case of difference of opinion between him and the beneficiaries on that subject, it should be determined by arbitration.

It was alleged in the petition an agreement had been made to fix the compensation at $3,500 per year, and judgment was asked to carry it out. But Lape denied such agreement had been made, and alleged and introduced evidence to show his services were worth $5,000 per year, and asked he be allowed that sum. The chancellor adjudged the sum of $3,500 to be amount paid to him, and we think it was properly done; for, while no contract was formally entered into, Lape, when called on by two of the beneficiaries to agree as to the amount he would be willing to accept, himself fixed $3,500 as a reasonable and fair compensation, and an amount he was willing to discharge the duties of the trust for. So whether there was or not a contract makes no difference, for, as the judgment was rendered for the identical sum Lape, of his own accord, stated was reasonable and would satisfy him, he can not now complain nor fairly ask a higher value should be fixed than he estimated his services at.

But we think the court erred in subjecting his estate, he being now dead, to payment of any other costs than such as accrued in the litigation of the issue as to the amount of his compensation, and also erred in disallowing a reasonable fee for services of his attorney; for, except the single one mentioned, there was no issue made by the parties, nor any delinquency or fraud on part of Lape shown or charged. He made no resistance to his removal, but was entitled to assistance and advice of counsel in filing his answer, and in the matter of settlement of his accounts and transactions as trustee; for, in view of the many transactions he had necessarily to have with the various beneficiaries, some being infants and others married women, and the vast sums, amounting to nearly one-half million, that passed through his hands during the period of five years and four months he had charge of the estate, a settlement of

his accounts as trustee, under direction of the chancellor, was inevitable upon termination of the trust. He had, therefore, the same right to such settlement at the cost of the estate, and should have been treated just as a personal representative not in fault would be treated in winding up an estate of a decedent, especially as there is no pretense that of the vast amount handled by him more than $100 was found on his books unaccounted for; and even that might have been explained by him but for the misfortune that befell him, though there was no loss to the estate thereby.

We think his estate ought to be credited by a reasonable sum to pay services of an attorney throughout, and, except in the litigation about the amount of compensation, the costs of the action ought to be paid by the estate; and for the error of the court in that respect the judgment is reversed and cause remanded.

HILL v. SCOTT.

(*Filed Feb.* 28, 1891—*Not to be reported.*)

Fraudulent conveyances—The chancellor will not exercise his power to restore to a vendor property that he has conveyed to another, with the intent to hinder, delay or defraud his creditors, but will leave them where the terms of the contract placed them.

James M. Sebastian and John W. Rodman for appellant.

Riddell & Son for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Pryor.

The doctrine of constructive fraud leaves the question open as between the vendor and vendee, as to the fraudulent intent, but actual fraud vitiates the entire transaction as to third parties who are creditors; and while this is so, there is no remedy for the fraudulent vendor in his effort to recover from his vendee realty that has been conveyed to avoid subjecting the estate conveyed to the payment of the vendor's debts.

In this case it is alleged in the petition that the appellant, being embarrassed and unable to pay his debts, furnished the money to his sister to purchase in some property and to hold it for him, having the deed made to her, with the expectation that the property would increase in value so as to enable him to pay his debts.

While every conveyance that may tend to hinder and delay creditors will not, in every instance, be so vitiated with fraud as to prevent any relief by the grantor as against the grantee, in a case like this, where the intent to delay and to prevent the creditor from subjecting the property is expressly stated, it seems to us there is no room to question the existence of actual fraud.

A debtor, being involved to a greater extent than his ability to pay, furnished the money to his sister to purchase realty, the title to which is made directly to her for the purpose of preventing creditors from reaching it until it had increased in value, so as to enable him to sell and pay his creditors, must be held to be guilty of fraud in fact. Suppose there had been no rise in value, the sister, with the title in her own name and the money given her by the debtor

to pay for it, would have held in secret trust and prevented the appellant's creditors from securing it. These facts appear on the face of the petition, and for the purposes of the demurrer must be taken as true, and, therefore, the demurrer was properly sustained.

The doctrine is well settled that a chancellor will not interfere to give relief in such a case. Jones v. Reid, 3 Dana, 425, and numerous cases cited in Barbour's Digest, title, Fraudulent Conveyances, article 1, section 11. The amended petition is not made part of the record by bill of exceptions, and can not be considered.

Judgment sustaining the demurrer affirmed.

STANFORD V. PARKER.

(*Filed March 5, 1891—Not to be reported.*)

Ejectment—Bill of exceptions—Appeals—On an appeal from a judgment in ejectment, this court can not consider a bill of exceptions containing the evidence unless the same has been signed by the judge, as required by section 337, Civil Code of Practice. Such requirement is imperative. After a submission of the case counsel, without having noticed the defect in the record relied on by adverse counsel, this court will not, on petition for a modification of its opinion, permit the correction of the record.

R. D. Hill for appellant.

A. Duvall for appellee.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellant brought this action of ejectment against the appellee to recover the possession of a small strip of land. The appellee put in issue the appellant's title, and the questions of law and fact having been submitted to the court, its decision was adverse to the appellant.

What purports to be the evidence used on the trial is embraced in what is called a bill of exceptions, which is not signed by the judge. The 337th section of the Civil Code of Practice is imperative upon the judge to sign the bill of exceptions, if he approves the same. Said bill of exceptions not having been signed, we can not consider the same. Consequently, there being no proof that we can consider as to the appellant's title to the land in dispute, and his title thereto having been put in issue, the judgment dismissing his action must be affirmed.

Judge Bennett delivered the following response to the petition for rehearing:

The only question relied on by the appellee in his brief was that the circuit judge had not signed the bill of exceptions, yet the appellant took no notice of the fact, and no steps to have the omission corrected; and the case having been submitted on the record as it is, and a decision having been rendered thereon, it is too late now to ask for a correction. Besides, the case ought to be affirmed upon the merits.

The petition for a rehearing is overruled.

RUBY, &c. v. RUBY, &c.

(*Filed Feb.* 28, 1891—*Not to be reported.*)

Conveyance—Construction of deed—A conveyance of land to "*Mrs. R. and to the heirs of her body forever, for her and their exclusive use, free from her husband*," did not constitute the wife a tenant for life, or a joint tenant with her children, but vested in the wife a fee-simple, free from any interest of her husband by reason of the marriage, which she could sell and, in conjunction with her husband, convey a perfect title to.

C. B. Moore for appellants.

George C. Harris for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Bennett.

The conveyance of the tract of land in controversy was to Mrs. Ruby, the appellee, and "to the heirs of her body forever." This, according to the common law, created in Mrs. Ruby an estate tail, which, by the statute of this State, is converted into an absolute title in Mrs. Ruby. The expression immediately following the one quoted, "for her and their exclusive use, free from her husband," only creates in her a separate estate, and perhaps excludes the husband from any interest in the land, by reason of the marriage, after the death of the wife. The language employed was evidently intended to exclude the husband from any interest in the estate, by reason of the marriage, after the death of the wife, and not to limit the wife's estate to a life or joint estate with the heirs of her body. Also, there being nothing in the deed of conveyance prohibiting the wife from selling this land, she, under the statute, her husband joining in the conveyance, may sell it.

The judgment is affirmed.

PERZEL v. PERZEL.

(*Filed Feb.* 28, 1891—*Not to be reported.*)

Divorce—Jurisdiction—Abandonment—In 1881 the appellant married the appellee in the city of New York, and they lived together until 1886, when the appellee left New York for France and has never returned. Appellee had no permanent home, and appellant, being an actress, spent much of her time on the stage, and she seems to have provided the means of support for the family, including her husband, as he had no means. A part of her time, prior to 1886, she spent with her mother in Kentucky, she being a native of Kentucky and having been raised and educated in this State. After her husband left for France she returned to Kentucky, where she made her home with her mother for more than three years prior to the institution of this action by her for divorce. *Held*—That the courts of Kentucky have jurisdiction to grant her a divorce, as it does not appear from the evidence at what time appellee, who has no permanent home, but is absent in foreign lands, formed the intention of abandoning his wife, nor does it appear that she has come into this State for the purpose of obtaining a divorce; on the other hand, the evidence shows that she has, in good faith, taken up her residence in Kentucky among her relatives.

G. C. Lockhart and Hallam & Myers for appellant.

Clifton Armsparger for appellee.

Appeal from Bourbon Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellant, Marie Perzel, was married to William Perzel in the city of New York, on the 23d of June, in the year 1881. They lived together as husband and wife until October, 1886, when the defendant, her husband, left New York for France.

From the testimony in the case the appellant lived prior to 1886, after her intermarriage with Perzel, a portion of the time in Covington, Ky., with her mother, Mrs. Victor. Her husband seems to have had no home of his own, or any means of subsistence except such as were furnished by his wife. She is an actress by profession and during the winter months was busily engaged on the stage, and applied her accumulations to the support of her two children by a former husband, and also to the support of the defendant. While his domicile was at one time in the city of New York, he seems now to have no permanent home, and whether he left that city for France with the purpose of abandoning his wife is difficult to determine from the record. The appellant, under the circumstances, came to Kentucky to live with her mother, and has, since the year 1886, made this State her permanent home. She was born and raised in Nicholas county, Ky., and educated at Bellewood Seminary, near Anchorage; and it is but natural that she should have returned to the place of her nativity, where her mother lived, as she had no other home or any one else to look to for care and protection; and the argument that the facts do not establish a residence in this State, because she is out of it so much of the time while engaged in her profession, can have but little weight in determining the question of residence.

She had been living in Kentucky for three years before this suit was brought, and her husband, who seems to be a foreigner, in France, and who had made no provision whatever for her support while living with her, and has evidently abandoned her because she refuses to longer support him. The testimony shows that she was an affectionate and devoted wife, and there was no reason apparent from the facts before us why he should have abandoned her, unless her refusal to maintain him longer was the cause, a fact assumed by the court from the general character of the testimony, and not from any act on the part of the appellant.

It is said, however, that this court, in the cases of Becket v. Becket, 17 B. M., 370, and Hick v. Hick, 5 Bush, 670, has, in effect, decided that when the abandonment took place in another State, where the parties were domiciled, neither party will be allowed to come into this State and procure a divorce on the ground of abandonment, unless ground of divorce where the cause originated. Section 4 of article 3, chapter 53, General Statutes, requires an action for a divorce to be brought in the county where the wife usually resides, if she has an actual residence in this State; if not, then in the county of the husband's residence, and no such action shall be brought by one who has not been a continual resident of this State for a year next before its institution; nor unless the party complaining had an actual residence here at the time of the doing of the act complained of, shall a divorce be granted for any thing done out of the State, unless "it was also a cause for divorce by the law of the country where it was done."

The residence of the appellant has been constantly in this State

since the year 1886. She has had no other home, and her husband, a foreigner, has no fixed domicile, and to say that the domicile of the husband is the domicile of the wife, under such a state of facts, would lead to an absurd conclusion. The only question, it seems to us, in this case is, did the husband, when leaving the city of New York, do so with the intent to abandon his wife. That such was his intent may be assumed from the facts before us, and still such a purpose might not even have been contemplated by him until after his wife left New York for her home in Kentucky. Where the husband has no fixed place of abode in this country, and compels his wife to seek a home of her own, fails to make any provision for her support, and where the testimony shows the wife to be blameless, ought the chancellor to so construe the statute as to deny a divorce to the wife because it may be inferred that the inception of the abandonment took place in some other State? The facts show that the object of the wife in returning to her native State was not for the purpose of obtaining a divorce. Nor does it become necessary to consider, in computing the time of abandonment, any part of that period embracing the length of time she remained in New York after her husband left for France. Parties can not come to this State from another jurisdiction, for the purpose of availing themselves of our laws to obtain a divorce, but the residence must be in good faith.

How is the chancellor to determine whether, when Perzel left for France, it was then his purpose to forsake forever his wife and rid himself of all marital obligations? The chancellor, however reluctant he may be in severing the most sacred of all social relations, will not be so unjust to a faithful and true wife as to look back for the purpose of ascertaining when the husband left for a foreign country, and make that date the period at which to fix a *bona fide* intent on his part never to return. The cause of the divorce has ripened in Kentucky. The appellant is a resident in good faith and is without fault, and there being as much reason for presuming the intention to abandon after the wife came to Kentucky as to presume a like intention when the husband left for France, we are of the opinion that the appellant is entitled to a divorce, and reverse the judgment below with directions to enter a judgment, if no other defense is interposed, dissolving the marriage relation between the parties.

WILSON, &C. v. THE AULTMAN & TAYLOR CO.

(*Filed March* 5, 1891.)

Jurisdiction—Receiver—Order by judge in vacation to sell mortgaged property— In an action upon notes given for a thresher and to enforce a mortgage lien on same, the judge of the court has no authority during vacation, and before trial, to make an order for the sale of the mortgaged property. By section 299 of the Civil Code of Practice, a receiver may be appointed to take charge of mortgaged property in order to preserve it from loss or deterioration in value, or to collect profits arising from it; but such receiver can not be directed to sell it before the determination of the action pending. The power given a judge in vacation to make an order to sell *attached* personal property, does not apply to a case like this. In that case the owner of the property is fully protected by his remedy on the attachment bond.

Cornelison & McKee and V. B. Young for appellants.

Tyler & Apperson for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellee instituted its action in the Montgomery Circuit Court against the appellants to foreclose a mortgage, executed by the appellants to the appellee, on a grain thresher, &c., and to obtain personal judgment on the notes executed for said thresher. The appellee also asked the judge of the court in vacation, in Richmond, Ky., for an immediate sale of the property and the appointment of a receiver to execute the same, upon the grounds that the conditions of the mortgage had not been performed; that the property was insufficient to pay the mortgage debt; that there was danger of the property being materially injured and becoming depreciated in value.

The appellee resisted said motion because of the want of power in the judge to order a sale before foreclosure, and the fact that the appellee was indebted to the appellants in a large sum for a breach of warranty, as damages, which the appellants proposed, at the proper time, to rely on as a counter-claim. The judge refused to hear any evidence as to said damages and ordered the sale of the property. The appellants have appealed from said order.

Section 299 of the Civil Code provides: "That in an action for the sale of mortgaged property a receiver may be appointed, if it appear that the property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

It appears that, if the property is in danger of being lost, removed or materially injured, a receiver may be appointed to take charge of it, although it is at present more than sufficient to pay the debt. If it appear its sufficiency might be impaired by the happening of either one of three conditions named, also the fact that the condition of the mortgage has not been performed, and the mortgaged property is probably insufficient to pay the debt, is sufficient to authorize the appointment of a receiver.

It seems, according to the foregoing section, that the judge in vacation has no power to appoint a receiver, except to take and keep the possession of the mortgaged property, to receive rents, collect debts, bring and defend suits, &c., and that the power of the judge does not extend to ordering a sale of the mortgaged property. It is true that the judge in vacation, in case perishable property is attached, &c., has the power to order its sale. The Code expressly gives him this power; but the power is not given him in case of a suit for the sale of mortgaged property. In the former case the attachment bond protects the person whose property is attached, in case his property is wrongfully sold, &c., but in the latter case there is no such protection by bond. Hence, the judge is not allowed to order a sale of the property in advance of the regular foreclosure sale, because such action would deprive the mortgagor of the title to his property in advance of the appointed time for a decision upon the merits involving the right of a foreclosure sale, and which advanced sale would deprive the owner of his property, although he might successfully resist the foreclosure sale. Hence, upon the grounds mentioned in the Code, a receiver can only be appointed to take charge of the property in order to preserve it, &c., for the benefit of both parties.

But it may be said that, inasmuch as the appellee, by the terms of the mortgage, was given the power to sell the property, in case of the appellants' default of payment, at private sale, it gave the judge the power to order said sale. But it seems to us, as the appellee could not sell the property under said power (Kentucky Trust Co. of Louisville v. Lewis, 82 Ky., 579, overruling; Hahn v. Pindell, 3 Bush, 189), the judge can derive no authority from that power; it does not have the effect of giving the appellants' consent to said sale. So far as the authority to the appellee to sell is concerned, it is void, and the power can not be vitalized so as to give the judge the authority; and as the judge had no other authority to order the sale, his order in that particular was void.

The judgment ordering the sale is reversed, and the cause is remanded for further proceedings consistent with this opinion.

LONG V. LONG, &C.

(Filed March 7, 1891—Not to be reported.)

Mistake in deed—Two brothers having conveyed to their mother a tract of land, after her death one of the grantors seeks to have the deed reformed so as to give him the remainder interest in said land, alleging that said deed, by mistake, was so drawn as to give to his mother the fee-simple interest instead of a life estate, with remainder to him, as was the true intention of the parties. *Held*—That the evidence was sufficient to uphold the decision of the lower court in dismissing the action.

Lindsay & Botts for appellant.

E. E. Settle and Thomas R. Gordon for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and the appellee, J. J. Long, conveyed by deed to Cynthia Long, their mother, and wife of the appellee, Robert Long, the land in controversy. Cynthia Long having died, the appellant seeks to have this deed reformed so as to conform, as he says, to the true agreement, to-wit: That Cynthia Long was to have only a life estate in said land, remainder to the appellant, whereas the deed conveyed to her the absolute title, which, as indicated, was not the true agreement. He also alleges as the reason for excluding J. J. Long from a share in the remainder, that he, appellant, paid the entire purchase money for the land; hence, he is entitled to the entire remainder. The lower court dismissed his petition and he has appealed.

We have no hesitation in affirming the judgment of the chancellor for the following reasons:

It seems from the weight of evidence that appellees, J. J. Long and Robert Long, bought the land in partnership from Joseph Long, brother of Robert Long, and uncle of the appellant and appellee, J. J. Long; but the deed was made to the appellant and the appellee, J. J. Long But Robert Long, for some reason not appearing in the record, secretly retained his interest in the land, paid the entire purchase money, and the appellant and appellee, J. J. Long, conveyed the absolute title to their mother, Cynthia Long. Now

Robert Long and J. J. Long say that this was the agreement, and there was no misunderstanding or secret understanding about it; and they are certainly corroborated all along the line. In the first place, by the deed itself, duly acknowledged by the appellant, which he, however, denies; but the clerk's certificate and other circumstances in the case flatly contradict him. Second. He knew and intended the effect of the deed, notwithstanding his denial of that fact. Third. His receipt in consideration of a half interest in the depot property of all of his interest in the said land, although he denies knowing the purport of the receipt. Fourth. He knew that the absolute title to a part of the land was to be and had been sold, and the vendee proposed to build and had built upon it, under the belief that he had a perfect title to the land, and he never claimed any interest in the land, the inference from which is, he did not have any interest in the land, else he would not have, without protest, seen it disposed of in that way.

By these and other circumstances not necessary to mention, but abundantly shown in the record, it is clear that the deed conveyed to Mrs. Long the title that the appellant intended her to have.

The judgment is affirmed.

BOARD OF INTERNAL IMPROVEMENTS OF LINCOLN CO. V. STANFORD AND LOGAN CREEK TURNPIKE ROAD CO.

(*Filed March* 3, 1891.)

Turnpikes—Lateral roads—Under the charter of appellant, and under section 13, chapter 110, General Statutes, a lateral road is prohibited from being opened within one mile of appellant's turnpike, unless within one mile of a town, but such restrictions do not apply to a turnpike road organized under chapter 56, General Statutes, to be operated as a private enterprise. Said restrictions apply alone to such ordinary public roads as may be opened, used and kept up by public authority.

Hill & McRoberts, W. G. Welch and R. P. Jacob for appellant.

W. E. Varner, W. H. Miller and W. O. Bradley for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was chartered as a turnpike company in 1834. The provision of another charter, which was made a part of the appellant's charter, is as follows: "That after said turnpike road shall be opened, it shall not be lawful for the county court, or any other body, corporate or politic, whatever, to open, or cause to be opened, any lateral public road, or roads, running from or to the same place, within one mile of said turnpike road; and all and every such road now made shall be discontinued as soon as said turnpike road shall be opened."

Section 13, chapter 110 of the General Statutes has a similar provision, except the county court is expressly authorized to order such road shut up, unless it runs not more than a mile from a town or city.

The appellant complains that the appellee, a company organized under chapter 56, General Statutes, is aboutto build a turnpike road

within a mile lateral to its turnpike road, and more than a mile in distance from the town of Stanford.

It appears that the appellee's proposed road is to be a turnpike road, constructed and operated as a private enterprise. The provision of appellant's charter, *supra*, has reference to no such road; it has reference to such ordinary public roads as may be opened, used and kept up by public authority. This is made manifest by the provision itself, because such road theretofore opened must be shut up, thereby showing there was no reference to a turnpike road chartered and constructed by private enterprise; such road could not be suppressed for the benefit of a new enterprise of the same sort. Besides, the provisions of the General Statutes, *supra*, tends to illustrate the meaning of said provision as indicated.

The judgment is affirmed.

FOLEY V. GIBSON.

(*Filed March* 3, 1891—*Not to be reported.*)

Subrogation—Mortgage lien—In the payment of the amount of policy of life insurance due to three benficiaries, the company deducted from the amount of the same more than the amount due one of the beneficiaries to whom they had made an advancement, to secure which he had executed his note with a mortgage on land. The company having assigned said note to one of the other beneficiaries, whose share had been reduced by the deduction made by the company, as above stated, *Held*—That the holder of said note is entitled to be subrogated to the rights of the company in the lien note.

H. B. Foley and Wilson and Rawlins for appellant.

J. W. Alcorn for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Lewis.

Foley, Falkner and Dishman, having become owners and beneficiaries of a policy of insurance, issued by the Kentucky Grangers' Mutual Benefit Society, of Georgetown, on the life of M. E. Humble, made proof after her death, and, through Falkner, acting for the other two, demanded payment of the policy, but the company refusing to pay the full amount, the sum of $1,500 was paid to, and accepted by, Falkner. But from that sum was deducted $561.35, which Foley owed the Society, $242 thereof being evidenced by a note, to secure payment of which Foley and wife had executed a mortgage on the tract of land.

It is obvious the one-third interest of Foley in the sum of $1,500 paid to Falkner is less than what he, Foley, owed the Society, and, consequently, after deducting such indebtedness, there was not left to Falkner the $500 to which he was entitled, and Foley became indebted to him in a sum sufficient to make up the deficiency, which indebtedness was increased to the extent of one-third of necessary expenses Falkner had paid in collecting amount of the policy paid; and the note having been assigned to Falkner, he subsequently transferred it to Gibson, who brought this action.

By the judgment appealed from there was found due on the note the sum of $122.50, ascertained by deducting first the one-third

of Falkner's expenses from the one-third of the $1,500, and then deducting the sum left from what Foley owed the Society, and was allowed and paid for his benefit by Falkner, in the manner mentioned.

It seems to us Falkner, as joint owner of the policy, having thus in effect paid off the debt, Foley owed the security was entitled to the note which seems to have been assigned to him, and that his assignee, Gibson, was entitled to collect the amount thereof actually due, and to the benefit of the mortgage lien, which was not, as appellee contends, canceled, but passed in virtue of the assignment of the note to first Falkner and then Gibson, to the exclusion of the homestead lien which was transferred thereby.

Judgment affirmed.

YOUNG V. YOUNG.

(*Filed March* 3, 1891—*Not to be reported.*)

1. *Divorce—Alimony—Evidence*—In an action for divorce by the husband, a judgment for divorce and alimony was granted on the cross-petition of the wife, alleging adultery, abandonment by the husband, and his contracting a loathsome disease from having sexual intercourse with another woman. On appeal from so much of the judgment as allows alimony to the wife and an attorney's fee, it is competent to consider the grounds of granting said divorce, in order to ascertain the correctness of making said allowances.

There is no positive proof to establish the fact that the husband had contracted such loathsome disease; his physicians state that they had prescribed medicine for him suitable for the treatment of such disease, but they refused to answer whether he had such disease. *Held*—That where it is apparent that the refusal of the physicians to answer such questions is not the result of a desire not to reveal professional secrets, the court may infer from such refusal to answer, that the witnesses could not answer such questions in the negative; this inference may be indulged where there is other proof tending to establish the fact desired to be proven; but, as a general rule, it is best to treat a refusal to answer such questions as a total failure of proof.

The allowance by the chancellor appearing to be reasonable, and to have been made with a due regard to the means of the husband, will not be disturbed on appeal.

2. *Same—Appeals*—No appeal lies from a judgment granting a divorce, but an appeal lies from a judgment allowing alimony and an attorney's fee to the wife.

G. W. Whitesides for appellant.

Goodnight & Roak for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant sued his wife, the appellee, for a divorce, on the alleged grounds of adultery, and lewd and lascivious conduct. She denied the charge and alleged, as a cross-action against the appellant for divorce, abandonment, cruel and inhuman treatment, &c.; and the living in adultery by appellant with another woman, and having contracted a loathsome disease by sexual intercourse with another woman than the appellee. The trial resulted in a judgment dismissing the appellant's petition, and granting the appellee a divorce, and allowing her $400 alimony, and $150 attorney's fee.

The appellant can not appeal from so much of the judgment as grants the appellee a divorce; but he appeals from that part of the judgment that dismisses his petition and allows the appellee said $400 and $150.

As to the judgment dismissing the appellant's petition: There is proof showing that the appellee was guilty of adultery with at least two men; and, on the other hand, it is clear, from the proof, that the appellant was also guilty of adultery, and from the proof it is probable that the appellant lived in adultery with one woman; and the proof upon this subject, we think, is sufficient to sustain the judgment of the court. We also think that the proof shows that the appellant contracted a loathsome disease by sexual intercourse with another woman than the appellee. Upon this subject there is no positive proof; but one of his physicians says that he gave the appellant medicines usually used for that disease, but declined to answer the question as to whether the appellant had that disease; his other physician likewise declined to answer the same question. It seems that they declined upon the ground that it would be a breach of professional confidence in that case for them to answer the question in the affirmative; and the inference that the appellee would have us to draw from the refusal to answer is, that they could not answer negatively truthfully. It may be said that the physician's refusal to answer, upon the ground that the answer might lead to an indelicate and damaging disclosure, and for that reason declined to be interrogated at all upon that subject, without meaning to be understood that his answer, in the particular case, would prove that the person was diseased. But such was clearly not the physicians' purpose in this case. They, doubtless, would have answered negatively, if they could have done so truthfully; and their declining to answer was, evidently, because the answer would be damaging to the appellant.

So the question is, what inference is to be drawn from their declining to answer? Ordinarily, from the fact that a designing person, without being guilty of perjury, might cast a suspicion upon the character of an innocent person, if an unfavorable inference were drawn from his refusal to answer such questions, it is best, as a general rule, to treat it as a total failure of proof, so far as that answer is concerned. But such an answer may become strongly significant when there is other evidence proving the fact, which is the case here. And, as either of these charges defeats the appellant's right to a divorce from the appellee on the ground of the alleged adultery, his action was properly dismissed. Also, we can not review the granting of a divorce to the appellee on the ground of abandonment and cruel treatment.

Considering the appellant's worth, and the fact that he got some means by the appellee, and she was a help to him, the sum allowed to her was not excessive.

The judgment is affirmed.

GOFF, &C. V. ANDERSON.

(*Filed March* 7, 1891.)

Curtesy—Evidence—This action involves the right of curtesy of a husband in lands of his wife, depending upon the question as to whether the wife had given birth to a child that was born alive. The testimony of the wife that such child was born alive is but hearsay and incompetent; but the testimony of the husband and attending physician is competent to establish such fact. The husband states that he was present when the child was born, heard it breathe and make a murmuring noise; saw some motion of its arms and feet, and that it was born alive. The physician states that the child was born alive and breathed several times, though not living over one or two minutes; that the breathing was not full inspiration at any time, but a very distinct and labored effort to breathe; that the child did not have strength to establish a circulation independent of the circulation derived from the mother by the umbilical cord. *Held*—That proof of the child having been born alive was sufficient. A child may be born alive, although the navel cord may not have been cut. *Born*, as ordinarily understood, and, in fact, means brought forth; and a child is completely born when it is delivered or expelled from, and becomes external from the mother, whether the navel cord has been cut or not; and, if it is not at that instant dead, it is to be regarded as born alive for every legal purpose whatever.

W. M. Beckner and G. B. Nelson for appellants.

L. Hathaway for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

The single question in this action between the heirs at law of M. A. Anderson, appellants, and her surviving husband, appellee, claiming as tenant by curtesy land owned by her, is, whether there was issue of the marriage born alive.

Evidence of statements on the subject, made by her after date of the child's birth being merely hearsay, and, consequently, incompetent, the only testimony to be considered is that of the husband and attending physician.

The former states he was present in 1853, right over the child when born; heard it breathe and make a murmuring noise; saw some motions of its arms and feet, and that it was born alive. Though objected to, his evidence is competent; for, relating only to the state of the child when born, it does not come within any exception mentioned in section 606, Civil Code, to the rule contained in section 605, that a person is competent to testify for himself.

Dr. Combs states he was the attending physician, and that the child was born alive and breathed several times, though not living over one or two minutes. On cross-examination he said the breathing was not full inspiration at any time, but a very distinct and labored effort to breathe—a sort of struggling or gasping to get full inspiration; that the child did not have strength to breathe enough to establish circulation of blood independent of circulation derived from the mother through the umbilical cord; and that there was no perceptible breathing when the cord was cut. He further stated it was a case of foot presentation, where there is always danger of the cord becoming compressed and circulation stopped before the child's head can be delivered; and that if the child in question had been detained five or ten minutes longer there would have been no effort to breathe.

Whether a child is born alive is sometimes a close question, difficult for those not present to decide from the account given by those who were. On the other hand, there are particular signs which all agree show the fact indubitably one way or the other. And it may happen that a person present reaches a correct conclusion the child was born alive, without being able, after a long period of time, though a physician, to recollect fully and precisely all the symptoms, or to give satisfactory reasons for such conclusion.

In this case the attending physician was called on to testify about thirty-five years after the birth of the child; and even if the reasons given by him had not been entirely convincing, still his opinion, formed at the time from actual observation and examination, and now distinctly stated, could not be safely or reasonably rejected; especially as he has not been impeached nor contradicted, but sustained by evidence of the only other witness then present. But the evidences of live-birth mentioned by him do, we think, show the fact, independent of the positive opinion on the subject of himself and appellee. For if, as all know, breathing by a child just born is a true sign of life, an effort to breathe, or, in the language of Doctor Combs, a gasping or struggling to get a full inspiration, is equally convincing life is not yet extinct, just as a cry of pain, though ever so feeble, shows as conclusively that death, however near, has not actually come, as would the voice of a stentor.

But, it is argued, that because the child may not have been living when the navel cord was cut, it was not, in meaning of the statute, born alive. Born, as ordinarily understood, and, in fact means, brought forth; and a child is completely born when delivered, or expelled from, and becomes external of the mother, whether the placenta has been separated, or the cord cut or not. Legal Med. by Tidy, volume 2, 154; Ewell Med. Jour., 111. And if not at that instant dead, it is to be regarded as born alive, for every legal purpose whatever. To give the word, as used in the statute, a different meaning, would be simply perversion without reason or excuse.

Counsel has cited the case of Doe v. Killen, 5 Del. 14, where the judge, upon trial of an action of ejectment between the surviving husband and heirs at law, charged the jury that, to find for the former, they must believe the child was born alive, having an independent circulation and existence of its own, apart from the mother, and by force of the child's own inherent vitality; and, though not distinctly so stated, it may be inferred the judge intended such independent circulation should exist after the navel cord was cut. We have been referred to no other authority for such view, and we can not sanction it. For a child, when delivered, is either alive or dead, for all purposes; and, to make its legal existence date from the time a physician may, in his wisdom, see proper to cut the navel cord, is without reason, and contrary to the plain meaning and intent of our statute.

We think the court properly found the child in question was born alive, and that the appellee was entitled, as tenant by curtesy, to the land owned by his wife.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

COOPER V. NELSON & DABNEY.

(Filed April 29, 1891.)

1. *Power of partner to bind the firm*—In commercial partnerships the extent of a partner's power to bind the firm is a question of law, while in non-commercial partnerships, it is a question of fact.

2. *Same*—In a non-commercial partnership, such as a partnership in the business of farming, one partner has no implied power to bind the other by borrowing money or issuing commercial paper in the name of the firm, unless it was necessary to the carrying on of the firm business or was usual in similar partnerships.

In an action against a firm upon bills of exchange drawn in the firm name, appellant, one of the two partners, filed a separate answer, alleging that he and his co-defendant were partners in the business of farming only, and that the money was borrowed by his co-defendant for his own individual use, without the knowledge or consent of appellant, none of it being used by the firm or going into the assets of the partnership, and that in borrowing the money his co-defendant acted without authority and outside of the scope of the partnership business. *Held*—That the answer presents a good defense, and it is incumbent on plaintiff to prove either that the money was borrowed in the necessary course of the firm business, or that borrowing money is the custom and usage of that particular branch of business, or that the partner who borrowed the money had express authority for so doing.

3. *Same*—Although the debt for which the bills sued on were executed may have been such a debt as the partner who signed the bills had the right to incur in the conduct of the partnership business, that in itself did not confer authority upon him to bind the firm by signing the firm name to bills of exchange.

C. H. Bush for appellant.

Wood & Bell for appellees.

Appeal from Christian Court of Common Pleas.

Opinion of the court by Judge Yost.

Two bills of exchange, amounting in the aggregate to $205.66, each reciting that it was an advance on 15,000 pounds of tobacco, which the drawers agreed to send to the acceptors, tobacco warehousemen, for sale, or to pay them $4 per hogshead as commission, were drawn in the name of J. W. and M. J. Cooper, on Nelson & Dabney, and accepted by them, payable to the Bank of Hopkinsville.

At maturity they were paid by the acceptors, who then brought this action against the Coopers, as drawers for the amount so paid, with interest from the date of payment.

The appellant, M. J. Cooper, filed a separate answer, to which a demurrer was sustained, when he tendered an amended answer, which the court refused to permit him to file. Pleading no further, judgment was rendered against the firm, from which judgment the appellant prosecutes this appeal, complaining that the court erred in sustaining the demurrer, and in refusing to permit him to file his amended answer.

In other pleadings it was alleged that J. W. and M. J. Cooper were partners in farming only, and that the money was borrowed by J. W. Cooper for his own individual use, without the knowledge or consent of the appellant, none of it being used by the firm or going into the assets of the partnership; and, further, that in borrowing the money J. W. Cooper acted without authority, and outside of and beyond the scope of the partnership business.

The right of J. W. Cooper, as one of the partners, to hypothecate the firm property for a loan to the firm will not be considered in this opinion, as no attempt is made to enforce the contract or to correct the penalty named in the bills for a failure to deliver it, and even if the indebtedness for which the bill was executed was such as J. W. Cooper had the right to incur in the conduct of the business, that, in itself, would not confer the authority upon him to bind the firm by signing the firm name to bills of exchange. Linn, cashier, &c. v Valz, 11 KY LAW. REP., 846.

It will be conceded that parties farming jointly are merely of a non-trading or non-commercial partnership. In Judgev. Braswell, &c., 13 Bush, 67, the partners were engaged in buying land, and the court holding that this was a non-commercial partnership, laid down the rule that in this class, one who seeks to hold the firm bound upon a contract made by a single member, must be able to show either express authority, or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his co-partners with the requisite authority, the distinction being that in commercial partnership, the extent of a partner's power to bind the firm is a question of law, while in a non-commercial form it is a question of fact. In Breckinridge v. Shreve, 4 Dana, 375, the court held that the borrowing of money was no part of the business of, and could not be considered as coming within, the scope of the partnership transaction of a firm of attorneys, and that one member was not bound by the act of another in so doing.

In Smith v. Sloan, 37 Wis., 285, the partners being lawyers this same doctrine is announced. In Deansdorf v. Thacher, 78 Mo., 128, the court held that members of a firm in the insurance, real estate and collecting business, had no implied power to bind each other by borrowing money or issuing commercial paper in the name of the firm, without express authority therefor, unless it was necessary to the carrying on of the firm business, or was usual in similar partnerships.

In the absence of necessity, authority, or that it was done within the scope of the partnership business, the power has been denied to one of several mining partners, quarry workers or farmers, to bind the firm by borrowing money or putting the name of the firm to negotiable instruments. Lindly in Partnership, 267, and cases cited there.

Mr. Story, in his work on Partnership, section 126, says that if a partnership is organized for farming purposes, the members of the firm will not, as incident thereto, possess the power to draw or accept bills, or draw or indorse notes, for the firm, unless there be proof that an express authority is given for the purpose, or is implied by the usage of the business. Cited as authority, Greendale v. Dower, 7 B. & C., 635; Dickerson v. Valpy, 10 B. & C., 128; Mullett v. Hutchinson, 7 B. & C., 639, and Wicknesse v. Brownlow, 2 Cro. J., 425.

Following in this case the law as given in Davis, Moody & Co. v.

Wiley, 3 KY. LAW REP., 315, we hold that J. W. Cooper could bind the firm in all business relating to the partnership and in the regular and necessary course of the business, whether the partnership was commercial or non-commercial. But under the pleadings we must take it as true.

First. But the borrowing of the money was not necessary to the carrying on, nor within the scope of, the partnership business, and that none of it was used by the firm or for firm purposes.

Second. But it was borrowed without appellant's authority, knowledge or consent, and the act was never ratified or agreed to by him.

These pleadings certainly set up a good defense to the action, and, before the appellee can recover, it is incumbent on him to prove either that J. W. Cooper borrowed the money in the necessary course of the firm business, or that borrowing money is the custom and usage of that particular branch of business, or that he had express authority for so doing. The court should have permitted the amended answer to be filed.

The judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

BELL-COGSHALL CO. v. BRADEL.

Filed January 14, 1891. Appeal from Louisville Chancery Court. Opinion of the court by Judge Young, affirming.

In order to bind the wife for necessaries for herself and family, it is essential that the sale should be made to her at her instance and request, and the credit given to her.

Lumber and materials used in building a dwelling on the wife's land were charged by the creditor to the husband, under the belief that he owned the land on which the house was built. When the creditor discovered that the wife owned the land, he changed the entry and charged the account to her, and husband and wife executed their joint note for the amount. *Held*—That the wife is not bound.

E. S. Watts for appellant; C. B. Seymour for appellee.

ELIAS & SHEPHERD v. GILL.

Filed January 28, 1891. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, reversing.

Suit to recover money lost in betting on horse races—Burden of proof—In this action to recover of defendants certain sums which plaintiff alleges he had lost and paid to them in wagering on horse races, defendants, in the first paragraph of their answer, denied that plaintiff had lost to them any moneys in wagering on horse races, and in the second paragraph alleged that they had lost and paid to plaintiff a certain sum in wagering with him on horse races, for which they asked judgment, further alleging that said

sum was lost and paid to plaintiff at the same times and places, and as a part of the same transactions set out in the petition. Plaintiff, for reply, alleged that defendants were professional wagerers against the public, and that he was one of the public and not a professional wagerer. *Held*—That the burden of proof was on plaintiff, and the court erred in holding that the only issue was whether or not plaintiff was in the transactions mentioned a professional wagerer, and that the burden of proof was on defendants. While the defendants admit that plaintiff wagered with them on horse races, their pleadings are to be construed as alleging that whenever he did so wager with them they were the losers.

Wm. Gobel for appellants; Hallam & Myers for appellee.

HAYDEN v. CROUCH.

Filed February 4, 1891. Appeal from Washington Circuit Court. Opinion of the court by Judge Yost, affirming.

Partnership—One partner can not claim compensation for services to the firm without a special agreement therefor.

C. C. McChord for appellant; J. W. S. Clements for appellee.

WEIHING v. KURFES.

Filed February 4, 1891. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Yost, affirming.

Recovery of money paid upon moral consideration—Although plaintiff was under no legal obligation to pay defendant for his board in the absence of an agreement therefor, yet there was a moral obligation resting upon him to pay therefor, and having done so by crediting defendant by the interest upon a note which the defendant owed him, and surrendering the note upon payment of the principal, he can not now recover interest upon the note, and thus recover back the board which he had paid.

Willson & Thum for appellant; Marc Mundy for appellee.

COMMONWEALTH v. SLAUGHTER.

Filed February 4, 1891. Appeal from Boyle Circuit Court. Opinion of the court by Judge Young, affirming.

1. *Indictment*—To constitute a good indictment under the Criminal Code, it is necessary that the name of the offense should be given in the accusatory part of the indictment. And where a statute creating an offense does not give the offense a name, but merely describes it, an indictment under the statute should, in naming the offense, follow the statute.

Under a statute making it unlawful for any person to sell spirituous, vinous or malt liquors within certain limits, an indictment charging the defendant with "the offense of selling liquors unlawfully, committed as follows," &c., is not good.

2. *Same*—An indictment for a statutory offense need not negative an exception or proviso of the statute which is not in the enacting clause, although it may be in the same section.

William Herndon and P. W. Hardin for appellant.

AULTMAN & CO. v. PERKINS, ADM'R.

Filed February 4, 1891. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Young, affirming.

Principal and agent--Conversion—If an agent to sell machines had no right to make any use of a machine left with him by the principal, then any use of it was a conversion. But if he had a right to use it for the purpose of testing it and thereby facilitating its sale, he was not guilty of a conversion by using it, unless he used it in an unreasonable or unauthorized manner.

An agent to sell threshing machines agreed with the principal to keep the

machines well housed, clean, bright and well cared for, and always subject to the order of the principal, and to be accountable to the principal for any losses or expenses resulting from any deviation from this agreement. The agent used the machines in threshing grain for pay. Thereafter the principal, with full knowledge of the use the agent had made of the machines, had them cleaned, and did not, until the machines had been destroyed by fire, notify the agent that he elected to treat the use that had been made of the machines as a conversion. *Held*—That the agent and one who guaranteed the performance of his contract are only liable for the depreciation in value of the machines by reason of the use which the agent made of them.

Willson & Thum for appellants; Rodman & Brown for appellee.

HINKSON, &C. v. COMMONWEALTH.

Filed February 11, 1891. Appeal from Harrison Criminal Court. Opinion of the court by Judge Young, reversing.

1. *Forfeited bail bond*—There can be no forfeiture by the circuit court of a bail bond taken in an examining court until there has been filed with the clerk a copy of the order of the examining court admitting the accused to bail, or some memorandum signed by the judge who held the examining court, showing that the accused was held to bail.

2. *The filing of a paper* can only be effected by bringing it to the notice of the officer authorized to receive it, and placing it in his custody or under his control. The depositing of a paper in the office without delivering it to an officer authorized to receive it, is not a filing.

Ward & Kimbrough for appellant; M. C. Swinford and P. W. Hardin for appellee.

LONG v. BRANNIN, BRAND & GLOVER.

Filed February 11, 1891. Appeal from Carroll Circuit Court. Opinion of the court by Judge Young, affirming on original and cross-appeal.

Settlement of accounts—Appellees having furnished to appellant money with which to buy tobacco, under an agreement by which appellant was to ship his tobacco to their tobacco warehouse to be sold by them, and the proceeds applied to appellant's indebtedness to them, in this action involving a settlement of accounts between the parties in which there was a reference to, and a report by, the master commissioner, the action of the court in sustaining and overruling exceptions to the report was proper, and judgment was rendered against appellant for the proper amount.

J. S. Gaunt. R. W. Masterson and D. M. Bridges for appellant; Winslow & Winslow for appellees.

DWELLING HOUSE INSURANCE CO. v. FREEMAN.

Filed February 11, 1891. Appeal from Washington Circuit Court. Opinion of the court by Judge Yost, reversing, Judge Young not sitting.

1. *Insurance—Proofs of loss*—While the failure to make proofs of loss within the time required by a policy of fire insurance does not work a forfeiture of the right to recover upon the policy, yet such proofs must be made before the institution of an action upon the policy, unless waived by the company. And whether or not there had been such a waiver, should have been submitted to the jury in this case under proper instructions.

2. *An overvaluation placed upon the insured property* by the insured, in his application for insurance, will not render the policy void, unless it was made with the fraudulent purpose of deceiving the company.

Young, Mitchell & Young and Edward W. Hines for appellant; J. W. S. Clements for appellee.

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KENTUCKY COURT OF APPEALS.

MALONE v. COMMONWEALTH.

(*Filed March* 7, 1891.)

Criminal law—Unlawful detention of female—Appellant, on this appeal, complains of a conviction for unlawfully taking and detaining a woman against her will, with intent to have carnal knowledge with her. The proof showed that appellant, at night, went into a room where a girl between thirteen and fourteen years of age was asleep, and, after removing the bed clothing and her own clothing from over her, kissed her person, his pants being unbuttoned. *Held*—That said conviction was proper, as the proof shows there was an actual taking and detaining of the woman, and the fact that she was asleep does not lessen the enormity of the offense, as her *consent* was lacking. It is enough to constitute this offense to show that the consent of the female was not given. Mere passive submission, without being conscious of the act about to be committed, does not excuse the perpetration of such a deed.

M. A. Walker for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This is a conviction under section 9, article 4, chapter 29 of the General Statutes: "Whoever shall unlawfully take or detain any woman against her will, with intent to marry such woman, or have her married to another, or with intent to have carnal knowledge with her himself, or that another shall have such knowledge, shall be confined in the penitentiary not less than two nor more than seven years."

The evidence shows that the appellant, John Malone, between

seven and eight o'clock at night, stealthily went into the room where Annie Divine, a girl between thirteen and fourteen years of age, was sleeping, and, without waking her, removed the bed clothes from over her, pulled up her clothes, and kissed her naked person, his pants being unbuttoned and his person exposed. There was a light burning in the room, and just at this time he was detected and taken away.

He does not, in testifying as a witness, deny the acts named, but being in the habit of staying at the house occasionally, he says, owing to his being somewhat intoxicated, he concluded he would go up stairs and go to sleep, and that he did not know the girl was in the room.

It is contended upon this state of facts that the appellant is only liable for an assault, and that his case does not fall within the statute under which he has been indicted. His counsel, therefore, at the close of the testimony for the prosecution, asked the court to peremptorily direct an acquittal. This was denied.

The object of the Legislature in enacting this statute was to create a less offense than that of rape, or an attempt to rape, but to hold one, who should be guilty of the conduct named in it, liable for felony; and to do so the taking or detention must be *against the will* of the woman.

It is said there was no taking or detention in this instance within the meaning and purpose of the statute, and that the appellant did nothing against the will of the girl. It is evident his purpose was to have carnal knowledge of her. His conduct and condition of his clothing admit of no other explanation. What he did was not only "a taking" of her, but also "a detention" against her will in law. Undoubtedly, if the female be conscious, or in possession of her will, then such conduct must be shown upon the part of the accused, for the purpose of taking or detaining her to have carnal knowledge of her, as subordinates that will to his control.

This is so in a case of rape. It was the old doctrine, however, that it was necessary to show that the carnal knowledge was had against the will of the woman, but the rule has properly been so far altered as to make the offense complete if it was committed without her consent.

Wharton says: "The original doctrine that it was necessary that the act should be *against the woman's will*, may now be considered as so far modified to make it sufficient to constitute the offense that it should have been committed without her consent." 1 Wharton's Crim. Law, section 1141.

There are cases where the will of the woman may remain passive, and yet the offense of rape be complete. She may be insensible from some cause, as from the use of stupefying drugs or otherwise, and, therefore, unable to object. In such case justice and the protection of female virtue require that the act shall be regarded as having been done without her consent, and the offender can not shield himself because she neither said yea or nay. This statute should be interpreted to conform to this view.

Suppose the man uses no force, but detains the woman to have carnal knowledge of her by getting her intoxicated. She has no power over her will; it is passive; but yet, should he not be held as an offender under the statute, just as he would be held guilty of rape in case he accomplished his purpose? Why should this not be equally true, if she be asleep, and he takes possession of her for such purpose? The statute uses the words, "take or detain."

The appellant had certainly taken possession of the girl for the

purpose of carnally knowing her; and although she was asleep, and, therefore, incapable of exercising her will in the matter, yet it was in law a detention or a taking of her against her will.

Judgment affirmed.

ARNETT V. ANDERSON'S ADM'R.

(*Filed March* 10, 1891—*Not to be reported.*)

Judicial sales—Failure to execute bond for purchase money—A purchaser of land at a judicial sale was informed by the commissioner that a survey of the land would be made on the following day, when the purchaser should execute his bond after the amount of land should be ascertained. On the day named the survey was made, and the purchaser was ready and willing to execute his bond; but owing to a mistake made by the surveyor, a re-survey was agreed on which would be done within eight or ten days, after which the commissioner should notify the purchaser, when he could execute his bond. After the lapse of nearly two months from the day of sale the purchaser was notified to execute the bond, but which he refuses to do, alleging as excuse therefor that he is released from compliance therewith by reason of the unreasonable delay of the commissioner in notifying him of the survey. *Held*—That such delay excuses him.

Wood & Day for appellant.

White & Brooks for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

The master commissioner, at decretal sale, sold the land of Anderson, deceased, in two parcels—one lying on the east side and the other on the west side of the turnpike road. The appellant purchased the parcel lying on the west side of the road at the price of $91.50 per acre, and the master informed him that he would have it surveyed the next day, in order to ascertain the quantity, at which time he could execute bond for the price. The master did have the land surveyed the next day, and the appellant was present and ready and willing to execute his bond for the price; but the surveyor having made a mistake in the survey, the master proposed to defer the taking of the bond until a re-survey could be had, and by reason of another immediate engagement which could not be postponed, he fixed eight or ten days' hence, as the time for making the survey, and promised, according to the positive recollection of both the appellant and Raimey, to notify the appellant of the survey, when it was made, and Raimey was to assist in making the survey; but the master was to notify the appellant of the fact.

The master's evidence upon the subject of notice is not positively contradictory of the appellant and Raimey's evidence. He says that it was his understanding, though he was not positive of the fact, that Raimey was not only to assist in making the survey, but was to notify the appellant of the fact. Hence, he did not think it his duty to give the notice, and he did not do so until after he had learned that the appellant had bought other land and would not execute the bond.

This notice was given on the 25th day of November, and the sale was made on the 3d of October preceding. The appellant swears

that at the time of receiving the notice he had several days before concluded, from the unreasonable delay in notifying him, that his bid had been rejected by the master; consequently, he regarded the bid as abandoned on both sides and he bought other land.

As intimated, the weight of the evidence is clearly to the effect that the master was to notify the appellant, who lived about twenty-five miles away, when there was a re-survey of the land and his readiness to receive the bond.

It is also clearly established that this re-survey was regarded by all the parties as a condition preceding the appellant's duty to give the bond, which condition devolved on the master to perform, and the appellant's willingness to sign the bond in blank, trusting the master to fill it up with the proper amount, was not accepted, but the idea was mutually abandoned. Hence, it can not be said that the condition was waived by the appellant; on the contrary, it was adhered to by all parties. Hence, as said, it was, by the agreement, the duty of the master to notify the appellant, within a reasonable time, that the condition had been performed. So the question is, was the appellant notified within a reasonable time, and if not, did he regard the contract as abandoned and change his relation to it in consequence of such failure.

We think that the re-survey was to be made within about eight or ten days, and the master was to notify the appellant, within a reasonable time thereafter, of the event, so that he could execute the bond; and supposing that the land was re-surveyed within the time, the delay from then until the 25th day of November, following, to give notice would be unreasonable, and which would justify the appellant to change his purpose in regard to the purchase. Such delay, if caused by the delay to make the survey, would have the same effect.

The facts relieving the appellant from any contempt of court render it unnecessary to decide the other legal question as to whether the appellee is liable by reason of the court's failure to rule the appellee to show cause why he should not execute bond, else be mulcted in damages as for a contempt; but, instead, it ordered a re-sale without giving the appellant a chance to condone his default by executing a bond and taking the land, but ordered the same to be sold, and then cited the appellant to show cause why he should not be mulcted in damages for his failure to execute the bond.

The view we have taken of the case makes the question cease to be a business question in this case, but merely a law lecture, which is not within the scope of our employment.

The judgment is reversed with the direction to dismiss the motion.

BEATTY V. COMMONWEALTH.

(*Filed March* 10, 1891.)

Constitutional law—Special jury law for Jefferson county—The special act of the Legislature, approved February 21, 1890, providing a special method for the selection of jurors in Jefferson county, does not violate the provision of the constitution which guarantees the ancient mode of trial by jury, because it only changes the method of their selection, without changing the qualifications of jurors; nor is said act open to the objection that, under its operation, a class of jurors inferior to those provided by general law will be selected for Jefferson county.

Helm & Bruce and Andrew A. Haggan for appellant.

Frank Parsons and P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This appeal involves the constitutionality of the law of February 21, 1890, entitled "An act to secure a more uniform and equal distribution of jury service among the citizens of the county of Jefferson, and the city of Louisville."

It is claimed, first, that it severs Jefferson county from the balance of the State as to the jury system, and necessarily gives to it a class of jurymen inferior to that provided by the general law, thus violating that equality in the law required by the constitution; and, second, that it violates the constitutional guaranty of the ancient mode of trial by jury.

Notice of its provisions, and of the general law becomes necessary. It provides that the county assessor shall, every three years, or oftener if required, as therein provided, furnish to the jury commissioners a list of the names of all housekeepers within the county, from which they shall "*select*" jurors for the courts therein named. This is to be done by writing "the names of all persons" so furnished, upon slips of paper, "all" of the slips to be then deposited in a box, from which the commissioners are to draw the number of slips necessary to make the jury lists; and, after taking a list of the names so drawn, the slips taken out are to be placed in another box, and this process is to continue until the first box is empty, and then lists are to be drawn from the one in which the slips have been deposited, they, after the names have been transcribed, being returned to the first box, and so continue, as lists may be needed.

Section 8 provides: "That, in making up the jury lists, as herein required, the assessors shall exclude therefrom the names of all persons who are not at least twenty-one years of age, housekeepers, sober, temperate, discreet and of good demeanor;" and section six says: "When persons summoned to serve on the juries are found to be permanently disqualified, physically, mentally or morally, the clerk shall keep a list of all such for the said commissioners, who shall strike their names from the assessor's list, and, as their names are drawn from the boxes, they shall destroy the slips."

This is all of the act necessary to be recited for the consideration of the question before us. Turning now to the law applicable to the State generally, we find that section 2, article 3, chapter 62 of the General Statutes, provides: "No person shall be a competent juryman for the trial of criminal, penal or civil cases in any court, unless he be a citizen, at least twenty-one years of age, a housekeeper, sober, temperate, discreet and of good demeanor;" and section 4, article 4, says: "They (jury commissioners) shall select, from the citizens of the different portions of the county, one hundred persons, or a less number if so directed by the judge, free from all legal exceptions, of fair character and approved integrity, of sound judgment and well informed, to serve as petit jurors at the next term of court;" and from the slips, upon which the names so selected are to be written, they are to draw thirty names, which are to constitute the jury list.

It appears, therefore, that by the general law, jurymen must be (1) citizens; (2) housekeepers; (3) twenty-one years of age; (4) sober; (5) temperate; (6) discreet; (7) of good demeanor; (8) of fair char-

acter; (9) approved integrity; (10) sound judgment, and, (11) well informed.

Under the act in question, however, the assessor is directed, in making out the names, to exclude only those who are not twenty-one years old, nor housekeepers, nor sober, nor temperate, nor discreet, nor of good demeanor.

This leaves out of view the requirements of the general law for jurymen, "of fair character, and approved integrity, of sound judgment and well informed;" and in this fact, it is said, consists the discrimination which will result in giving to Jefferson county an inferior character of jurymen; because, it is contended, that, under the act relative to it, the duties of the jury commissioners are altogether clerical, and that they have no right to repeat the names of those who are not of "fair character and approved integrity, of sound judgment and well informed."

In this view we do not concur, and the act, in our opinion, does not admit of any such construction. Undoubtedly, in a matter general to the entire State, there can be no discrimination against, or favoritism of, one locality.

Thus, creditors can not be allowed to charge ten *per centum* interest in one county, while the general law fixes the rate at six *per centum* in all the other counties of the State. A rule of evidence or pleading can not be made for one county different from that in force in the balance of the State. Property in one county can not be made to pay a greater rate of State tax than is paid by the other counties; but certainly the Legislature may constitutionally provide that an officer of a certain character may collect the tax in one county, while one of a different character does so in another; or that a mode of selecting jurors may be followed in one county which does not exist in the other counties, provided jurymen of the same character are selected or the same result reached. Nor would their mere selection, by a different officer from the one who by law was required to select them at the time of the adoption of our constitution, be treated as an impairment of the ancient mode of jury trial. If it be a matter of form, and not of substance, a mere change of manner in arriving at the same result, then there can be no ground of complaint to which a court will listen.

The evident, and only purpose of this act, as both its title and provisions show, is to secure a more uniform distribution of the jury service among the citizens of Jefferson county. It upholds rather than violates the constitutional principle of equality. As an aid to this end it requires the assessor to furnish, for the use of the jury commissioners, a list of all the housekeepers of the county, excluding certain persons therefrom; but it no where declares who shall be a competent juryman. It does not regulate the qualifications of jurors; it was not intended to do so, and is not, in this respect, a law for Jefferson county different from that which prevails in the balance of the State.

It does not provide that, after the assessor purges his list, as directed by the statute, all of the persons whose names are returned by him shall be competent jurymen.

It is, however, contended that it does so by implication by directing the names of "*all*" the persons so returned to be written upon slips of paper, and "*all*" of the slips to be placed in the box from which the lists are selected.

But, keeping in mind that the purpose of the statute is not to fix the qualifications of jurors, but merely *the manner* of selecting them, these expressions should not be construed as depriving the commis-

sioners of the power to strike from the list those who are known to them to be disqualified as jurors under the general law. If so, then the act would be held to relate to the qualifications of jurors, as well as the mode of selecting them. The first section of it declares that it is the duty of the commissioners *to select* the jurors. It no where provides the oath to be taken by them, but leaves them to be sworn, as provided by section 1, article 4, chapter 62 of the General Statutes, a part of the oath being that they will not "knowingly *select* any man as a juryman whom *you believe to be unfit and not qualified.*"

It can not for a moment be supposed that the Legislature intended to forbid their doing something which their oaths required them to do. The spirit of the law, and not its mere letter, is to be sought; and the plain object of this statute was to better the manner of selecting jurors, instead of debasing the system, and thereby also the administration of justice, by requiring a lower standard of qualification.

The assessor's list is to be furnished in order that the commissioners may have at hand the names of all the housekeepers of the county, but few of whom—being thousands in number in a county like Jefferson—would be remembered by the commissioners; and by way of aiding them in the performance of their sworn duties, the assessor is required to omit from the list the names of those whom he knows to be devoid of certain enumerated qualifications, and which are also required by the general law; and, as both the assessor and the commissioner may err in judgment, the sixth section of the statute, by way of further purging the lists, provides that if, after the jurymen are summoned, the court finds that any of them are disqualified, the names of such persons shall be furnished by the clerk to the commissioners to be stricken from the assessor's list, and the slips upon which their names are written to be destroyed as they are drawn from the boxes.

The act contains no repealing clause, and, of course, only such portions of the general law are repealed by implication as, considering the spirit of the statute, and the real meaning of its language, are manifestly inconsistent with it.

The implication of an intention to repeal must necessarily flow from the language employed. There must be such a conflict between the provisions of the earlier and the later law as to be irreconcilable by any fair construction. This does not exist in this instance. If the act in question were intended to relate to more than the mere mode of selecting jurors, it would be unenforcible because of incompleteness. It looks alone to the proper distribution of the burden of jury service, and it is still the duty of the jury commissioners to see that no one is selected as a juryman who is not qualified under the general law.

This being so, it is not open to the objection that it authorizes a grade of jurymen inferior to that provided by the general law, thus destroying the constitutional equality required as to each locality, in a matter general to the whole State. It is conceded that when our present constitution was adopted, the law then in force as to the qualifications of jurors was similar to the present general law.

That period of time must be looked to in determining what was the ancient mode of trial by jury, and whether the constitutional guaranty as to it has been violated. Collins v. Henderson, 11 Bush, 86. This being so, and as the act under consideration does not change the existing general law as to qualifications of jurors, but

only regulates the manner of their selection, it results that there has been no violation of this right.

The judgment is affirmed.

SCHNORBUS, &C. V. WINKEL, &C.

(Filed March 12, 1891—Not to be reported.)

1. *Fraudulent conveyance—Partition*—Two joint owners of land, in ignorance of their respective interests in the same, made a deed of partition between them, which seems to have been done as a compromise of some transactions between them. In an action to cancel said deed of partition, there being no evidence of fraud or undue influence, the prayer was properly refused.

2. *Pleading and Proof*—Where a prayer of a petition is for the cancellation of a deed of partition, and the facts show no ground for granting the relief prayed for, the court will not give judgment against one party for a sum of money owing to the other, nor adjudge to one party possession of a house to which he may be entitled, because there is no prayer for such relief.

Orlando P. Schmidt for appellants.

H. J. Gausepohl and B. F. Grazianni for appellees.

Appeal from Covington Chancery Court.

Opinion of the court by Judge Lewis.

Appellants, Louis and Mary A. Schnorbus, husband and wife, brought this action against appellees, Catharine Winkel, daughter of Mary A., by a former husband, Gerhard Kolter, and her husband, Herman Winkel, to cancel and set aside a deed of partition between mother and daughter. Gerhard Kolter left a lot of land, in which Mary A. had a dower estate, and their children, two of whom died childless after arriving at full age, which resulted in their mother acquiring a fee in the lot. But one of the children having mortgaged his interest, the lot, or his interest, was sold under judgment, and purchased by Louis Schnorbus, though a part of the lot was sold and conveyed, and the purchase price thereof used to pay the sale bonds given by Louis Schnorbus, who, some years after the judicial sale, caused the commissioner of court to convey the residue of the lot to him.

The ground upon which the deeds of partition are asked to be set aside is, that the appellants entered into the agreement by mistake, and in ignorance of their rights, and were misled and defrauded by appellees.

There may have been a question as to the precise quantity of the lot owned by Mary A. Schnorbus and her daughter, Catharine Winkel, respectively, which, however, could have been easily determined. But they seem to have made the deeds of partition as a compromise, whereby the lot was divided, each getting absolute title to a part thereof, the dwelling-house being upon the part which Catharine Winkel got, who agreed to pay her mother $500 to make up the difference.

There is no proof of ignorance or mistake on the part of Mary A. Schnorbus, nor of fraud on the part of appellees; but the real ground of complaint, as manifested in the deposition of the former, was the

failure of appellees to pay the $500. The court, therefore, properly dismissed the action, and refused to render judgment in favor of appellants for the money because there was no prayer for it; and for the same reason no judgment was rendered in favor of appellees for possession of the house.

Judgment affirmed.

THOMAS, &C. V. COMMONWEALTH.

(*Filed March* 12, 1891—*Not to be reported.*)

1. *Larceny—Jurisdiction*—Appellant having committed larceny by stealing bacon in Bourbon county and carrying it into Montgomery county, was properly indicted and tried in Montgomery county, as he could have been prosecuted in either county.

2. *Verdict—Signing by a juryman*—A verdict of conviction for grand larceny having been signed by a member of the jury, without styling himself "foreman," was sufficient.

H. Clay McKee for appellants.

P. W. Hardin for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The testimony in this case leaves no doubt as to the guilt of the appellants, and the only question is, was the offense grand larceny? The two women, by the same verdict, were found guilty of petty larceny, but that part of the verdict was set aside for the want of evidence to support it. They only accompanied the men for an evening ride, and when in the country the appellants concluded to break open the meat-house of the owner and took from it the bacon, for the stealing of which they have been convicted.

If the testimony of the owner is to be believed the offense was grand larceny, although the appellants swear as to the number of pieces taken and their value. How much they may have secreted elsewhere is not known. It may be that their statement is correct, but the jury heard the whole case upon the proof and were satisfied that the meat taken exceeded the value of $10. The statement of the owner authorized such a conclusion, and for a felony like this, with the proof clearly and indubitably established, there is no reason presented for disturbing the verdict. The moral character of the accused, who stood in court with the crime confessed or clearly proven, could not have influenced the verdict as to the punishment.

The verdict is signed by one of the jurymen and was returned into court by the entire jury, and whether it was signed by the juror as *foreman* is wholly immaterial. The instructions in regard to secreting the meat did not affect the question as to the felonious taking. The meat was stolen, and the theft committed by the appellants, from the meat-house of the owner in Bourbon county, and carried to Montgomery county and there disposed of.

It is argued that the Montgomery Circuit Court had no jurisdiction of the offense. It is a familiar doctrine that where a larceny is committed in one county and the property stolen removed to another, with the felonious intent to appropriate it, the offender is guilty of the offense in each county. This is the common-law rule, and the statute in regard to a larceny committed in another State,

with the property stolen brought into the State, making the offender guilty of larceny, has no application to this case. The parties have been indicted under the common-law rule.

Judgment affirmed.

WILSON V. POPHAM.

(*Filed March* 12, 1891.)

1. *Disbarring attorneys—Pleading*—Under section 10, article 1, chapter 5, General Statutes, a proceeding was begun by appellee filing his affidavit, alleging the failure of appellant, as an attorney-at-law, to pay over money collected by him as attorney for appellee, upon which a rule was awarded against appellant requiring him to show cause why he should not pay over said money. Appellee, by leave of court, filed an amended affidavit, and the court overruled a demurrer filed to the original affidavit; it also overruled a motion of appellant to quash said rule, and entered judgment suspending appellant from practice in *all* courts in the State for twelve months and until he should pay over said money. *Held*—That the action of the lower court in failing to sustain the demurrer before permitting an amended affidavit to be filed, is not a reversible error, and the judgment of court disbarring appellant, following his refusal to plead, was proper.

2. *Parties to actions*—In proceedings against an attorney for commission of acts in violation of his duty as an officer of court, as prescribed by common law, the Commonwealth is the proper party plaintiff, but in proceedings against an attorney for failure to pay over money, as prescribed by statute, the party injured is the proper party to prosecute such action.

H. T. Wilson for appellant.

P. W. Hardin for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Holt.

Article 1 of chapter 5 of the General Statutes provides:

"SEC. 10. If an attorney-at-law shall collect the money of his client, and on demand wrongfully neglect or refuse to pay over the same, the circuit court of the county in which the money may be collected may, after notifying the attorney to show cause against the same, suspend him from practice in any court for twelve months and until the money shall be paid.

"SEC. 11. Before any such motion shall be entertained a demand of the money shall be made of such attorney in the county of his residence, and no such proceeding shall take place unless it is commenced within two years next after the collection of the money."

Under this statute the appellee, Popham, as plaintiff, obtained upon his affidavit a rule against the appellant, H. T. Wilson, to show cause, if any he had, why he should not pay over to him by a certain day a certain sum, which he had collected as his attorney. The appellant demurred and also moved to quash the rule; but before any disposition thereof the appellee moved to file an amended affidavit, and this being allowed, the court thereupon overruled both the demurrer and the motion of the appellant to quash the rule.

The original affidavit was manifestly defective. It failed to state that the payment of the money had been demanded of the attorney

in the county of his residence, and did not show when it was collected or in what county.

Complaint is made because the court permitted the amended affidavit to be filed before it disposed of the demurrer and the motion to quash the rule. Appellant says he came first to the hopper with his grain, and was, therefore, entitled to the first grist. As the record is made out, the motion to file the amended affidavit was made before the filing of the demurrer or the motion to quash the rule; but as this may be a clerical error it is not improper to say that, even if the court ought first to have acted upon the demurrer and sustained it, yet its failure to do so is not a reversible error. The costs to which the appellant would have been entitled by his demurrer being sustained, would have been inconsiderable, and the defects of the original affidavit were remedied by the amended one.

It is urged, however, that the motion to quash the rule should have been sustained, first, because the rule is not comprehensive enough and does not support the judgment, which suspends the appellant from practice in all the courts of the State for twelve months and until he shall pay over the money he has collected; and, second, because the proceeding should have been in the name of the Commonwealth. The rule was only to show cause, if any existed, why the money should not be paid; but in the absence of a denial by the appellant of the statements of the appellee's affidavits, and upon the confession of the appellant, by his failure to plead, that he had not only collected the money, but had failed, without cause, to pay it over, it was the duty of the court, by way of judgment, to enter the order suspending him from practice. The rule was sufficient in merely requiring him to show cause for the non-payment of the money. This was the material matter. If good cause were not shown, then the suspension from practice, by way of judgment, flowed from it as the sentence does in a criminal cause, when the accused has been found to have committed the act, and the penalty is fixed by law.

The appellant, being an attorney, was an officer of the court. As it could admit him to practice, if qualified and of proper character, so it necessarily possesses the inherent power—to be exercised, however, in accordance with the law of the land—to disbar or suspend him from practice for misconduct as an attorney. The character which he must possess at the outset must be retained. This is necessary to insure public respect for the courts and the honest and proper transaction of their business. This is not a proceeding, however, by virtue of this inherent court power—or perhaps, more properly speaking, a power arising from the common law—but one under the statute. In the former case it is quite proper that it should be in the name of the Commonwealth. There may be no complaint to the court of the misconduct; it may occur in its presence.

The Commonwealth must necessarily, in such case, be the adverse or prosecuting party. There can be no other. We, therefore, find that in the cases of Rice v. Commonwealth, 18 B. M., 472, Turner v. Same, 2 Mich., 619, and Baker v. Same, 10 Bush, 592, and other cases, the proceeding was in the name of the Commonwealth. It was not based upon any statute; it was for such alleged misconduct as, if true, the court, in the exercise of the inherent power necessary to its own proper existence, but which must not conflict with the law of the land, had the right to punish by the suspension of the offender from practice; as, for instance, if he has improperly changed a writing offered in evidence, as was the fact in the Rice case.

In all such cases, although the charge may, in some instances, be preferred by private individuals, yet the proceeding should be in the name of the Commonwealth, as was held in the Turner case. There may be no individual immediately interested in it; it may only affect the public generally; as, for instance, an act which tends to impair that public respect for the court which is necessary to the proper administration of justice.

This proceeding is, however, under a statute which relates to but one act of an attorney. It embraces a single act of misconduct, and that is one where there is always a person immediately and directly interested. It is true the public are incidentally interested, and, therefore, the Legislature, upon the idea likely that otherwise it may not be properly prosecuted, has provided that the attorney for the Commonwealth shall attend to the proceeding. The statute does not say in whose name it shall be carried on; and in view of the fact that there is always a person directly interested in the proceeding, it seems to us it should be prosecuted in his or her name. Under the statute this person must take the preliminary steps necessary to its institution. He only can demand payment of the money; and as he is immediately interested and knows whether there is ground for the proceeding, he should, in case it be unfounded, be responsible for the costs to the attorney. He is, therefore, the proper party to the proceeding, because if he can, without proper ground, act in the name of the Commonwealth, then there can be no judgment for costs to the attorney, and he is remediless, although another was immediately interested and directly instrumental in putting the proceeding upon proof. The motion to quash the proceeding was, therefore, properly overruled.

It is contended that the judgment is too sweeping; that it covers too much territory, by suspending the appellant from practice in *all* the courts of the State for twelve months and until the money shall be paid. It is urged that the statute, by providing that the court may suspend the attorney from practice "in *any* court," means a single court of the State; that otherwise it would have said, "all courts." The latter, however, is what it means, and is substantially what it says, in our opinion. If this were not the intention and its proper construction, it would avail but little. The duty of enforcing this statute is a delicate one; so much so, that it is perhaps not done in some proper cases; and while it should be discreetly exercised, because it involves the professional existence of the attorney, yet, as has been said, not only individual interest, but that of the public, demand a fearless exercise of the power whenever a proper case is presented.

The judgment is affirmed.

ESTILL COUNTY v. R., N., I. & B. R. R. Co.

(*Filed March* 14, 1891.)

Pleading—Verification—This action was instituted by order of the justices, sitting as a court, to enjoin the delivery to appellee of certain bonds, alleged to have been issued illegally by the agents of said county. The petition was dismissed for failure and refusal of the county judge to verify the same. An amended petition was offered to be filed, which was verified by some of the justices, who stated that the county judge was opposed to the institution of the action. The court refused to permit the amended

pleading to be filed, and dismissed the action from which this appeal is prosecuted. *Held*—That in case of the refusal of the county judge to verify the pleading, the county attorney should do so, and, in the event of his failure to do so, the justice or justices should be permitted to verify it; otherwise the ends of justice might be defeated, because of the opposition of the county judge.

J. B. White, Grant E. Lilly, W. H. Lilly and Turner & Son for appellant.

Appeal from Estill Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellant, by order of its justices, sitting as a court, instituted this action against the appellee to enjoin the delivery of some bonds to the appellee, claimed to have been wrongfully and illegally issued by the agents of the county to the appellee.

The appellant was required to verify its petition, and the county judge refusing to verify the same, it was dismissed for want of verification. Thereon, the appellant offered an amended petition, verified by some of the justices who concurred in bringing the suit, stating that the county judge opposed the bringing of the suit and refused to verify the same for that reason, and asked that they be allowed to verify the same in his stead. The court would not allow the amendment to be filed, and the action was dismissed, and the county has appealed.

Subsection 2 of section 117 of the Civil Code provides "that the petition of a county * * * must be verified by its chief officer, * * * residing in the county; or if there is no such officer residing in the county, it may be verified by its attorney."

The chief officer referred to is the county judge, who must verify the petition, if there be such judge residing in the county; if not, then the county attorney may verify the same. These persons are designated as the proper persons—the one in the absence of the other—to verify the petition, evidently because of the fact of their being more immediately connected with the management of the business of the county, and, consequently, should verify its pleading. But the county judge, opposed to the proposed action by the county, which it has the right to institute independently of his wishes, and which it does authoritatively order instituted, undertakes to defeat its action by refusing to verify its petition. If this should be allowed, justice would be at the mercy of the county judge, who is only the designated agent of the county for the purpose of the verification, and it would fail whenever he set himself up in opposition to the authority of the county in the matter of bringing an action for the redress of grievances. To avoid this unfortunate condition the county attorney should have the right to verify it, and if he should refuse, some person authorized to order the action instituted should be permitted to verify the petition. This, of necessity, ought to be so to prevent a failure of justice.

The case is reversed with directions—the county judge still refusing to verify the petition—to allow the county attorney to verify the same, and, upon his refusal, to allow the said justice or justices to verify it.

HENDERSON V. COMMONWEALTH.

(*Filed March* 5, 1891—*Not to be reported.*)

Criminal law—Continuance—Instructions—This appeal is prosecuted from a conviction for manslaughter, in which appellant relies for a reversal upon the refusal of the court to grant him a continuance on the ground of absence of material witnesses, and of refusal to give instructions asked for by the appellant. *Held*—That the evidence of the absent witnesses was cumulative in its nature, and the instructions, even if erroneous, were not prejudicial, and the judgment of conviction is affirmed.

J. D. Jones for appellant.

P. W. Hardin for appellee.

Appeal from Carter Criminal Court.

Opinion of the court by Judge Lewis.

Appellant, having been indicted for the murder of Grant Henderson and convicted of manslaughter, seeks reversal of the judgment upon two grounds; first, refusal of the court to grant a continuance; second, refusal to give instructions asked for him.

There were three persons besides him present when the homicide occurred, one of whom was Mrs. Clark, sister of the deceased, and he stated in his affidavit one of the absent witnesses would testify she told him the defendant was not to blame for killing Grant Henderson, who brought on the difficulty himself.

It appears that the accused on his way home, accompanied by a man named Patrick, overtook the deceased, who was drunk, and had, perhaps, mistreated a woman then present, named Watson, by taking from her a basket, which she asked the aid of the accused to recover, and was given back to her. They all then started homeward, Grant Henderson being in rear of the other three, and when they got opposite to Mrs. Clark's house he was shot by the accused and died next day.

There is no material difference between the testimony of Mrs. Clark and that of Patrick and Watson, who were introduced by the defendant. They all agree that Grant Henderson was noisy and aggressive; that he offered to fight, and, in fact, said he could whip them all, and when shot was in the act of taking his coat off for the purpose of fighting, and had divested his person, except his left arm was not clear of it. And it is a reasonable inference that there would have been no violence done, at least on that occasion, if he had not made the demonstration he did, and that inference might have been drawn from her testimony, as well as that of the other two witnesses present. But they all agree that Grant Henderson distinctly stated that he wished and intended to fight with nature's weapons alone, and that he did not use, or threaten to use, a knife or gun. And it was further shown that he did not have about his person any weapon at all.

By the other absent witness the accused stated he would prove previous threats by the deceased against him. But such evidence would have been merely cumulative, for other witnesses testified on the trial to such threats, and also to previous difficulties between the deceased and accused, in which the former was the aggressor. There was abundant evidence of bad feeling between them, and on the same day of the homicide, in a village where they met, they had a difficulty, though, on that occasion, the accused was the aggressor.

If the absent witnesses had been present their testimony, even if they had sworn what the accused stated in his affidavit, would not have varied the fact, as it was proved by the three who were present that the accused shot and killed Grant Henderson, who was known by the accused to be unarmed, and before any attack or advance had been made upon him. It is true the accused testified Grant Henderson had an open knife, but he was contradicted by those present at the difficulty, as well as others who examined his person and found no weapon of any kind. As the evidence of the absent witnesses could not have changed the aspect of the case by showing any legal excuse whatever for the homicide, appellant was not prejudiced by the action of the court complained of; besides, proper diligence to procure attendance of the witnesses was not shown.

The instructions given by the court correctly and fully cover every legal issue involved in the case, and refusal of additional instructions asked for appellant did not prejudice his substantial rights, even if they had been without defect.

Judgment affirmed.

TRIMBLE V. CITY NATIONAL BANK OF PADUCAH.

(Filed March. 5, 1891—Not to be reported.)

Bills and notes—Liability of acceptor—Limitations—Appellant, as an acceptor of a bill of exchange drawn by an insolvent and addressed to ———, having for many years made partial payments on it, and finally having executed a mortgage to secure it, can not avoid liability by claiming, in this action, that he was merely an accommodation acceptor, and, therefore protected by the five or seven years' statute of limitation.

J. W. S. Bloomfield and Wm. Lindsay for appellant.

W. D. Green for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Pryor.

The principal question involved in this case, and the only one necessary to be considered, is as to the liability of the appellant, A. A. Trimble, on the bill of exchange drawn by L. L. Trimble.

The bill is addressed to ———, and is accepted by A. A. Trimble. L. L. Trimble became insolvent and left the State of Kentucky, after the execution of the paper, and the appellee, the bank, has been indulging the appellant, who now claims to be the surety only, for many years.

The answer filed admits the acceptance of the paper by the appellant, and the defense is that he was an acceptor for accommodation only—a fact known to the bank—and, therefore, is only liable as surety. Other defenses in regard to the application of payments, and the failure to dispose of collaterals were also made, none of which were available. Many payments were made on this paper, and, finally, a mortgage was executed by the appellant to secure its payment. The parties all treated the bill as if the appellant was personally liable, and, with his acceptance, he must be regarded as the principal debtor. This really is the only point at issue. It is well settled that the effect of an acceptance of a bill is to constitute the acceptor the principal; and even if accepted for accommodation, the

acceptor, if he pays the bill, can not sue the drawer on the paper but for money paid for him at his instance and request. See Daniel on Negotiable Instruments, section 532, page 488.

When the acceptor pays the bill the instrument becomes a nullity, and can be used as evidence only on the trial of the assumpsit, showing the obligation resting on the acceptor to pay it, if he only accepted the paper as a matter of favor, and the liability as between the two was on the drawer. Anderson v. Anderson, 4 Dana, 352.

It is argued that as the paper was addressed to no one, the appellant should be treated as a mere surety or endorser, and that the statute of five or seven years should apply. The demurrer in the answer of the appellant shows that he was really the acceptor of the paper, and so understood his liability at the time; and while the mere belief of the parties as to the paper being a bill or note would not, in every instance, determine its character, still, when it clearly appears that L. L. Trimble was insolvent, and in parts unknown, and payments made from time to time on the bill, and, in addition to all this, when the bank has accepted a mortgage and indulged the acceptor for such a length of time, upon the idea that each party, the appellant as well as the bank, regarded the acceptor as personally liable, it would be a harsh rule of law that would relieve the appellant of responsibility by reason of the lapse of time, on the ground of his being merely a surety on the paper.

We are of the opinion, therefore, that the appellant was properly made liable by the chancellor in his judgment below, and it is, therefore, affirmed.

BYRNE V. LONG.

(*Filed March* 14, 1891—*Not to be reported.*)

Contract—Fraud and undue influence—Appellant seeks, in this action, to compel appellee to execute to her a deed of conveyance for a house and lot which she claims under a written contract of purchase. Appellee resists such action on the ground that he was induced to sign said contract while intoxicated, and upon representations made to him at the time by the agent of the appellant, which induced him to believe that the contract he then signed was a lease, and not a contract for sale of the property. *Held*—That the lower court, having decided from the evidence that appellant was not entitled to the relief prayed for, that finding will not be disturbed on appeal.

W. H. Julian for appellant.

Geo. C. Drane for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, Mary A. Byrne, seeks to compel the appellee, John F. Long, to convey to her a house and lot. The petition avers that it was sold to her by a written contract, which is filed with it, on October 6, 1886, for $120, payable in $5 installments, on the first day of each month, and, that notwithstanding all the purchase money has been paid, the appellee has refused to make her a deed. It is insisted that the judgment dismissing the petition must be affirmed, because the contract contains no covenant to convey, and the petition does not aver any was ever made. This, however, is

implied where the property has been, in fact, sold by bond, and payment made.

The defenses are: First, that the appellee was at the time mentally incapable of making the sale, by reason of intoxication; and, second, that he was induced to sign the writing by the agent of the appellant falsely representing to him that it was a lease of the property for two years to her.

The testimony is very conflicting. So much so as to be utterly irreconcilable. We must, therefore, adopt that version of the transaction which is the most reasonable.

The appellant had been renting the property of the appellee for several years prior to October 6, 1886, at $5 or more per month. She says that about noon on that day, and at the house, her agent, who is dead, prepared, and the appellee, being then entirely sober, as she says, signed the contract filed with her petition; and that her agent, by her authority also, then gave appellee the writing which is filed with the answer, and which, epitomized, states the sale; the price and time of payment; description of the property, and that if the appellant fails to make any one of the $5 payments, for fifteen days after its maturity, then she is no longer to hold the property.

The appellant is somewhat sustained in this version of the matter by a servant, and also by "a woman of the town," who had a room in the house. Their testimony is, however, not of an altogether satisfactory character. Another woman, who also had a room in the house, testifies that on October 7, 1888, which was the day after the last payment was made, the appellee came to the house, and, upon the appellant demanding a deed of him, said that she had gotten the house too cheap, and that if she would give him forty dollars more she might have it.

The appellee denies all this. It appears October 7, 1888, was Sunday. He lived several miles from the house, which is in the city of Frankfort, and testifies that he was not in town on Sunday for several years covering the time named.

He says that on the day appellant claims to have bought the property, he came to the city early; went to the house in the morning to get his rent, and then and there agreed to re-let his house to her for two years for $120, payable in $5 installments on the first of each month. That several hours after he left the house, and when he was at another place in the city, and also when he was intoxicated, the appellant's agent came to him with a paper, representing and reading it to him as a lease for the two years, and that, upon this representation, he signed it, and the agent then gave him the other writing above named. No other witness testifies to any deceit by the agent. It is, however, proven by at least five witnesses that the appellee began to get intoxicated by nine or ten o'clock in the day, and that by noon he was so much so as to be upon the ground and unable to walk.

He, however, testifies that, although intoxicated, he remembers what occurred when he signed the writing. If he was then conscious of his condition, and so far at himself as to be able to know he was selling and not leasing the property, then his defense is not made out. It is not sufficient that he may have been under undue excitement from liquor. To avoid his contract upon the ground of drunkenness, it must have been of that degree which deprives one of reason and understanding; and, when so, it avails, because there can then be no deliberate consent, and this necessary element of a valid contract is absent.

But, although he may not have been altogether *non compos mentis* from too much liquor; although that excessive drunkenness may not have existed which, *per se*, authorizes a court of equity to interfere, yet his condition may properly be considered in reaching a conclusion as to whether any deceit was practiced upon, or unfair advantage taken of, him. 1 Story's Eq., section 231.

In the first place, the wording of the writings is peculiar. Suspicion does not attach to the title bond from any interlineation or erasure, but its language is: "I have this day *let*, sold, and bargained * * * for the sum of $120, to be paid as follows: $5 on the first day of each month," &c.

It contains no covenant to convey, as is usual in such writings. It refers to the writing, also, then executed to Long, and, when we look at it, we find it was originally written: "I have this day *rented* from John F. Long," &c.; but the words "rented from" have been crossed with a pen, and the words "bargained with" interlined in the place of them.

These appearances cast suspicion upon the transaction, especially in view of the appellee's condition at the time. They give force to his testimony. It is very strange, if he was in his right mind, that he should have sold the property for a sum payable at times and in amounts only equal to the rental of it for the two years.

By renting it, as he was then doing, and evidently could have continued to do, he would have obtained as much money and at the same times as under the alleged sale, and yet have remained the owner of it.

The appellant stated, upon her cross-examination, that she took receipts from the appellee for the money she paid him after October 6, 1886, when she claims to have purchased the property; and, being asked by the appellee to do so, she produced twenty-two receipts, amounting to $120, and covering the entire two years from October 6, 1886, to October 6, 1888. Every one of them show that they were given for *rent*. They so recite, without an exception. The body of two of them were written by the same agent of the appellant, who prepared the bond, and the writing of the same date to the appellee.

The appellant offers no explanation of this circumstance, so strongly counter to her claim that she purchased the property. Her counsel say they were so written because if she failed to make any payment by a certain time, she forfeited her right to the property; and, that had this occurred, the payments would have gone in satisfaction of any claim for the use of it. This reason is at least not well founded as to the last payment of $5, made on October 6, 1888. It was the last of the $120. If there was a purchase, there could then have been no forfeiture. The receipt recites, however, that it is "in full of *rent* up to October 6, 1888."

These circumstances are convincing that the writings, dated October 6, 1886, do not truly state the contract then made between the parties; that neither of them, in fact, then so understood it, as shown by their subsequent conduct; and that the appellee, in his drunken condition, was induced by some misrepresentation or deceit, probably in the way stated by him, to sign the writing upon which appellant bases her claim of purchase. His statement is fully corroborated by all of the receipts, which are entitled to a controlling influence in the decision of the case. Moreover, the lower court determined these issues of fact; and, while its conclusion in an equity cause is not, of course, conclusive upon this court, yet it is entitled to consideration.

Judgment affirmed.

RASH v. FARLEY.

(*Filed March* 14, 1891.)

Constitutional law—Peddler's license—Illegal consideration for note—Sale of lightning rods manufactured in Illinois, and sold in Kentucky by a peddler who has obtained no license for such trade, is forbidden by statute, and, therefore, a note given in payment for same is based on an illegal consideration, and no recovery can be had thereon.

Such statute is not in violation of that clause of the constitution of the United States, which gives power to Congress to regulate commerce among the several States.

Thos. E. Ward for appellant.

James F. Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

In 1880 appellee executed his promissory note to Gillispie & Co., in consideration of lightning rods sold to, and put up for, him, that had been manufactured in Illinois, and brought into this State, of which note appellant became holder and owner; and he brought this action on a note given to him in 1884, in renewal of the original.

The ground of appellee's defense is, that the lightning rods were sold by Gillispie & Co., as peddlers, without license, by reason of which the contract of sale and purchase was under the statute pleaded and relied on void and not enforcible. And the general demurrer to the answer having been overruled, and the action—the appellants failing to reply—having been dismissed, this appeal is prosecuted.

The precise question involved was decided by this court in Rash v. Holloway, 82 Ky., 674, where a note, given to Gillispie & Co., for the same consideration and under the same conditions as the one executed to them by appellee, was held to be void because within operation of the statute mentioned.

But it is now argued the statute conflicts with that clause of the constitution of the United States, which gives power to Congress to regulate commerce among the several States, and cases decided by the Supreme Court are cited in support of the position.

The leading case referred to is that of Robins v. Shelby County Taxing District, 120 U. S., 489, where a statute of Tennessee was held to be an infringement of the clause mentioned, which provided, "All drummers, and persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale, or selling goods, wares and merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week or $25 per month, for such privilege."

In that case it was held, substantially, that, while a State might impose taxes upon persons within its limits, or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or inter-State commerce, or with some other employment or business exercised under the authority of the constitution and laws of the United States; and upon all property within the State, mingled with, and forming part of, the great mass of property therein, it can not impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with inter-State or foreign

commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made by any State regulation adversely to the persons or property of other States; and no regulations can be made directly affecting inter-State commerce.

But it was not decided in that, nor any other case following it, that goods sent from one State to, and already in, another State, may not be taxed as other general property in the latter that is subject to taxation; and a distinction is made between a tax on the sale of goods, then in another State, or the offer to sell them before they are brought in the State imposing it, and a tax in the usual way, and as other goods are taxed, upon such as may have already been brought into the State from another State.

And as conclusive the court did not mean to hold such statute, as is now under consideration, unconstitutional, the following language was used in the dissenting opinion delivered in that case: "I am unable to see any difference in principle between a tax on a seller by sample, and a tax on a peddler; and yet I can hardly believe it would be contended that the provisions of the same statute now in question, which, fixing a license fee for all peddlers in the district, would be held unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again."

Section 2, article 3, of the constitution of the United States, provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. But it does not follow that a citizen of one State may go into another, and, while enjoying all the privileges and immunities, defy and disregard all the obligations and duties imposed upon citizens of that other. And, until it is so plainly decided by the Supreme Court to the contrary, as that there can be no misunderstanding about it, we shall feel it our duty to decide that a person bringing goods, wares and merchandise from another into this State, for the purpose of peddling them, is liable just as a citizen of this State to pay the peddler's license, and is subject in the same way to all the pains and penalties for refusing to do so.

It is alleged, substantially, in the answer, and, not being denied must be taken as true, that there was an agreement between appellant and appellee, before the note sued on was executed, that they would abide the decision of the case of appellant against Holloway, and that the appellee, who resided in the country and was ignorant on the subject, was deceived and induced to execute the note in renewal of the original, by false information sent to him by appellant for the purpose of inducing him to execute it, which he would not have otherwise done.

In such case, it seems to us, appellant must be treated as he would have been, holding and asking judgment on the original note, which was made by statute void, and, consequently, the court properly overruled the demurrer to the answer and dismissed the action.

Judgment affirmed.

HILL & MOORE V. COMMONWEALTH.

(*Filed March* 17, 1891—*Not to be reported.*)

Criminal law—Felonious breaking and stealing from dwelling-house—Evidence—Section 4, article 5, chapter 29, General Statutes, provides: "If any person * * * shall feloniously break any dwelling-house or any part there-

of, * * * and feloniously take away any thing of value, * * * he shall be confined in the penitentiary," &c. Appellants were convicted under this section, from which they have appealed. The prosecuting witness testified that he was awakened and saw appellant, Hill, with his (witness's) pants searching the pockets, and Moore, the other appellant, going through his trunk; that they were startled and ran out, Hill throwing the pants on the floor or a chair near by. *Held*—That as the evidence shows a breaking of the house the acts of appellants show sufficient legal caption and asportation to constitute the commission of the offense charged.

A. L. Dembitz and W. A. Kenney for appellants.

P. W. Hardin and Frank Parsons for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

The indictment in this case is for the offense of "feloniously breaking and entering a dwelling-house, and feloniously stealing articles of value therefrom," which is made punishable by section 4, article 5, chapter 29, General Statutes, as follows: "If any person * * * shall feloniously break any dwelling-house, or any part thereof, * * * and feloniously take away any thing of value, * * * he shall be confined in the penitentiary not less than two nor more than ten years."

The prosecuting witness testified in substance that in the morning, about seven o'clock, he was awakened and saw Henry Hill, one of the accused, with his (witness's) pants searching the pockets, and John Moore, the other, going through his trunk; that they were startled and ran out, Hill throwing the pants on the floor or a chair near by; and that witness followed them and caused their arrest.

The evidence shows satisfactorily there was, in legal contemplation, a breaking of the house described in the indictment. But the prosecuting witness stated that no goods or articles of any kind were taken from the room where he slept, nor any part of the house; and, upon conclusion of evidence for the Commonwealth, a motion was made for a peremptory instruction to the jury to find a verdict of not guilty, upon the ground there was not proved a felonious taking away any thing of value, in meaning of the statute; and, for the same reason, a reversal of the judgment of conviction is now asked of this court.

There is no practical difference between "feloniously stealing articles of value" from a dwelling-house feloniously broken, as the offense is charged in the indictment, and the offense of "feloniously taking away any thing of value," as the offense is described in the statute; for in both the compound felony of feloniously breaking a dwelling-house and of larceny of articles of value is contemplated and described, and the plain question presented is whether the facts proved show commission of the offense of larceny.

There sufficiently appears two of the elements of the crime; that is, felonious intent and possession of the goods and chattels; and the remaining inquiry is whether there was the caption and asportation. It is well settled that the least removing of the thing taken from the place where it was before, with an intent to steal it, is a sufficient asportation, though it be not quite carried away; as where a person intending to steal plate took it out of a trunk wherein it had been deposited, laid it on the floor, but was surprised before he

could carry it away. Russell on Crimes, volume 2, sections 152-153.

We do not see any reason for modifying that definition of larceny when committed in connection with, or as the end of the previous crime of burglary or house-breaking; and manifestly it is not the policy of the law to relax the punishment of the offense of larceny when so committed; for section 5, article 5, makes the forcible breaking and entering a railroad depot and other structures therein mentioned, a felony, even where done with intent to steal property therefrom, without actually stealing.

In this case the dwelling-house had been feloniously broken, the trunk of the prosecuting witness opened, and his pants taken into possession of one of the accused and removed from its proper place; and though it may be guessed his object was to merely take what money he might find in them, still he had taken the pants, and at common law the offense of larceny was as fully committed as if the pants had been feloniously carried out of the house.

It seems to us the lower court properly overruled the motion, and as the jury found the verdict upon instructions according with the views of this court, the judgment is affirmed.

BROWN, GUARDIAN V. HORD.

(*Filed March* 19, 1891—*Not to be reported.*)

1. *Wills*—A testator, by his will, charged his estate with the care and support of his imbecile daughter, and devised the residue to his two sons. One son died childless and unmarried, leaving a will directing that his property be applied to the support of his sister, and the residue he devised to a nephew. *Held*—That the whole estate being already charged with the support of the daughter, the son's will could have no other effect than to apply his estate to the support of the sister, relieving his brother's estate of said charge so long as such estate should prove sufficient for that purpose.

2. *Landlord and tenant*—A tenant has no right to remove fencing built by the landlord, without his consent.

John B. and D. W. Lindsey for appellant.

L. Hord for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

This court, in an opinion delivered in September of the year 1881, held that Orlando Brown, senior, by his last will, made the support of his daughter, Euphemia, who is an imbecile, a charge upon his entire estate; and the question now raised by the present appeal is between the two principal devisees of the testator, or, one of them being dead leaving a will, between the devisee of his son, Mason, and the surviving devisee, Orlando Brown, or those claiming under him. The testator left two sons, Orlando Brown, who is now living, and Mason Brown, now dead. Mason died childless and unmarried, devising his estate primarily for the support of his unfortunate sister, remainder to his nephew and namesake, Mason Brown, jr., a son of Orlando, his brother. The step-mother, a beneficiary, is dead, and her interest in Mason's estate terminated at her death.

Orlando Brown, the surviving brother, has a family, consisting of his wife and several children. His brother, Mason, by his will, directs that his sister, Euphemia, be well and comfortably supported out of his estate, and his nephew, Mason, takes it subject to that incumbrance. The devisor knew, when he made this will directing his sister to be supported out of it, that her support was already a charge upon the entire estate belonging to himself and brother, and, being childless, and his brother with a family, and devising what he had to his brother's son, intended to make his estate primarily liable for the support of his sister. He expresses it in so many words, and, when considering the two wills, and the charges upon the entire estate, as well as the relation of the parties, there can be no doubt but that Mason Brown intended to relieve the whole estate of the burden of supporting his sister, and placing it upon the estate he had devised to his nephew.

This was the object in view, as we see no other reason for his making his part of the estate assume the *burden of supporting well and comfortably* his imbecile sister. We adjudge that the estate, so devised, is primarily liable for her support, but do not intimate, or mean to adjudge that, if insufficient for that purpose, the remaining estate devised by Orlando Brown is released from this burden, but, on the contrary, it remains bound.

As to the picket fencing made by the Association and Brown, jointly, Pepper has no interest in it, and, consequently, no right to remove it. The contract with Brown does not authorize such a construction, nor could the Association remove it if they were the lessees.

Judgment affirmed.

GIBSON v. PORTER.

(*Filed March* 19, 1891—*Not to be reported.*)

1. *Easements—Private passways*—A remote vendor of land provided, in his deed, that a way through the land conveyed, and described definitely, should be opened and so remain forever. This was a covenant running with the land and passing with it to all vendees of it, and a failure in subsequent deeds to mention this proviso did not authorize subsequent vendees to close up the passway. Besides, the vendors of appellees, by various acts, have recognized the existence of such passway for a period of over twenty years.

2. *Jurisdiction*—A county court has no jurisdiction to order a private passway opened, where it has been closed by the land owners and the existence of the passway denied, and the order of the county court directing the sheriff to open same was illegal.

Porter & McQuown for appellant.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Holt.

The parties to this contest own adjoining farms. The appellant, J. T. Gibson, claims a passway from his land over that of the appellee, James Porter, to the public road, by reason of long-continued use and in virtue of the deed of a remote vendor of the appellee. The latter denies the existence of any such right. He says the provision in the deed of the former owner was not for the benefit of the land owned by the appellant, and was binding merely upon the imme-

diate parties to it; and even if this be not true, yet the way has been closed up for so long, and adversely held and claimed by him and those through whom he derived title, that any right to its use that may have once existed has been lost.

The Porter land once belonged to James E. Long. In 1875 he conveyed it to Samuel Fitzpatrick; he, in 1878, to one Dillard; he, in 1881, to one Thompkins, and he, in September, 1885, to the appellee, Porter. When Long owned this land his brother, N. H. Long, owned the Gibson land. He conveyed it to one Lewis, he to H. H. Fitzpatrick, he to one Hagar, and he, in August, 1885, to the appellant.

The deed from James E. Long to Samuel Fitzpatrick of the Porter land, and which was duly recorded in August, 1875, contains this provision: "To have and to hold with all the appurtenances, both varied and singular, thereunto belonging, excepting an open wagon-road through the place, from the stone at the mouth of the lane to the elm or the beginning corner, which road is opened, and it is agreed between all parties shall remain so forever."

This reservation was not one merely binding between the parties to the deed. It related to the land, no matter who might be the subsequent owner. It was a real covenant, running with it. It imposed a servitude upon it in favor of the adjoining land that now belongs to the appellant, Gibson. It matters not that the exception was not contained in the deeds to the subsequent vendees, including the appellee, Porter. It having been made in the deed from James E. Long, and running with the land, a subsequent vendor could not pass the property divested of the servitude.

The Long deed being of record when the appellee purchased, he is chargeable with notice of its reservations and conditions. It is satisfactorily proven, however, that he had actual notice of the provision relating to the passway, and he is as much bound by it as if it were contained in the deed to him.

Th location of the passway is fixed and certain. In this respect there is no dispute. It appears that many years ago it was a lane, fenced upon each side, and running from the public road over the land now owned by the appellee to that now owned by the appellant. This was its condition when James E. Long conveyed the Porter land to Fitzpatrick. Subsequently the fence upon each side of it was removed, but gates were put up and its use continued. While Dillard owned the Porter land he put up one gate or more, but recognized the existence of the passway. The gate at or near the line between the two farms was put up by agreement between the then owners, and the evidence shows beyond all doubt that the use of the passway by the respective owners of the Gibson land was continued and uninterrupted from and long prior to the time when Long conveyed to Fitzpatrick, until a very short time before this suit was brought, when the appellee closed it.

The evidence also shows that this use has not been merely permissive, but with claim of right by the owner of the Gibson land, and that this right was recognized by the respective owners of the Porter land, and acquiesced in by them until the appellee closed the passway within a year prior to the bringing of this action. The route is the same as that described in the deed from Long, and the same as has been used for twenty years or more. The use has been of a character that, even in the absence of the clause in the Long deed establishing or confirming it, a grant of it would be presumed; and although it is clearly shown not to have been merely permissive, but under a claim of right, which was recognized by the re-

spective owners of the Porter land, yet if this were not so, after such a long-continued use, the burden would be upon the party denying the right to show that the use was merely permissive. Such a long use, when unexplained, raises the presumption that it has been adverse and of right.

The appellee's own witnesses prove that this passway had been continuously used, for many years prior to the closing of it by the appellee, to get from the Gibson land to the public road. It was being so used when the appellee purchased his land, and the erection of the gates, instead of showing an adverse holding in the owner of the Porter land, rather evidences the recognition of the right to the passway.

James E. Long says that the exception in the deed from him was for the benefit of the Gibson land, and the appellee, before he purchased, was distinctly notified by his vendor, Hager, that the passway was an existing one and must so continue.

When the appellee obstructed the passway the appellant, after notice to the appellee, moved the county court to compel him to open it. Upon hearing, this was ordered, and the appellee failing to comply the court ordered the sheriff to do it, and he having done it and the appellee having again closed it, the court entered a fine against him. About this time this suit was instituted, involving not only the validity of the county court proceedings, but the right to the passway.

While the county court has general control over the public roads and public passways of the county, yet this is a private passway, and if it were not, but a public one, we know of no statute authorizing such a proceeding, and the county court is not vested with it by virtue of its having the general superintendence of the roads of the county. The statute provides how even a public passway shall be opened. The power of the county court in such a matter is statutory, and where a person claims the land covered by even a public passway, it has no power upon mere notice and hearing to send the sheriff of the county and open it in this summary way. Whether rightfully or wrongfully, it is adversely held, and the right to the way can not thus be tested or determined by the county court. It has no power or jurisdiction in such a case.

The decree below was, therefore, right in so far as it adjudged the county court proceeding invalid and enjoined the collection of the costs of it from the appellee; but it is erroneous in determining the non-existence of the passway and in enjoining the use of it by the appellant. To this extent the judgment is reversed and the cause remanded for further proceedings in conformity to this opinion.

PETTY V. COMMONWEALTH.

(*Filed March* 26, 1891—*Not to be reported.*)

1. *Criminal law—Continuance*—This appeal is prosecuted from a conviction for murder. Appellant complains that the court erred to his prejudice in refusing to grant him a continuance on account of the absence of a witness.

The appellant and the deceased had never met until the night of the homicide, when they engaged in a game of "craps," which terminated in a difficulty in which appellant struck the deceased in the breast with his fist, and pursued him some distance, but without overtaking him; shortly afterward

the body of deceased was found, near the place where the appellant abandoned the chase, with a stab in the breast as if from a knife.

The affidavit disclosed that the absent witness had been recognized to appear, and would testify that another party, who was engaged in the game, had made a threat against deceased, and had, just before the difficulty, gone away in the direction of the spot where the body was afterwards found, and that witness was with appellant from prior to the difficulty until the body was found. *Held*—That the refusal of a continuance was error prejudicial to appellant.

2. *Instructions*—It was also error not to give an instruction which would have authorized a conviction for manslaughter.

3. *Misconduct of Commonwealth's attorney*—The court should not have permitted the attorney for the Commonwealth, in his argument, to read a newspaper article containing an account of the number of murders committed in this country, against the objections of appellant. This was calculated to prejudice the jury against appellant.

Josiah Harris for appellant.

P. W. Hardin for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Holt.

The appellant, Russell Petty, is under sentence of death for the killing of William Cole. The tragedy occurred about midnight. The parties did not know each other until that night. They then met in a bar-room, and, upon its closing for the night, they, together with two other men, engaged in a game of "craps" upon the sidewalk. A quarrel arose between them, and the appellant struck the deceased in the breast. The latter immediately turned and ran, being pursued, but not overtaken, by the appellant, and was soon after found dead in an alley near by, with a stab in the breast, as if from a knife.

The appellant was not seen to have a knife in his hand when he struck the deceased. There is no evidence as to it, one way or the other; but there is some testimony that he had one in his hand when he returned from pursuing the deceased.

The defense was, that the accused did not do the stabbing. Several questions are presented in argument, but the one at the threshold is, was the accused entitled to the continuance, which he asked upon his written affidavit, on account of the absence of his witnesses?

According to the affidavit, he would have proved by James Douglas a threat by another party, who was engaged in the game, toward the deceased, made just after the deceased ran away, and that the person making it then left the accused and went toward the alley in which Cole's body was afterward found; also that the witness would testify that he was with the accused all the time from prior to his difficulty with Cole until his body was found.

This witness had been recognized for the accused for the term of court at which he was tried; he lived in the county, and was only temporarily absent. The affidavit discloses all the necessary diligence; is sufficient as to the formal part of it, and, while we do not mean to intimate how material, in our opinion, this evidence would have been to the accused, yet we think, in view of the fact that no witness proves the use of a knife upon the deceased, the accused should have been allowed an opportunity to get this evidence before the jury. It might, and might not, in their opinion, have been entitled to con-

sideration; and this being so, the accused, in a case of life or death, should have been allowed a reasonable opportunity to present it.

The prosecuting attorney, over the objection of the accused, read to the jury a newspaper article, giving an account of the number of murders committed in the country. This was improper; and, while the court told the jury that it was, of course, not evidence before them, yet it should promptly, upon objection being made, have stopped such a course by the attorney for the Commonwealth.

While considerable latitude must, necessarily, be allowed in the discussion of a case, yet matters foreign to the record, and calculated to excite the prejudices of the jury, and produce a verdict without regard to the evidence, should be carefully excluded by the court. We do not mean to say that the course pursued in this particular case in this respect would authorize a reversal, but only that it should not have been permitted.

However guilty of crime men may be, it is important to every one that they should be afforded a fair trial according to law. It appears to us this was not given to the accused.

No instruction was given as to manslaughter. It was a proper case for it. The two men were not acquainted until the night of the killing; and, if the accused did it, then it occurred during a sudden quarrel.

But two instructions were given: One as to murder, and the other told the jury that, if they had a reasonable doubt of the guilt of the accused, they should acquit him. As instructed they were bound to either find him guilty of murder or acquit him.

His counsel now contend that the court should have told the jury if they had a reasonable doubt of the degree of the offense, they should convict of the lesser degree only.

According to this record, however, the trouble goes further back. The court had improperly limited the jury to a finding of murder, in case they found the accused guilty. It is true the court, in giving the whole law of the case, as it must, should have given the instruction as now contended by counsel; but, in advance of it, it should also have given one as to manslaughter.

The State, by its witnesses in chief, and before the accused had testified or put his character in issue, proved that it was morally bad. It is true there was no exception upon the part of the accused to this, nor as to instructions; nor are these two matters embraced in the grounds for a new trial, and we allude to them in view of another trial, and as showing that the appellant has not, thus far, had a fair one.

He may be guilty. If so, he should, of course, be punished; but, while a speedy administration of the law is desirable, it should never be had at the expense of justice.

For the error in refusing a continuance, the judgment is reversed, and the cause remanded for a new trial consistent with this opinion.

HESTER V. UNITED STATES LIFE INSURANCE CO.

(*Filed March* 19, 1891.)

Insurance—Forfeiture of policy by laches of beneficiary—The policy of life insurance in controversy contains a provision that a failure to pay the premiums, at the times stipulated, will relieve the company from liability to pay the sum insured, or any part thereof, and the policy shall cease and deter-

mine, provided that after the payment of premiums for two years, a paid up policy will be issued for a proportionate share of the amount insured upon the surrender to the company of the old policy within twelve months from ceasing to pay further premiums.

The appellant, having obtained the policy upon the life of her husband for $2,000, and having paid more than two years' premiums upon same, instituted this action after the death of her husband. and about fourteen years after ceasing to pay premiums, to recover a proportionate share of the policy.

For defense, it is insisted that her failure to demand and receive a paid up policy, within twelve months after ceasing to pay premiums, forfeits her right to recover any sum whatever. *Held*—That the failure to demand a paid-up policy, within twelve months from time of ceasing to pay premiums, bars appellant of her right of recovery of any part of the sum named in the policy. That provision is not enforced as a penalty, but as a condition precedent, and an essential part of the contract, enabling the company to adjust its business for the benefit of its policy holders, without being required to meet stale claims after many years' delay on the part of policy holders, after they have ceased paying premiums. The cases of Montgomery v. Phœnix Mutual Life Insurance Company, 14 Bush, 51; Johnson v. Insurance Company, 79 Ky., 403; Insurance Company v. Montague, 84 Ky., 653; Insurance Company v. Grigsby, 10 Bush, 317, reviewed and distinguished.

Finch & Finch, Dodd & Dodd and Chas. A. Grubbs for appellant.

Wilson & Thum for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The provision of the policy sued on is as follows: "And it is understood and agreed that, in case the said Barbara Hester shall not pay the said premiums, as above reserved, on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine; provided that if, after the receipt by this company of not less than two whole years' premiums, this policy should cease in consequence of the non-payment of premiums, then, upon the surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for a proportion of the premiums paid."

This policy was issued to the appellant in January, 1867, upon the life of her husband, for the sum of $2,000, and nearly fifteen years after the appellant had ceased to pay the premiums, the husband having died in the meantime, she brought suit on the policy to recover the sum of $1,150, which is the sum due (as she claims) on the policy, by reason of having paid more than two whole years' premiums.

It is admitted that the appellant, before the premiums were all paid, ceased to pay any more of them; and the appellee contends that, in consequence thereof, its liability on the policy ceased in toto, and the appellant has no right of action thereon; that the only right the appellant had was to surrender the policy within a year, and obtain a paid-up policy for the proportionate part, and she having failed to do so, she is barred of that right. The appellant contends that the case stands on all fours with the cases of Montgomery v. Phœnix Mutual Life Insurance Company, 14 Bush, 51; Johnson

v. Insurance Company, 79 Ky., 403; Insurance Company v. Montague, 84 Ky., 653; Insurance Company v. Grigsby, 10 Bush, 317.

In the Montgomery case the provision, in the particular under discussion, was as follows: "If said premiums shall not be paid at the office of the company, in the city of Hartford, Connecticut, or to an agent of the company, * * on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments, &c., and this policy shall cease to determine."

The policy also provided that, in case of non-payment, the insured might, within a year, surrender the policy and obtain a paid-up policy for the proportionate part, &c.

The court held, in said case, that, in case of the non-payment of the premiums, as in the policy provided, the company was liable to an action on the policy for the cash, in proportion to the annual payments made; that the policy ceased and determined only as to the balance; or that, if the assured wished, he could waive the cash payment, and, by surrendering the policy, obtain a paid-up policy for the proportionate part. The language of this policy clearly admits the company's liability on it for the proportionate part in cash, and this liability exists according to ordinary written contract liabilities, and the liability continues thereon until barred by the time that ordinarily bars such contracts. In the other cases relied on the company, by the terms of the policies, were clearly liable on them for the proportionate part of the sum insured, in case of a failure to keep the premiums paid up; and, in consequence of this liability, it was held that the forfeiture provided for, in case the assured failed to surrender the policy within a given time, in some instances only thirty days, and obtain paid-up policies, was intended as a penalty, which a court of equity would relieve against. Such relief is granted upon the familiar principle that where the party, against whom the forfeiture is claimed, will be placed in a worse condition if the forfeiture is enforced, and a failure to enforce it will not affect the other parties' equitable rights under the contract, a court of equity will relieve against such forfeiture upon the ground that it is a penalty, which a court of equity will not enforce against justice, the court presuming in such case that the parties never intended the enforcement of the penalty, if its enforcement worked an injustice.

But the Montgomery and Grigsby cases distinctly decide "that the conditions of the policy in life insurance, providing for forfeitures for the non-payment of premiums in exact accordance with the terms of the agreement, have been upheld and enforced by courts." Such forfeitures are not regarded as being in the nature of penalties. It is considered that, in agreements of this character, time is of the essence of the contract. They are to be kept in force from year to year, at the will of the insured. The right to keep the policy alive by the payment of stipulated premiums is a privilege secured to the insured by his agreement with the insurer. He may exercise or abandon this privilege at his discretion; but if he does abandon it, those beneficially interested can not complain that the insurer refuses longer to be bound by a contract that has lost all the elements of mutuality. (See the Grigsby case, *supra;* opinion by Judge Lindsay.) Also, in the Montgomery case, it is decided that the provision of forfeiture will be considered as a part of the contract and will be enforced, "when the nature of transaction or the stipulation of the parties show that it was so intended by them."

So the question is, does the stipulation in the policy under consid-

eration fall within the first or second category named? It will be seen that the policy expressly provides that, in case the appellant shall not pay the premiums as provided, the appellee "shall not be liable to the payment of the sum insured or any part thereof." Here, unlike the provisions in the other cases referred to, is an express stipulation that the appellee shall not be liable to pay any part of the sum insured, if the appellant failed to perform her part of the contract. Such is the agreement. Why should it be construed as an essential part of the contract, requiring the appellant to pay the annual premiums as a precedent condition? Because, first, the appellant had the right to abandon the contract, and the appellee had no remedy against her for so doing; consequently, they agreed that the appellee should be released if the appellant abandoned her contract; second, the nature of the appellee's business required promptness in the payment of the annual premiums.

These considerations, doubtless, induced the making of the agreement, which were sufficient to uphold the agreement as an essential part of the contract and not as a mere penalty. Also the agreement to issue a paid-up policy for the proportionate part of the sum insured, provided the policy was surrendered within a year, did not have the effect of continuing the appellees' liability on the policy; but it had the effect of giving the appellant a new and only right, in case she forfeited the right to the payment of any part of the policy, provided she surrendered the policy within a year after she had forfeited it. This proviso was not intended as a penalty, but as an essential part of the contract, having for its consideration a reasonably certain business rule equally for the protection of the appellee and its assured; for to allow the assured to abandon the performance of his contract for years, without any remedy in favor of the company, and then make the company liable, would make its business too precarious to be at all safe for itself as a business enterprise, and render the claims of other policy-holders, who had kept their contracts, uncertain and perhaps worthless.

To avoid this uncertain and unequal condition, the appellant and appellee adopted the rule requiring the appellant, after she had failed to comply with her contract and forfeited the right to the payment of any part of the sum insured, if she wished to avail herself of the new contract provided for, to apply within a year from such forfeiture. This she could do without any inconvenience to herself, save that that usually attends simple business transactions, and at the same time appellee's business (so far as this matter is concerned) would be kept in reasonable bounds. Hence, it is evident that the performance of this stipulation, both as to payment and time, was made a condition precedent—an essential part of the contract; and the appellant having failed to perform either, she has no cause of action.

But in some of the cases referred to the liability on the policy for a proportionate part of it was expressly reserved, and in the others it was clearly implied. Hence, the court held that the stipulated forfeitures were intended as penalties, against which courts of equity would grant relief; and if it become necessary, in order to grant such relief, it would allow a reasonable time notwithstanding the time fixed in the policy.

The judgment is affirmed.

HUSTON, &C. v. REUTLINGER.

SAME v. UNION INSURANCE CO.

SAME v. FRANKLIN INSURANCE CO.

(*Filed March* 14, 1891.)

Corporations—By-laws contrary to public policy—The constitution and by-laws of the Louisville Board of Underwriters, a voluntary association, formed for the mutual benefit and protection of the interests of insurance agencies in the city of Louisville, which was afterwards incorporated and adopted by-laws, among the provisions of which it is declared that no member of said association shall employ more than one solicitor; nor shall any solicitor be employed for less than six months; nor shall any solicitor, who has severed his connection with a member of the association, be employed by another member until twelve months after he has severed his former employment; that the member employing any solicitor in violation of the provisions of the association shall be subjected to the payment of fines; that upon a charge having been made against any member for a violation of any of the rules or by-laws of the association he shall be deemed guilty, unless he shall, within twenty-four hours after said charge is preferred, establish satisfactorily his innocence, and pending the investigation he is required to deposit with the secretary $50, which shall be forfeited if it appears that such violation was wilful and deliberate, and that he be deprived of communication with said association, or receiving any benefits from same, in prosecuting his insurance business. *Held*—That such by-laws are not only in violation of the spirit and meaning of the organic law of the association, but subversive of every rule of right known to the common law, and in direct hostility to every organic law upon which free government is based. A conviction and suspension of the member occurs unless the accused, within twenty-four hours after the formal declaration of the accusation against him, appears and establishes his innocence; and for the privilege of having such an investigation, he is required to deposit $50 that is forfeited to the association in the event the innocence of the accused is not shown; he is denied the privilege of showing that his business required employment of more than one solicitor, or that the by-law requiring him to discharge those in his employ is in violation of the law of the land, but is compelled to abandon all business intercourse with his fellow-members and submit to a judgment of suspension that no chancellor should hesitate in adjudging null and void. The restraint placed upon appellees, by the by-laws of the association, as to the number of solicitors they may employ and the time of employment, and the compensation to be paid them, and forbidding them to contract with a solicitor so as to make his pay depend on the number of risks he procures, and forbidding an employment of a solicitor who has severed his connection with another member, are each and all in violation of law.

W. O. Harris and Bullitt & Shields for appellants.

B. F. Buckner, Marshall & Locker, J. K. Goodloe, Bryson Bacon and Oneal, Jackson & Phelps for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

These three actions in equity were instituted in the court below by Adolph Reutlinger, the Franklin Insurance Company and the Union Insurance Company against the Louisville Board of Underwriters, in which injunctions are sought to prevent the appellants from enforcing against them certain by-laws, adopted by the appel-

lants in the month of August, in the year 1888, and from proceeding to convict them of employing more than one solicitor in the conduct of their insurance business; from denying them business intercourse with the members of the board, and from inflicting certain penalties denounced by its by-laws, found in section 7 of the enactment of August, 1888.

The appellants and the appellees are all members of the Board of Underwriters, a voluntary association, unincorporated, and governed by a constitution adopted and by-laws framed by its members. The organization began its existence in the year 1854, and its constitution, as then framed, has remained in substance the same to the date of this litigation. The object of the association, as declared in the preamble to its organic law, is "for the purpose of securing uniformity in the rates of premiums, harmony in the conditions of insurance, and concurrence in the policies they may issue, hereby form an association to be known as 'The Louisville Board of Underwriters,' and for their better organization and government, adopt the following articles as their constitution."

The constitution provides the usual machinery necessary to perfect such an organization, with provisions that are not objectionable, and no complaint seems to have been made by its members until the by-laws, framed in August, 1888, were attempted to be enforced, and that were framed against the protest of the appellees. Section 4 of the by-laws of that date prohibited a local company from employing more than one solicitor, and then for not a period less than six months, and also regulated the manner in which his salary has to be paid; and no solicitor can be employed by any member of the board within twelve months after the termination of his connection as employe of another member. The member employing the solicitor is made responsible for the acts of the latter, and subjected to certain fines and penalties for a violation of the by-laws.

Section 5 makes it the duty of a member to prefer charges when the tariff rates of insurance have been, in his belief, violated, or any of its by-laws, and this belief he communicates to two other members, who, if they think the facts warrant it, shall unite in making the charge.

By section 7 the preferring of charges, as ordained in the foregoing section, *shall be taken as prima facie* evidence of violation, and conviction follows unless the accused establishes *satisfactorily* his innocence in twenty-four hours from the time the charge is formally preferred. *Absolute* business non-intercourse, upon any subject and matter relating to insurance, shall immediately be established and maintained between the members of the board and the accused member until the charge is officially declared of no effect. The accused is required to deposit $50 with the secretary, pending the investigation, and for a wilful and deliberate violation of these by-laws the $50 is forfeited, and the member required to take up any and all policies written by him in violation of the by-laws.

These members, who were the complainants below and appellees here, had more than one solicitor, and were not disposed to admit the right of the association to control them in the employment of solicitors, or in the conduct of their business, further than to produce harmony and uniformity in the insurance business. This, in fact, seems to be the extent of the power conferred on the association by its constitution and its preamble, with the right to pass such by-laws as may be necessary to accomplish the object in view.

This, in fact, is a controversy between the home companies of the city of Louisville and the agents of foreign companies, the latter

having a number of agencies and with greater business or capital to sustain them. It is proper, first, in determining the rights of these parties, to ascertain the extent to which the chancellor may go in giving the relief sought by the appellees upon the facts alleged in their petitions. There is a plain distinction between the by-law of a corporation that must always, at least, be within the implied terms of the grant made by the sovereign and by-laws enacted by a voluntary association that derives its existence from the contract between its members. A member can withdraw from a voluntary association when he pleases, and, as a general rule, such by-laws as are adopted by the association will be held binding on its members. If they have been agreed upon by the members to be framed in a certain manner, and that mode is followed, it is but seldom that the chancellor will interfere.

In this case, while the appellant is without capital, it is organized as a business body, and its members, by reason of their connection with it, are given a standing as insurance men, and when indorsed by the association in the way of membership, their honor, fidelity and ability in the discharge of their duties will scarcely be questioned by the public; and, besides, they have become interested in the building they occupy under a lease, with certain maps, charts, &c., that give information as to the character and location of the various buildings in the city of Louisville, and to be expelled from all business intercourse with such an association becomes at once a matter of pecuniary loss to the appellees. Therefore, in this character of case, if the by-laws enacted violate the public policy of the State, or if they are a departure from the object sought to be accomplished by the contracting parties, and are unjust and unreasonable, the chancellor will not hesitate, when called on, to protect the parties in the enjoyment of their rights as members of the association.

The majority in this case have undertaken to control the business of these appellees; to say how many solicitors they shall employ, and whom they shall employ; to renounce all business intercourse with them upon their refusal to submit to rules and regulations that are unreasonable and oppressive; and with no adequate remedy at law, a court of equity is the proper tribunal from which a restraining order should go preventing this unlawful action on the part of the majority.

The trial as to one or more of these appellees was had in great haste by the association when learning that the chancellor was at the time being asked to issue a temporary injunction, and the appellees suspended from all business intercourse with their fellow members, and the $50 deposited by each forfeited to the association, because of their refusal to permit their private business to be regulated by the association, and in declining to discharge their employes at its dictation.

The doctrine as to the right of a court of equity to interfere in this class of cases is well stated in the case of Otto v. Tailors' Union, 75 Cal., 313. It is there said: "Courts will interfere for the purpose of protecting property rights of voluntary associations in all proper cases, and where they take jurisdiction, will follow and enforce, so far as is applicable, the rules for incorporated bodies of a like character." In that case Otto, a member of the union, had been expelled for working for parties against whom the strike had been ordered, and his trial the court held "was a travesty on justice and lacking all the elements of fairness and good faith, which should

characterize the action of men in passing on the rights of their fellow men."

The by-laws under which these appellants acted were not only in violation of the spirit and meaning of the organic law of the association, but subversive of every rule of right known to the common law, and in direct hostility to every organic law upon which free government is based. A conviction and suspension of the member follow unless the accused, within twenty-four hours after the formal declaration of the accusation against him, appears and establishes his innocence; and for the privilege of having such an investigation, he is required to deposit $50 that is forfeited to the association in the event the innocence of the accused is not shown. He is denied the privilege of showing that his business required the employment of more than one solicitor, or that the by-law requiring him to discharge those in his employ is in violation of the law of the land, but is compelled to abandon all business intercourse with his fellow members, and submit to a judgment of suspension that no chancellor should hesitate in adjudging null and void.

While members of a voluntary association must abide by its rules and regulations, unless contrary to the fundamental law of the order, or in violation of the law of the land, and even then the chancellor might be powerless to afford relief, still, when the suspension or expulsion results necessarily, as it must in this case, in affecting the financial standing of the appellees, as well as in depriving them of the use of property that is common to all, however insignificant its value, we perceive no reason for denying the relief sought. The majority of the members, under the guise of producing harmony in this business association, have taken from these individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position; nor can they employ a solicitor for a less period than six months, or offer a solicitor an employment within twelve months after the solicitor has severed his connection with any other member; is compelled to discharge those in his employ, if he has more than one, and, if these by-laws are enforced, have placed their business under the control of the majority vote of the association—a power, the exercise of which was not given by the fundamental law of the order, and, doubtless, not contemplated when the association was formed. The purpose, we think, from the character of this corporate legislation, was to discriminate in favor of certain insurance companies against the appellees; but as those by-laws were adopted by nearly all the members it may be assumed that no such motive influenced the action of the association in passing them.

The common-law rule, recognized and adopted when business relations were not so multiplied and extensive as now, and when less necessity existed for enforcing it, condemned all such restrictions upon trade and business intercourse with men as is found to exist in this case. The right of one to control his own property as he pleases and to employ those necessary to aid him in his business upon such terms as may be agreed on, when not in violation of the law of the land, is the rule of the common law, and the right of the laborer to dispose of his skill and industry to whom he pleases, and for the price agreed on, is embraced within the same rule. In all classes of business the employer and the employe should be allowed to contract with each other, unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon their rights by combinations

or associations of men, they will be regarded as in violation of law and void.

An association organized for the purpose of advancing the private interests of members, by which one or all are prevented from employing only a certain number of laborers or agents in the conduct of the business of each, and then only at a fixed rate, is an incentive for those seeking employment as agents in the same line of business to organize counter-associations, that are always attempted to be justified under the plea of self-protection, when both are in direct violation of law.

Cooley on Torts, page 280, says: "Any one has an undoubted right to refuse to be employed by another, but he has no right whatever to resort to compulsion of any sort to keep others from employment." "It is also indictable to combine to engross under one control any particular business staple, so as to force from the community its purchase at exorbitant prices." 7 Wharton, Criminal Law, section 2324.

In the case of Hilton v. Erkerly, Ellis & Blackburn, 9 B., 73, eighteen owners of cotton mills in Lancaster, England, formed a combination by which they agreed that for twelve months they would each carry on their mills with respect to whom they should employ; the wages they should pay; the times they should keep open, &c., according to the direction of the majority of the others. The agreement was held to be illegal, because they had surrendered their discretion as to whom they should employ, and were prevented from paying any sum for wages except such as were fixed by the majority, and could only employ such persons as the majority would authorize. That case is very much like the case being considered, and the English court reached the conclusion, based on the rule of the common law, that these were regulations restraining each man's power of carrying on his trade according to his discretion, denying him the right to employ others, and, therefore, such restraints on trade as could not be enforced. Stanton v. Allen, 5 Denio, 434; People v. Fisher, 14 Wendell, 9; Morris Coal Co. v. Barclay, 68 Penn. St., 173; People v. Medical Society, 24 Bar., 572.

This court, in every instance where the questions involved here, or those similar in their character, have been presented, has followed the common-law doctrine, and what the common law condemns as injurious to the public, in restraint of trade, and leading to disastrous results, is now insisted by the appellants as being a restraint upon the exercise of individual rights. We think the experience of business life exemplifies the wisdom of the principle recognized, and if required to depart from it, we would feel inclined to make it more rigid in its application than is now sanctioned by law.

In the case of Sayre v. Louisville Union Benevolent Association (1 Duvall, 146), organized for the purpose of affording relief to sick and disabled members, with the power to adopt such rules for their mutual interests and as common carriers as shall seem proper. The society passed a by-law declaring that no member shall go into any river or trade and work for less than a fixed sum, or carry any freight for less than the established rate in the trade, and prohibiting members from advertising or working for any boat not represented in the association or acting in concert with it, and assessing a penalty for the violation of these by-laws. Sayre was a member of the association *and subscribed* his name to the by-laws. He was sued to recover a fine of $250 for carrying freight for less than the established rate, and it was held that the by-law under which the

fine was imposed was illegal and void. The court, in discussing the question, laid some stress upon the fact that the parties to the association were common carriers, and, therefore, compelled by law to carry freight for a reasonable price; but an examination of the authorities, as well as the doctrine announced in that case, will show that any agreement or combination for the purpose of depressing the price of wages, or elevating them, to the injury of the public, is a conspiracy at the common law and subject to indictment. The laborer has the right to fix his own price for his labor, and the employer the sum he is willing to pay, and combinations entered into for the purpose of preventing the exercise of these rights, are unlawful.

In the case of Nash v. Page, where ten warehousemen of the city of Louisville undertook to exclude the plaintiff from their warehouses as a buyer, it was held that the result of such conduct was to deprive the producers and sellers of free and full competition, and their action was, therefore, condemned.

In the case of Anderson v. Jett, 88 Ky., —, the owners of two steamboats, rivals in business, in order to prevent competition agreed to pool their profits. It was held that, as the object of the contract was to prevent competition in the trade, the contract was void, and no recovery could be had for its breach.

We do not mean to adjudge that every agreement or combination detrimental to trade and injurious to the public is an indictable offense; that question is not before us; but we do adjudge that the restraint placed upon these appellees by the by-laws of the association, as to the number of solicitors they may employ and the time of employment, and the compensation to be paid them, and forbidding them to contract with a solicitor so as to make his pay depend on the number of risks he procures, and forbidding an employment of a solicitor who has severed his connection with another member, are each and all in violation of law, and the judgment of the chancellor giving the appellees all the rights pertaining to other members of the association must be affirmed.

NEAL V. NEAL, &C.

(*Filed March* 24, 1891—*Not to be reported.*)

1. *Decedent's estate—Advancements*—The decision of the chancellor equalizing advancements to heirs will not be disturbed where no injustice appears to have been done.

2. *Services rendered to decedent*—The appellant, a son of decedent, having resided some time with his father and rendered only such services as were dictated by affection for the father, or such services as one neighbor would render another without expectation of reward, is not entitled to compensation as a claim against the estate. The fact that appellant had as administrator distributed a large portion of the estate among the heirs before asserting his claim for services, strengthens the position that said claim is unjust.

W. P. Ross for appellant.

H. L. Stone and Jno. C. Norvel for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Pryor.

This action involves the settlement of the estate of Wm. Neal, deceased, and was transferred from the county court, where a petition had been filed for the division of the land of the intestate, to the circuit court, on the ground that advancements had been made to the children, and the personalty being exhausted, it was necessary to resort to the land in order to equalize the heirs. There are only two questions necessary to be considered, the one in reference to the advancements, and the other as to the claim for personal services rendered his father by the appellant. Some exceptions were filed to depositions and to claims of minor importance, and that would not, if determined either way, prejudice the rights of the parties, and if the exceptions to the depositions had been sustained, it would not have affected the result

The testimony as to the advancements is conflicting, but it is apparent, from the general character of the proof, that the father of these children was attempting to equalize them in advancements during his life, and while the book in which the advancements were charged has been lost or destroyed, it may be safely assumed from the testimony that the father was seeking equality in the distribution he had made; and while the chancellor has charged some of the children more than the others the difference is slight, and this court, after the question has been passed on by the chancellor below and his commissioner, will not disturb it, unless satisfied that injustice has been done. The claim for personal services rendered the father by the appellant was, in our opinion, properly rejected. The brothers and sisters of the appellant had removed from Nicholas county many years before the death of their father, and the appellant resided with him on the farm and took care of and managed it until he removed to the adjoining farm that his father sold him, and which was to be paid for at the latter's death, the appellant to retain one-fourth of the purchase money, as that much he was or would have been entitled to of the land if no sale had been made. The intestate was over eighty years of age, and for two years prior to his death was in a helpless condition, and required and received much attention from his son. He was almost an imbecile and unable to attend to his business. The appellant after his marriage lived with his father for several years, and no doubt did many acts of kindness for him, all of which were appreciated by the old man, and favors bestowed on the son in consideration of these services, that could not be bestowed on his children who lived in a distant county and were not near enough to comfort him in his declining years, or to perform such service as should have been prompted by a child's affection for his parent.

The character of service rendered and the business relations of the father and son would not authorize the conclusion that an obligation existed on the part of the intestate to pay the son money for aiding in managing the farm or in performing other personal service. The management of the farm consisted in the aid that one neighbor would afford another when needing it, with the obligation to make such kindness reciprocal, as was done by the father, as the testimony shows.

Besides, an examination of the record will show that the appellant did not assert, even in his own mind, any primary claim against the father's estate for these services until long after he had administered on his estate. A considerable sum of money had been paid out to the distributees, his brothers and sisters, as their portion of the personalty, leaving but a small sum in appellant's hands as administrator, when he must have known, if he then intended to assert

this claim, that he had the right to retain it as administrator, upon making a proper voucher, but instead of doing this, he distributes all the personalty, and then asserts his claim for services that requires a resort to the land in order to satisfy his demand. Such a claim, if allowed under the circumstances, would result in the chancellor substituting a pecuniary recompense for an unselfish affection and rewarding the son in money for services to the father that should have been prompted alone by filial affection.

The judgment below must be affirmed.

ROBERTS AND PHELPS & CO. v. BRUCE.

(*Filed March* 28, 1891—*Not to be reported.*)

Lien—Indemnity—Surety—Subrogation—The holder of a purchase money note for $2,800, secured by a lien on land retained in a deed, obtained a personal judgment on the note without enforcing the lien; the debtor, for the purpose of raising money to pay off said debt, agreed with appellee that the creditor should assign said judgment and note to appellee as indemnity to secure him as surety in raising the money to pay off said debt, and further "to indemnify him in any and all obligations upon which he is now or may be hereafter held as the security" for the debtor. The assignment of the note and judgments were made, and appellee became surety, first to a bank for the money which was applied in payment of said debt, and afterward various arrangements were made by borrowing money from different parties to pay this debt, as well as others, appellee being surety in such loans. After the debtor became insolvent and made a deed of assignment for benefit of his creditors, the appellants as general creditors resist the claim of appellee to the lien by reason of the assignment of the note and judgment as indemnity. *Held*—That appellee is entitled to the benefit of the lien assigned to him. It is clear that a surety when he renews the suretyship to a different party, but to raise money to pay the first liability, should be entitled to retain any indemnity in his possession or under his control. Its continuance for his security should not be affected by the change. Besides the lien retained in the deed gave notice to all creditors of the amount of indebtedness existing as a prior lien on said land, and no one could have been deceived or misled thereby.

John D. Carroll for appellants.

Wm. Carroll and Thos. H. Hines for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Holt.

Stanley Bruce made an assignment for the benefit of his creditors generally, in 1887, being then the owner of a tract of land, upon which his brother, the appellee, W. O. Bruce, claims to have a lien for money paid by him as the security of Stanley Bruce to the extent of the amount of a note given by the latter for a part of the purchase money of the land, and which W. O. Bruce claims was assigned to him as indemnity.

The appellants, who are general creditors of Stanley Bruce, deny the existence of any such lien; and a brief statement of facts, as to which there is little dispute between the parties, is necessary to a consideration of the question.

In 1877 Frances Kelly held a note upon Stanley Bruce for $2,800, bearing ten per cent. interest, dated April 30, 1875, and due one day

thereafter, which had been executed for a part of the purchase money of the land; and in that year she obtained a personal judgment only upon it, none being sought to enforce the lien. This she had a right to do without its operating to destroy the lien.

Stanley Bruce desired to pay the judgment, but did not have the money. He applied to the appellee to become his surety to a bank for it, but the appellee refused, because he was already his surety to L. M. Sanford and D. F. Caplinger for considerable sums.

It was finally agreed, however, that if he would do so, the note and judgment upon it should be assigned by Frances Kelly to him to secure him as to the Sanford and Caplinger debts, the debt to be then created in the bank, and all other debts upon which he was then or might become bound as the surety of his brother; and thereupon, on June 5, 1878, he did become such surety to the bank upon a note for $3,968, the proceeds of which were at once paid to Mrs. Kelly. The evidence shows that this was substantially the agreement between the two brothers, but it was not then reduced to writing, nor was this necessary to its validity.

There is no question but what up to this time there was a lien upon the land for the payment of the note held by Mrs. Kelly, or the judgment that had been rendered upon it. The note was, however, not assigned by her to the appellee until June 29, 1878, or twenty-four days after she had been paid; but it was then done in pursuance of and to carry out the agreement previously made between the Bruces. She also at the same time authorized her attorney to assign the judgment to the appellee, and he did so on July 5, 1878.

In June, 1882, a part of the land was mortgaged to a third party to obtain money to pay the bank debt in part. In this mortgage the appellee united, owing to his holding the lien debt upon the land, but only to the extent of giving the mortgagee the first lien; and at this time the parol agreement between the Bruces, already recited, was reduced to writing.

Subsequently $1,000 was borrowed of S. E. DeHaven to pay the balance of the bank debt, and the appellee became the surety upon it, and it is one of the debts as to which he now claims to be indemnified by the Kelly purchase money debt.

Money was also borrowed of R. L. Ricketts to pay upon the Sanford and Caplinger debts, the appellee also becoming surety for it; and as to it, and the remainder of the Sanford debt, he also claims the same indemnity.

The three debts to DeHaven, Ricketts and Sanford amount to much more than the Kelly debt, and the appellee has paid all of them. If he is entitled to priority over the general creditors as to the land, or the proceeds of a sale of it, it is of course only to the amount of the Kelly debt, and this is all that the lower court allowed.

The appellants contend, first, that when Mrs. Kelly assigned the note, and her attorney the judgment to the appellee, her debt had been extinguished by its prior payment to her, and that as none then existed, the appellee acquired nothing by the assignment.

If this be true, then of course no indemnity ever existed, and it cuts off all other questions.

If not true, then the appellants say the parol agreement between the Bruces as to indemnity, and, in fact, embraced the bank debt only; that upon two of the seven renewals of the notes for it the appellee was not bound; and that the moment he ceased to be liable the indemnity died, although he subsequently became bound again for the same debt; and if this be not so, then, lastly, even if the

agreement, as originally made, also embraced the Caplinger and Sanford debts and any debts upon which the appellee might thereafter become bound as the surety of Stanley Bruce, yet the bank and the Caplinger notes were paid; that the DeHaven and the Ricketts debts were new ones subsequently created, and that any agreement between the Bruces that the Kelly debt should be held by the appellee as indemnity for any liability as surety for his brother to be created in *future* was not valid as to the future creditors of Stanley Bruce.

None of these positions can upon the facts of this case be sustained. Undoubtedly the absolute payment of a debt, without any agreement or understanding that it is to continue in force for some purpose or the benefit of some one, terminates not only its existence, but that of any lien to secure its payment.

It can not be revived by any subsequent agreement, nor again be forced into life to secure a new debt or some other engagement.

Freeman on Judgments, section 466, says: "Payment produces a permanent and irrevocable discharge, after which the judgment can not be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements."

In accordance with this well settled rule it was held by this court, in Thompson's adm'r, &c. v. George, 86 Ky., 311, that the re-delivery of a mortgage, which had been satisfied by the payment of the debt it was given to secure, upon the agreement that it should secure another debt, created no lien.

It is true equity could not substitute the appellee to the right of Mrs. Kelly as to her debt, as it would if he had paid it as surety for it. It had to be done by agreement, and could not be by equitable subrogation. It is also true she was not present when the agreement was made between the Bruces, but by the payment to her they became the only interested parties; the note was not surrendered to the debtor, nor any entry of satisfaction of judgment made; there was no intention that the lien should be released, and in a short time after the agreement was made she, in conformity to it, assigned the note, and had her attorney assign the judgment to the appellee.

Upon such a state of case it should not be held that the debt was extinguished by the payment to Mrs. Kelly. This would be inequitable. The chancellor would not listen to the debtor, Stanley Bruce, were he asking it. It was virtually a payment by the appellee under an agreement with the debtor that the debt was to remain in force as his indemnity. The agreement was made by them in good faith, and long before the debts of the appellant were created. The obligation did not die with the payment to Mrs. Kelly, but by the agreement of the parties really interested, then made, survived for the benefit of the appellee.

It is true he did not go upon two renewals of the bank note, each lasting about six months, the one in August, 1880, and the other in August, 1881; but thereafter he again became and was bound for it when the money was gotten of DeHaven, and also when the agreement with his brother was reduced to writing in June, 1882. It was the same debt. The Kelly note was never surrendered by him, nor was the judgment upon it ever released. In fact he remained bound all the time for the Sanford debt, and also for the Caplinger debt until the Ricketts money was borrowed. When he again became bound for the bank debt his right to the Kelly debt as indemnity again attached by virtue of the agreement between him and his brother, it never having been surrendered. This intention and understanding is shown by the writing of June, 1882, signed by both

of them, and which recites: "W. O. Bruce holds said note and judgment to indemnify and secure him as the security of said Stanley Bruce in a note to the bank of Newcastle, and in a note to L. M. Sanford and D. F. Caplinger, and further to indemnify and secure him in any and all obligations upon which he is now or may be hereafter held as the security of said Stanley Bruce."

It is said, however, that the bank and the Caplinger debts were paid; that the DeHaven and Rickett's debts were new ones, and that the indemnity could not apply to them, even if that were the agreement, because it could not be made to cover any future liability of the appellee as surety of Stanley Bruce. They were created, however, to raise money to pay off the debts upon which the appellee was liable as surety, and as to which he held the indemnity.

In such a case, in the absence even of an express agreement to that effect between the parties, the security should have the right to continue to hold his indemnity. His liability, although to another party, still continues, and the money raised having been applied in payment of the original debt, his right to the indemnity should be upheld in equity. In our examination we have been able to find no case upon this point, but any other rule would be inequitable and contrary to natural justice.

If a security, when he pays the debt, be entitled, because it is equitable, to the benefit as against the debtor of all collateral securities held by the creditor, equally should a surety, when he renews the suretyship to a different party, but to raise money to pay the first liability, be entitled to retain any indemnity in his possession or under his control. Its continuance for his security should not be affected by the change.

This court, in the case of the Louisville Banking Co. v. Leonard, trustee, &c., 11 KY. LAW REP., 917, held that a mortgage upon real estate for a certain sum, given *bona fide*, to secure future advances is valid.

That decision is supported by both reason and authority; and likewise we see no reason why an indemnity like this one should not be valid where the parties have, in good faith, agreed that it shall secure the surety in liabilities that may be thereafter assumed for the principal.

No one here was liable to be imposed upon to his injury. The deed to Stanley Bruce gave notice to every one that the purchase money lien existed. The judgment for the amount of it was of record as well as the assignment of it to the appellee. Every one was told by the record that the property was in lien for a certain sum. There was no secret lien that might operate as a fraud upon creditors. True, the assignment of the note to the appellee was not of record; but that of the judgment was, and really it made no difference as to others whether the lien appeared upon record, as held by Mrs. Kelly or the appellee.

There was no entry of satisfaction or release of lien. The debts of the appellants were created not only long after the agreement in parol was made between the appellee and his brother, but after it was reduced to writing in 1882, and the *bona fides* of the entire transactions being beyond doubt, the judgment is affirmed.

Judge Pryor not sitting.

WELLS v. RUBENACKER.

(*Filed March* 31, 1891—*Not to be reported.*)

Division fences—This action was for trespass, involving the true location of a division fence, and the jury, under proper instructions, having located same where a fence had been for forty years, that verdict will not be disturbed on appeal, as it seems sustained by the evidence.

George R. Gill and Wall & Worthington for appellant.

L. W. Robertson and Thomas R. Phister for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as tenant of William Chamberline, sued the appellant, in trespass, for throwing down a fence on Chamberline's land, used as a division fence between lands of the appellant and said Chamberline. The appellant admits that he threw down the fence, but says that the appellee had recently reset it over on his land, consequently, he had the right to throw it down; and the appellee denying that the fence was reset on the appellant's land, therefore, the question of title was involved, and the jury, having found for the appellee, the appellant has appealed.

The jury having found from the evidence that the fence was not reset on the appellant's land, the only question as to that matter is, if properly instructed, was their verdict flagrantly against the evidence.

The positive facts before the jury, in regard to the question, are: That Pence and Bennett, many years ago, owned the respective tracts of land now owned by the appellant and Chamberline; that the lane, now said to be a public lane, was a private lane on the land of Bennett, and used by him alone for his own convenience; that in 1837 or 1838 (according to the evidence of Mr. Chandler) he helped Mr. Pence to repair the fence on the west side of this lane, said Pence owning the land on that side of the lane and claiming the fence as his; that not many years thereafter, Moran having become the owner of the Pence land, and Bennett still owning the tract on the east side of the said western fence, Moran claimed that the western fence was too far west; consequently, over on his land. This contention caused a dispute, and it was settled between them by having the lines surveyed, and the fence moved back east on the line that they agreed on as the true division line; Bennett removing the fence east of that, the agreed fence remained where it was thus placed for over forty years, and until 1884, or thereabouts, as the true dividing line between these two tracts, and the owners of each tract adversely held and claimed the tract up to said fence.

Said Chandler proves the foregoing facts in detail; Dave Adams proves them so far as the agreed line and fence are concerned; Chamberline and other witnesses prove that said fence was recognized as the dividing line, and each party claimed the land up to it. It is also shown that the appellant often recognized this fence as being on the true line, notably in acting as commissioner to allot Mrs. Bennett dower. It is also shown that in 1884 the appellant moved this fence back on Chamberline's land, and when the appellee removed it back to its right place, where it was before, the appellant threw it down.

Now, the jury having been properly instructed, the verdict of the

jury is not flagrantly against the evidence, but is, in our opinion, in accordance with its weight.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

BANK OF LOUISVILLE v. LOCKRIDGE, &C.

(*Filed Nov.* 12, 1890.)

1. *Involuntary assignment—Rights of lien creditors*—In the distribution of the estate of an insolvent debtor, who has committed an act which has been declared to have operated as an assignment under the statute, a creditor, whose claim is partially secured by a contract lien on the debtor's estate, is entitled to prove the balance of his debt, after exhausting his lien, and to share *pro rata* with the other creditors to that extent. He is not entitled to share *pro rata* with the other creditors upon the full amount of his claim, without regard to his lien, as in the case of a voluntary assignment; nor is he required, as in the distribution of a decedent's estate, to wait until the general creditors have been made equal with him before he can share in the general estate.

2. *Same*—That the section of the statute concerning involuntary assignments, which provides that "the action and proceedings as to the mode of proving claims and otherwise, shall be conducted as actions and proceedings for the settlement of the estates of deceased persons," was intended to regulate merely the practice and not to determine the property rights of the parties.

Humphrey & Davie and W. C. Churchill for appellant.

H. L. Stone for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Barbour.

S. Caye, Jr., & Co., a firm doing business in Louisville, having transferred certain bonds to the appellant to secure an antecedent debt, the act was, upon the petition of the appellee, a creditor of the firm, adjudged to have operated as an assignment of all his property and effects under the statute against preferences by insolvent debtors.

The appellant holding several debts against the firm, which were each partially secured by collaterals (which securities were not affected by the preference referred to), insists that, in the distribution of the trust estate, it has the right, disregarding the collaterals, to a *pro rata* with the other creditors on the whole of each of its debts, to the extent it is necessary with the collaterals to pay them. The court below, however, refused to allow appellant to receive any thing more upon its debts until the general creditors had, out of the

general assets, received a dividend equal to what appellant had realized from its collaterals. The correctness of this ruling presents the only question on this appeal.

The contention in support of the judgment is, that under the third section of the statute concerning involuntary assignments, which provides that "the action and proceedings as to the mode of proving claims and otherwise, shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable," the assets of the debtor are to be distributed, as in the case of the settlement of an insolvent decedent's estate—that is, "if any creditor has a lien, and the property subject to the lien is not sufficient to discharge the debt, he shall not be entitled to any portion of the residue of the estate, until all of the creditors not having liens shall have received a sum equal *pro rata* with such lien creditor." Section 34, article 2, chapter 39, General Statutes.

Counsel cites as sustaining this construction a *dictum* in McCallister v. Savings Bank, 80 Ky., 389, where the court, referring to the third section, *supra*, says: "This only applies to the manner of proving claims and distributing the proceeds of the estate of the debtor, and was not intended to determine the question of jurisdiction." We hardly think that the expression goes to the extent counsel claims; but be that as it may, the only question before the court was one of jurisdiction; the conflicting rights of lien-holders and general creditors were not involved; the mind of the court was not addressed, even incidentally, to the question presented here. In our opinion the section will bear no such construction as is claimed. It seems plain to us that its purpose was to lay down the manner of procedure—the practice in such cases—and not to determine the property rights of the parties.

The seventh section, however, determines the rights of a certain class of creditors by providing that debts due, as guardian or administrator, shall have priority, and it should be presumed that if the Legislature had intended to declare the relative rights of lien creditors and general creditors, it would have done so by language equally as clear. The statute, therefore, being silent as to the respective rights of these creditors, they must be determined upon equitable principles.

Nor can we concur in the appellant's contention, that the rule applied in the settlement of the estate, under a voluntary assignment, controls in a case like this. In the cases of Logan v. Anderson, 18 B. M., 118, and Citizens' National Bank v. Patterson, 78 Ky., 291, the rights of the parties were purely contractual; the liens which had partially secured the claims of some of the creditors were acquired by contract. Their rights, under the assignment, were also procured by contract—by the voluntary assignment of the debtor, accepted by them. The purpose of each of these contracts was to secure the payment as far in the one case as the value of the lien property, and as far in the other case as the value of the assigned estate; and, by virtue of these contracts, the creditor with the lien had the right to look to both funds for the payment of the whole debt. Why? Because, as so fully and lucidly argued in the two cases cited, the parties had so contracted.

But that is not the case here. While the bank acquired the collaterals by contract, the estate, out of which it is now seeking a dividend on its whole debt, did not arise out of any contract between it and its debtor, but was created by operation of the statute and

against the will of the debtor, and to the destruction of the contract he attempted to make.

In the case of the German Security Bank v. Jefferson, 10 Bush, 330, the lien which the bank had on the stock of the debtor in the bank, to secure its debt, was derived from its charter, not by contract—was a legal, as distinguishable from a contract, lien. The lien which it, in common with the other creditors, acquired under the voluntary deed of the debtor, was a contract lien. The court held that, if the bank asserted its charter lien upon the stock, it could not participate in the fund arising out of the assigned estate until the other creditors had received a dividend equal to that received by it from the stock.

But it does not follow that the converse of the rule should be applied, and the creditor, who by contract has obtained security for part of his debt, denied any participation in the general estate created by the operation of the law for the benefit of all the creditors, until the other creditors have received from it an amount equal, *pro rata*, with that which he received from his contract lien. The debtor had pledged the collaterals to the bank as security for his debt before the commission of the act which operated as an assignment, and to the extent these collaterals were necessary for the payment of that debt, they had passed beyond the control of the debtor; and the advantage which the bank thus secured by its vigilance should not be denied it, but to the extent of the balance of its debt it should be allowed to share *pro rata* with the other creditors in the trust estate. This rule, it seems to us, is the logical sequence of the reasoning in the cases we have cited, and results in substantial justice to all the parties.

We are not unmindful of the *dictum* in Spratt v. First National Bank, 84 Ky., 90, where the court in its argument intimates that the same rule should govern in the adjustment of liens in the settlement of the estate of an involuntary assignor, as in the settlement of the estate of a voluntary assignor. But no question as to involuntary assignments was raised in that case, and the *dictum*, it seems to us, is based upon false premises, and is not, as is assumed, in harmony with Logan v. Anderson and the other cases, which, as we have said, base the right of the lien creditor, in case of voluntary assignment, solely upon the ground of the two contracts—the lien contract and the contract of assignment.

We do not perceive the pertinency of Gideon v. Struve, 78 Ky., 134, to the question involved here. The court does not say that the husband and wife, by their contracting act, made an assignment, but says that the conveyance which they intended should operate just the reverse, by virtue of the statute, not by their act, operated as an assignment; and they were denied the homestead, not because they had conveyed it for the benefit of his creditors, but because they had parted with the title by the deed, which was not void, but which, under the statute, operated as an assignment.

It is true this opinion suggests three different modes of settling insolvent estates; but this grows out of the difference in the nature of the cases. In the one class of assignments the rights of the creditors are secured by the contract; in the other class they are secured by operation of law; and in the case of insolvent decedents the statute expressly postpones lien-holders until creditors not having liens are made equal out of the general estate. But there is no such statute applicable to assignments, whether voluntary or involuntary. Perhaps it would be wise legislation to have the same rule of distribution in the case of involuntary assignments as is now fixed in

the case of deceased insolvents. But the courts can not make the law; their powers are limited to the interpretation of the law as it is.

The judgment disallowing the appellant any part of its claims is reversed, and the cause remanded with directions to make an order distributing the funds in accordance with the principles announced in this opinion.

SUPERIOR COURT ABSTRACTS.

CROUCH v. CROUCH.

Filed February 18, 1891. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Limitation—Evidence of new promise*—The plaintiff, having averred in her petition that defendant had frequently, within five years next before the institution of the action, promised her to pay the debt sued for, further averred that he, "in October, 1888, and in 1889," promised her to pay the debt. *Held*—That plaintiff was not confined in the proof to promises made in 1888 and 1889. Proof of a promise made at any time within five years before the institution of the action was sufficient to sustain the allegations of the petition.

2. *Grounds for new trial*—Rulings of the court in overruling and sustaining demurrers to pleadings have no place in a motion for a new trial. All such questions are saved by exceptions taken at the time.

3. *Evidence of communications between husband and wife*—It was competent for plaintiff to relate a conversation she had with defendant in regard to the payment of the debt, and her statement that she told him that her husband "said for him to pay the money or give a good note" could not have prejudiced the defendant, nor was it a material violation of that provision of the Code prohibiting a husband or wife from testifying concerning any communication between them.

4. *Evidence—Leading questions*—The courts will not reverse in every case where counsel for the successful party has elicited an answer from his own witness by a leading question. There can be no reversal except for errors which are prejudicial to the party complaining.

George C. Drane, E. E. Settle and Lindsay & Botts for appellant; Thos. R. Gordon and J. W. Greene for appellee.

MUD RIVER COAL CO., &c. v. TIPTON.

Filed February 18, 1891. Appeal from Muhlenberg Circuit Court. Opinion of the court by Judge Young, affirming, Judge Yost not sitting.

1. *A new trial will not be granted upon the ground of newly discovered evidence*, unless the discovered evidence is of such a permanent and unerring character as to preponderate greatly or have a decisive influence upon the evidence to be overturned by it.

2. *A new trial will not be granted for excessive damages*, unless the damages are so great as to strike the mind at first blush as having been superinduced by passion or prejudice.

A verdict for $1,725 for injuries which confined plaintiff to his bed for several months, and in consequence of which he is now a cripple, is not excessive.

Charles Eaves for appellants; E. D. Walker for appellee.

MATHIS v. MATHIS.

Filed February 11, 1891. Appeal from Spencer Circuit Court. Opinion of the court by Judge Yost, affirming on original and cross-appeal.

1. *Contract for support*—Under a contract between an aunt and her nephew, by which the nephew was to furnish the aunt a home in his family, and provide and care for her during her life, except that in cases of protracted illness, requiring much nursing and medical attention, she was to pay the expenses, the nephew was entitled to compensation for the services of his family in extra attention and nursing given the aunt during several protracted spells of sickness, and for his own services to her as a physician.

2. *Same—Mental capacity*—The proof shows that at the time the contract was made the aunt was a woman of good mind, fully able to understand the terms of the contract, and that she entered into it willingly.

3. *Bastards*—The legitimate child of a bastard can succeed to an inheritance that would belong to the bastard if he were alive.

G. G. Gilbert and A. P. Harcourt for appellant; W. Lindsay and W. H. Anderson for appellee.

COMMONWEALTH v. FLEMING LODGE, &c.

Filed February 11, 1891. Appeal from Fleming Circuit Court, Opinion of the court by Judge Yost, affirming.

Refusal of county court to list property a ministerial act—The county court, in refusing to list property for taxation under an information filed by the auditor's agent, and in dismissing the information, acts ministerially and not judicially, and, therefore, no appeal lies. Baldwin v. Shine, 84 Kentucky, 502.

P. W. Hardin, L. T. Moore and G. A. Cassidy for appellant; W. G. Dearing for appellees.

PEOPLE'S MUTUAL ASSURANCE FUND v. BRICKEN.

SAME v. BUSH.

Filed February 18, 1891. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

Insurance—Right of insured to recover premiums paid—Where the amount to be paid by an insurance company under its contract was dependent upon the number of members in the division or class of which the assured was a member, the company had no moral or legal right to so act as to impair the rights of the assured by reducing the number of that class; and the act of the company in inducing members of that class to surrender their certificates and insure with it upon a different plan, was a breach of its contract, as was also the act of the company in depriving the assured of his membership because of his failure to pay assessments which it had no right to make, and, therefore, the assured had the right to recover of the company the sums he had paid to it under the contract.

W. C. McChord for appellant; J. W. S. Clements for appellee.

HOME INSURANCE CO. v. PATTERSON.

Filed February 18, 1891. Appeal from Hardin Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Fire insurance—Misrepresentations as to title*—Where the assured was in possession of the insured property under a parol contract of purchase from his father, and, in addition was the owner in fee of an undivided interest in the land as one of the heirs of his father, who had died since his purchase, his representation that he had a fee simple title to the land, did not render the policy void. And a deed executed to him by the other heirs subsequent to the fire, was competent evidence of his title, as it related back to the date of the parol contract.

2. *The company is estopped to rely upon false statements in the application* for the purpose of avoiding the policy, where the assured made truthful answers to

the questions asked him, and the agent wrote false answers in the application without the knowledge or consent of the assured.

3. *Interest*—Where the policy provides that the amount of loss shall be due and payable sixty days after proofs are received by the company, the insured is entitled to interest from that time as a matter of right, and not merely at the discretion of the jury.

J. P. Hopson for appellant; J. C. Poston and W. R. Haynes for appellee.

BERGMAN & Co. v. COMMERCIAL UNION INS. CO.

SAME v. PHŒNIX INS. CO.

Filed February 18, 1891. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

1. *Fire insurance—Arbitration*—Where a policy of fire insurance provides that, in case differences arise touching any loss or damage, the matter shall be left to impartial arbitrators, an arbitration is not a condition precedent to a right of action upon the policy. It is only necessary when differences arise as to the amount of loss, and if such differences have arisen and there has been no arbitration, it is a matter of defense.

2. *Where mortgaged property is insured* and the company agrees, by an indorsement on the policy, to pay the loss to the mortgagee as his interest may appear, the contract being with the mortgagor, the mortgagee's right of recovery may be defeated by any breach of the conditions of the policy by the assured before the loss occurs, but the mortgagee's claim can not be defeated by the act of the assured after the loss has occurred. Therefore, the mortgagee is not bound by an arbitration of which he had no notice.

W. O. Harris and R. T. Colston for appellants; B. F. Buckner for appellee.

N. N. & M. V. Co. v. THOMAS.

Filed February 18, 1891. Appeal from McCracken Circuit Court. Opinion of the court by Judge Young, affirming.

1. *New trial—Bill of exceptions*—As a new trial was granted in this case, and further time in which to file a bill of exceptions was not asked or given, a bill of exceptions which was not filed until after the new trial was had can not be considered for the purpose of showing what occurred on the former trial, and, therefore, this court must assume that the action of the lower court in granting a new trial was proper.

2. *Ejection of passenger from railroad train*—One who sues a railroad company to recover damages on account of his unlawful ejection from a train on which he was a passenger, is entitled to recover damages for the force used in ejecting him.

3. *Evidence*—It was competent for the plaintiff in such an action to prove the condition of his health prior to the time he entered the train.

Holmes Cummins for appellant; C. H. Thomas for appellee.

INGRAM v. GREENWADE.

Filed March 4, 1891. Appeal from Menifee Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *In suing upon a supersedeas bond* it is necessary to allege in the petition whether the appeal was granted by the lower court or by the clerk of the Court of Appeals, in order to show that the bond was taken by the clerk authorized to take it, as a bond taken by the clerk not authorized to take it is a nullity.

2. *In an action upon a supersedeas bond* there can be no recovery of the ten per cent. damages provided for by section 764 of the Code, unless they were awarded by the Appellate Court upon the affirmance of the judgment. The circuit court has no power to award such damages.

3. *Defense by one defendant avails for all*—In a joint action against several a plea of payment or satisfaction by one presents a defense for all.

R. Gudgell and Clark & Vanarsdell for appellant; Wood & Day for appellee.

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KENTUCKY COURT OF APPEALS.

EIFERT V. TOWN OF CENTRAL COVINGTON, &C.

(*Filed Feb.* 3, 1891.)

Municipal Taxation—A territory or division of land was erected into a town by a charter obtained from the Legislature, which provided that before the town was created the question should be submitted to a vote of the people. The appellant was instrumental in obtaining said charter, and voted in favor of establishing the town. The original charter, as well as two amendments thereto, provided for the levy of an *ad valorem* tax upon the taxable property in the town for municipal purposes, which was paid by appellant, until the institution of this action, in which he seeks to enjoin the collection of such tax on the ground alleged that his lands are not town lots but farming lands, in no wise benefited by such tax or municipal government. *Held*—That such lands, although situate on a border of the town, remote from the more populated portion thereof, constitute town lots and are properly taxable as such. In addition to appellant's participation in establishing said town, he had laid out his land into streets and lots, and sold some of the lots, describing same as situate on streets in his division; bridges and better roads facilitating travel to and from appellant's lands were made by the town authorities, the expenses of which were defrayed by taxation and other benefits derived from taxation, which fortify the conclusion that such property should be subjected to municipal taxation.

W. A. Byrne for appellant.

Orlando P. Schmidt for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Holt.

The appellant enjoined the appellee from collecting municipal taxes, for the year 1888, upon the ground that his land was used ex-

clusively for agricultural purposes and derived no benefit from the municipal government.

The town of Central Covington was incorporated in 1880. It lies adjoining the city of Covington. The original charter provided that its citizens should be exempt from working the county roads; that its trustees might levy a $2 tax upon each one so exempted, and also a tax of six cents on each $100 in value of property in lieu of the county road tax, all of the money so raised to be applied in repairing and improving the streets and paying the expenses of the town.

The charter was not to take effect until it should be submitted to the voters of the proposed town, and adopted by a majority of those voting at the election. This was done, the appellant not only voting for, but as the testimony tends to show, advocating its adoption. The land now claimed as exempt from municipal tax, and upon which the appellant resides, was within the limits of the territory thus incorporated.

By an amendment to the charter, procured in 1886, the trustees were authorized, in lieu of the former tax, to levy a capitation tax of $2, or in lieu thereof, two days' work, to be applied in improving the streets, and also an *ad valorem* tax of twenty-five cents on each $100 worth of property.

A second amendment, procured in 1888, provided in lieu of the former taxation an *ad valorem* tax of not over $1 upon each $100 in value of property, to be used for general purposes.

Relief was thus given from working on the county roads and from the payment of the street tax or labor in lieu of it.

The thickly settled portion of the town is upon the eastern side of its territory, or next to the city of Covington, while the appellant's land is upon the western limit. It is, however, a growing place, and is gradually extending its buildings towards the appellant's land. It consists of a considerable number of lots laid out in divisions and subdivisions, one lot not being divided by fence from another, but all lying within one inclosure, and used for gardening purposes.

The town plat shows the number of the lots, and also the streets, which are, however, yet to be improved through the land. The appellant has sold and conveyed some of these lots, designating them in the conveyances by their numbers, and calling for the unimproved streets. A turnpike formerly ran along upon one side of the land, and while not definitely shown by any drawing in the record, yet Willow street appears, according to the testimony, to run first upon one side and then upon the other of it, but this street, if graded or paved at all, is not so far out as the appellant's land. He having access to the turnpike included, Willow street, within his inclosure.

The town does not appear to have begun to grade and improve its streets much until 1888.

It appears, however, that it has built and kept in repair one or more bridges near appellant's land for the purpose of travel to the main part of the town, and to the city of Covington just beyond. It has also, under some arrangement with the turnpike company, taken control of and keeps in repair the turnpike to or near the town limit, but in some way, not clearly shown by the record, some toll is yet exacted in passing over it from the appellant's land toward the center of the town, but the company has no right to charge for as great a distance as formerly.

The town has also constructed a board walk along the side of the turnpike, which extends to the appellant's gate, or at least to his land.

The complaint in the petition is that the land derives no benefit from the municipality; that no gas or other lights, or water or police protection is furnished, and that indeed there is no need of them.

The evidence shows, however, that the place is but a small town. It furnishes no water to any of its inhabitants; it does no street lighting, and has only a town marshal, and no police.

The appellant derives all the advantages from the incorporation that any of its citizens do.

Clearly he has thereby been furnished with better roads or streets to enable him to carry his produce to market, and the evidence tends to show that he has been benefited as much or more than any other inhabitant of the town by the imposition of the taxes, as they have been mainly expended in the improvement of the streets, which are being graded or improved at or near his property.

This is not a case where the Legislature, without the consent of the owner, has extended town limits so as to include agricultural lands for no other reason but municipal taxation, the owner receiving none of the benefits enjoyed by the inhabitants of the original town, as was the case in the City of Covington v. Southgate, 15 B. M., 491; and in some other cases decided by this court. Here the complaining party has distinctly voted for and assisted in making his land a part of the original town. We do not mean to decide that this fact in and of itself would render it liable for the tax, but it is certainly one circumstance to be considered. Nor do we mean to hold that all land within even an original incorporation is liable for municipal tax; but in this instance, while the appellant's land is used for gardening purposes, yet it is platted into town lots, which divisions he has recognized in sales of portions of it; he is afforded substantially all the advantages that the incorporation affords to any one, in the way of improved streets and increased facilities for travel, by which his property is constantly becoming more valuable; it is essentially *town*, and not *farm* property; and under all the existing circumstances he should not profit by these advantages and escape the burthens which the other property owners of the town are compelled to bear, and which will of course be the greater, if he is not made to contribute his proper proportion. This he seems to have done willingly during all the previous years since the incorporation. He should be subject to the burthens because he has an interest in the purposes for which it is imposed, and the advantages accruing to him therefrom are a just compensation for the exaction.

If he derived no advantage whatever from the existence of the town, and his lands were so situated as to afford no ground for municipal control, then he might say that his property was under the color of taxation, being taken for public use without compensation; but such a case is not, in our opinion, presented.

Judgment affirmed.

HOPKINS, &C. V. HOPKINS' ADM'R, &C.

(*Filed March* 7, 1891.)

Appeals—The plaintiff recovered a judgment in favor of defendant, but no appeal was prayed in the lower court, and the defendant afterwards died. At the time of his death there was no action pending in either the lower court or the Court of Appeals, and after the appointment of his administrator plaintiff sued out an appeal before the clerk of the Court of Appeals, and the administrator was made party, appellee, by proper process. Appellee

moves to dismiss the appeal as unauthorized by the Code of Practice. *Held*—That the appeal is properly prosecuted. Unless an appeal is allowed in such cases there will be a failure of justice. The Civil Code does not provide for appeals in such cases.

Stone & Sudduth for appellants.

M. A., D. A. & J. G. Sachs for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Holt.

The judgment in this case was rendered on February 10, 1890. It was in favor of W. W. Hopkins, who was a defendant. He died September 5, 1890. No appeal was asked or granted in the lower court, and at the time of his death there was no action pending either in this or the lower court.

His administrator was appointed on December 5, 1890, and the appellants, who were plaintiffs below, sued out an appeal in this court on December 9, 1890, making the administrator an appellee.

These facts are properly shown by the record now before us.

The administrator now moves to dismiss the appeal, upon the ground that there has never been any revivor of the judgment either in this or the lower court. He insists that the death of Hopkins suspended all further proceedings until a revivor of the judgment.

There is no specific direction in our Civil Code as to how an appeal shall be taken under such a state of facts. Section 767 provides that the provisions of title 11 shall, so far as applicable, regulate cases in the Court of Appeals; but that title relates exclusively to the revivor of *actions*. This is shown not only by the provisions of its sections, but they are entitled "Revivor of Actions," and no other provision upon the subject refers to this court.

It is manifest this court could make no order reviving the judgment of the lower court, and at the death of the party there was no appeal pending here to revive. Chapter 4, title 9, of the Civil Code, provides for the revivor of judgments for the purpose of enforcement.

It is, however, the unsuccessful party that has taken this appeal, and if he can not do it in the manner now attempted, where his adversary has died before he has done so, and subsequent to the rendition of the judgment, then he must revive a judgment against himself; and if, upon the state of case now before us, he must do so, then, if the successful party dies within a very few days before the end of the two years within which an appeal may be taken, and when there is not time to revive the judgment and then appeal, the party is remediless; and if it could be properly said there must be a revivor of the action, then there is the greater likelihood of it, because, by section 507 of title 11, there can be no revivor of an action against a personal representative within six months after the qualification of the first personal representative, and the time for an appeal might expire before the party desiring it could by law put himself in a position to take it. But, as already said, there is really no pending action, and hence there can be no revivor in either court of an action.

The cases of Williams, receiver, &c. v. Thompson, &c., 80 Ky., 327, and Thompson's adm'r v. Williams, receiver, 86 Ky., 16, are not applicable in this case, as there the party died while the action was pending in the lower court.

It seems to us, in a case like this one, all the party desiring to appeal need do to perfect his appeal, when taken in this court, is to make the personal representative a party, appellee, and, by proper process, bring him before the court. He is a necessary and proper party to the appeal. He represents the estate of the party who obtained the judgment, and section 734 of the Civil Code provides that an appeal shall be granted as a matter of right against a party or *privy* either by the court rendering the judgment, at the term when it is rendered, or thereafter by the clerk of this court.

If such course be taken, it certainly accomplishes all that any order reviving the judgment would, if made in the lower court. No one is prejudiced, and the estate of the decedent is properly represented upon the appeal.

In the absence of an express statutory provision regulating the mode of proceeding in a case like this one, we think all has been done that is necessary, and that the proper mode of taking the appeal has been pursued.

This view is, to some extent, sustained by what was said in the case of Spalding, adm'r, &c. v. Wathen, 7 Bush, 659, and the motion to dismiss the appeal is overruled.

CAPERTON, &C. V. STEGE.

(*Filed March* 17, 1891.)

Landlord and tenant—Removal of improvements—A lease of a lot was made, with the privilege given the tenant to erect improvements on the same at any time during the lease, and to remove the same from the lot on the expiration of the lease. A short time before the lease expired the landlord notified the tenant that the lease would not be renewed, but that he would buy the improvements. A negotiation to fix the valuation of same followed, which continued until after the lease expired, and then failed. In an action to recover possession of the lot, *Held*—That the tenant was entitled to a reasonable time after the expiration of the lease, or the failure of the negotiations, within which to remove his improvements. This privilege follows by implication as a matter of justice to the tenant, but the right of ingress and egress, for the purpose of removing the improvements, is all that he is entitled to, while the landlord is entitled to the possession of the lot at the expiration of the lease, subject to the tenant's right of ingress and egress with a sufficient number of hands to remove the improvements. The fact that the lot, to which the landlord is entitled, may be small and that no income from it may be derived during the time the removal of improvements is being made, can make no difference in the application of the rule.

Wilson & Thum and Burton Vance for appellants.

O. A. Wehle for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

James Guthrie leased to the appellee a vacant lot of ground, in the city of Louisville, for the term of twenty years, the lease expiring on the 10th day of June, 1887. By the agreement appellee had the privilege of erecting improvements on said lot at any time during the lease, and to remove the same from the lot on the expiration of the lease. About two or three weeks, perhaps more, before the

lease expired, the appellants (one of whom is the daughter of said Guthrie, and the other her husband) notified the appellee that he would not be permitted to renew the lease, and appellants proposed to buy the improvements, paying therefor the value of the material, the appellee agreeing, but about the value of which they differed, which caused the negotiation concerning the same to pend for several weeks after the expiration of the lease. The parties finally failing to agree, the nogotiation was abandoned; and the appellee, still holding the possession of the property and collecting rents therefor, claiming that he had a right to a reasonable time after the termination of said negotiation to remove said improvements, and to remain in the possession of the property during the time that it required to remove the improvements, the appellants brought this action of forcible detainer for said property, the trial of which, upon appeal to the law and equity court, resulted in a verdict and judgment for the appellee, and the appellants have appealed.

The court instructed the jury in substance that, by the terms of the lease, the appellee had the right to use and occupy the leased premises during the entire term; that he was not required to remove the improvements before the expiration of the term, but was allowed a reasonable time after the expiration of said lease in which to remove said improvements; and he had a reasonable time in which to remove said improvements after the negotiation concerning the purchase of the same had been terminated, provided the negotiation was conducted in good faith on the part of the appellee, and he had the right of occupancy during said time.

By the terms of the lease the appellee had the right to use and occupy the improvements during the entire term, and to remove the improvements on the expiration of the term; and to require him to remove the improvements before the expiration of his term would violate his contract right to use and occupy them on the premises, until the expiration of his term, and to refuse him the right to remove them after the expiration of the lease, provided he did it in a reasonable time, would cause him to lose his property by availing himself of his contract right. Hence, the law implies his right to remove the improvements within a reasonable time after the expiration of the lease.

This implication arises in order that justice may be done, to prevent an injustice, and the implication extends no further. Hence, not to allow the appellee a reasonable time after the expiration of the lease, or of the termination of the negotiation, in which to remove the improvements, would, as he had the contract right to use and occupy them on the premises until the expiration of the lease, be unjust; but no injustice would be done him to require him to surrender the possession of the lot on the expiration of the lease, subject, however, to his right of ingress and egress to remove his improvements. To allow him to occupy the premises during the time required to remove the improvements, should not be implied, because not necessary to prevent a failure of justice. The implied right is that of removal, not of occupancy, as the latter is not necessary to the removal of the improvements. The instruction as to the right of occupancy is erroneous.

The judgment is reversed.

Judge Bennett delivered the following response to a petition for rehearing:

The error of the lower court, as we held, consisted in the fact that the court held that the appellee was entitled to occupy the premises

during the time which the law allowed him to remove the improvements, we holding that the appellants were entitled to the possession of said premises on the date that the lease expired, but consistently with the appellee's right of ingress and egress with a sufficient force to remove the improvements. The appellee contends that this rule applies to larger bodies of land only, not to small bodies that are nearly all covered by the improvements. But it seems to us that the smallness of the right ought not to change the principle that, because the appellants would not have a great number of acres upon which to enjoy his right consistently with that of the appellee, the latter's right is not increased for that reason; that he can not, for that reason, occupy the premises, rent them out and pocket the rent. We have been educated to believe that a person owning a nickel toy, usually intended for the amusement of children, is as much entitled to the enjoyment of it as he would be to a fine horse.

The petition is overruled.

PAXTON V. BOND.

(*Filed March* 24, 1891—*Not to be reported.*)

Wills—Power of devisee to sell land—A testator, by his will, left to his widow his property, real and personal, during her natural life, and further provided that, should the farm fail to provide her a support, she might sell fifty acres off and have the proceeds. The widow married again and sold off the fifty acres. *Held*—That she had the power to make this sale, and her judgment exercised in this matter was conclusive of the necessity for the sale.

Bell & Bell for appellant.

T. M. Cardwell and Nat Gaither for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

Stanfield Burns, a resident of Mercer county, died childless, leaving his widow, Jane Burns, surviving him He left a last will, by which he gave to his wife all of his property, real and personal, for her support during her life. This, as he supposed, gave her only the income or profits arising from his estate, all of which seems to have been realty, except some little personal estate of insignificant value, and he, therefore, further provides: "If at any time my wife should become needy and the farm fail to make her a support, I give her the right to sell fifty acres of the land on either side she may choose, and to have the proceeds."

The wife subsequently married and sold the land, the consideration being $200 in cash and her support comfortably during life. This she had the power to do, because, by the will, the proceeds of the fifty acres were given directly to her. She judged of the necessity for selling this land, and, in fact, was the only one authorized to determine that question. She was advanced in years, and the entire farm could not have rented for exceeding $250, and if a state of case was presented where proof as to the needs of the widow was admitted, we would still hold that she had the right to sell, and when the sale was made the proceeds belonged to her exclusively.

She was also entitled, as long as she lived, to the rent of the balance of the land.

The power of sale may, in certain instances, depend on the happening or non-happening of some event; but this is not that sort of case, but a power given the wife to sell if her wants required it, and the testator evidently thought she would sell, and further provided that the farm of "seventy acres be sold if the fifty acres is disposed of; but if not, the whole one hundred and twenty acres be sold, and the proceeds divided between those named." The widow selling the fifty acres, left only seventy acres to be sold, and the chancellor below, having held the power to sell existed and that the widow was entitled absolutely to the proceeds, we must affirm the judgment.

GIVENS' ADM'R V. K. C. R. R. CO.

(*Filed March* 24, 1891—*Not to be reported.*)

Negligence—Instructions—In an action by an administrator of a child nine years of age to recover damages of a railroad company, for injuries resulting in the death of the child, which were caused by backing an engine and tender over him while trespassing on the company's track at no crossing, it was proper to give a peremptory instruction to the jury to find for the company where the evidence showed that but for contributory carelessness of the child the accident would not have happened, as the employes in charge of the engine were not aware of the danger of the child until the accident occurred, the child having come upon the track so close to the tender as to prevent the engineer or fireman from seeing him, so that the danger could have been avoided.

A peremptory instruction should never be given in such cases if there is any evidence showing negligence on the part of the defendant.

M. C. Swinford for appellant.

G. C. Lockhart and T. T. Forman for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Holt.

Thomas Givens was killed by a locomotive and tender of the appellee backing upon him, when he was crossing its road in or near a small town of about one hundred and fifty inhabitants. He was not an employe of the company, and only nine years old, but was fully aware of the danger from moving trains.

His administrator brought this action, under section 1 of chapter 57 of the General Statutes, to recover damages, upon the ground that the killing resulted from the negligence of the company's servants in charge of the train.

To sustain this charge it is contended that the train was being operated by inexperienced hands, and that no signal was given of its movement.

The lower court, at the close of the appellant's testimony, peremptorily directed the jury to find a verdict for the company, and the propriety of this direction is the only question before us.

The company insists that there was no negligence upon the part of those in charge of the train, and that but for the negligence of the deceased the accident would not have happened.

It is well settled in this State that if there be any evidence, however slight, conducing to show a right of recovery, a plaintiff has the right to have the question settled by the jury. If, therefore, there was any testimony tending to show neglect upon the part of the company, or from which an inference of it might be fairly drawn, or if a state of case was presented which, to one man's mind, might show neglect, while it might not to another, then the question should have been left to the jury, unless it appeared without doubt that but for contributory neglect upon the part of the deceased the accident would not have happened.

It did not occur at a public crossing, but at a point upon the track of the company where it had the sole right of way. The deceased was in fact a trespasser, and those in charge of the train are under such circumstances ordinarily not required to keep a lookout and guard against danger to such a person.

They are not required to presume that anyone will trespass upon the exclusive right of way of the company, and they are, therefore, not bound to be on the lookout for trespassers, but only to avoid injury to them, if possible, when their presence and liabilty to danger becomes known. This rule applies in the case of a child just as it does in that of a grown person. If those operating a train were required to look out and guard against danger to children trespassing upon the track, then this would necessarily afford an opportunity to see all other persons who might be upon it, and in danger.

Undoubtedly a greater degree of care is required of them as to children, not old enough to be aware of the danger, than as to grown persons, when they have been once discovered upon or near the track; but until their presence is known, the rule applies equally to both.

An exception to this rule exists, however, where a train is passing through a town or city, and where people are likely to cross the track at any point, and are known to be in the habit of doing so by those operating the train.

In such a case there is constant danger to life; and out of regard for it, those in charge of a train must look out for persons who may be upon the track, and give such notice of its approach and movements, and so regulate its speed as is likely to warn them of danger, and enable them to get out of the way. A less rate of speed results, but the protection of human life is paramount to this consideration. The care to be exercised by those in charge of so dangerous a motive power must in reason be graduated by the liability to danger. This is the reason for the exception, and it is urged that this case falls within it. We do not think so.

It appears that a freight train had just passed, going south, when the deceased started to cross the track. He doubtless did not see the engine and tender, which was backing in the same direction, although in plain sight, and although steam was escaping from it, until his attention was drawn to it by a cry from a person some distance away, and then the tender was almost upon him. He no doubt failed before going upon the track to look to see if a train was at hand, although he knew a work train moved about there a great deal, owing to the company having a quarry at that immediate point. In any event, he was negligent, either in failing to look, or if he did look, then in attempting to cross when it was so near at hand. He carelessly placed himself in the way of the danger.

It is certain those in charge did not know of his presence upon the track, and consequent danger. One standing in the cab of the engine could not see the track within thirty feet of it by reason of the

tender, and he must have gone upon the track when it was much nearer to him than that distance.

It is true the regular engineer was not at his post. He was at the depot, distant some two hundred yards probably, and his son, whose age is not shown, was acting in his place. The train was, however, being operated very prudently as to speed. It was not moving faster than a man would walk.

It is said, however, no signal was being given of its movement. This is true; but the situation and circumstances were not such that the law required it.

It matters not that the village was not incorporated. It is not this circumstance which imposes the duty upon those operating a train of giving proper signals when entering or passing through a center of population, but the fact that at such a point persons may be presumed to be passing in all directions and that, therefore, constant danger to life.

The deceased was killed some two hundred yards north of the depot. This distance is not accurately shown, because a map, which the parties agree does show it, has not been made a part of this record before us. No part of the town is situated along the track north of the depot. There is but a single house in that locality. For a considerable distance upon one side of the track, at the point where the accident occurred, there is a quarry of considerable area, and in the rear of it, and upon the side of the hill above it, there are very few houses.

Upon the other side, but some distance from and parallel with it, there is a dirt road, and along it are scattered a few houses; but nearly all of the village is either south of the depot or across Licking river, which at that point runs along east of the railroad and parallel with, but some distance from it.

The locality where the accident happened is not such as required those in charge of the train to anticipate the presence of and be on the lookout for trespassers.

It is not shown that persons were in the habit of crossing or being on the track in that locality. There is no evidence whatever tending to show, and we can not presume it from the surrounding circumstances. This being so, the trainmen were not required to presume the presence of any one, and guard against danger to him by the use of the usual signals.

There being no evidence whatever of neglect upon the part of the company, the peremptory direction to the jury was proper, and the judgment is affirmed.

MCMATH V. MAUS' BROS. BOOT AND SHOE STORE.

(*Filed March* 26, 1891—*Not to be reported.*)

Attorneys—Disbarring for failure to pay over money collected—On the trial of a motion to suspend an attorney from practice for failure to pay over money collected by him, it is no defense that he is holding same to indemnify him for sums of money owing him by the collecting agency, through whom he received the claim for collection. The liability of the attorney making a collection is to the claimant, as he had notice that the collection agency was merely the agent of the claimant.

Applegate & Colvin and Bonar & Lee for appellant.

J. T. Simon for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Pryor.

At the November term, 1888, of the Pendleton Circuit Court, Maus Bros. filed a notice of their purpose to move for a judgment against the appellant for money collected as their attorney, and which he had failed to pay or account for, and that he be suspended from the practice of the law until the money is paid. A judgment was rendered against the appellant for the sum collected, and then a rule issued on plaintiff's motion, made returnable on the first day of the April term of the court, against appellant, to show cause why he should not be suspended from the practice of his profession.

The defense to the original motion was that the appellant had received the claim for collection from an agency in Cincinnati, and that their collecting agents were indebted to him for services rendered, and that he had the right to retain this money to satisfy this demand against this agency; that the plaintiffs were strangers to him, and he only used their name because the claim upon its face seemed to be due them.

The court very properly held that there was nothing in the defense and rendered a judgment. The appellant then had until the next term of the court to pay the money, but in response to the rule to show cause why he should not be suspended, he said that he had prayed an appeal to the Superior Court, and that the appeal was still pending, and, therefore, the rule should not be enforced.

The judgment of the court was not suspended by an appeal, and that judgment is in full force, and we must hold it valid, because it must be presumed, as the judgment is in force, that there is nothing in the defense, and for the additional reason that an ample opportunity was given the appellant to pay the debt after judgment. The appellant is mistaken in saying that the court, of its own motion, had the rule to suspend issued. The rule was on the motion of the plaintiff. There was first a judgment for the money, as that part of the complaint, asking a suspension from the practice, was stricken out, and after judgment the rule, on motion of the plaintiff, was issued asking the suspension.

It may be that the appellant is appealing in good faith, but this does not stay the judgment below. The court can not be too rigid in applying the statute, although a summary remedy, where it is evident the attorney has collected the client's money and failed to pay it over. The appellant, we have no doubt, trusted to the fidelity and honesty of this mercantile agency to make good this claim to the plaintiff, but this they failed to do, and his use of the money or the odium that attaches to such a suspension is certainly mitigated by reason of the failure of the agency at Cincinnati to pay him. An attorney, however, must be presumed to know that when claims are sent him by these collecting agencies, in the names of other parties, that the collectors are, what they term themselves, mere agencies to collect for others, and the only way in which this suspension can be removed is to pay the money.

Judgment affirmed.

DEGLOW'S EX'OR V. MEYER, &C.

(*Filed March* 26, 1891—*Not to be reported.*)

Pleading—Vendor and vendee—Landlord and tenant—D. having executed to appellees a written contract, termed a lease, by the terms of which it was agreed that, in consideration of five notes to be paid by appellees at stated periods during five years, D. leased to appellees certain brewery property, stipulating that, in case of sub-leasing the same without the written consent of D., the lease might be forfeited and repossession of the property taken by D. It was further stipulated that, after payment of said lease notes and after five years, appellees might purchase the property by executing their notes for a price named in the agreement. Four of the five lease notes were paid to D., and the last to his executor after his death. Appellees then asserted their claim to purchase same as provided in said contract, and the executor having no power to convey the title, and some of the devisees being infants, this suit was instituted to compel a conveyance of the title to appellees, upon their execution of the purchase-money notes, which they aver a willingness and readiness to do. As defenses it is alleged that the petition is defective in failing to allege a tender of the purchase-money notes, and that appellees had sold the property to another party, thereby forfeiting the benefit of his contract. *Held*—That the averment of the payment of the five lease notes was a condition precedent to asking the relief sought, and a tender of the purchase-money notes was not required as a condition precedent, for no deed could have been executed upon such tender being made, the interposition of the chancellor being necessary for this purpose. The claim of forfeiture can not avail as a defense; it could operate only during the time of the lease; besides, had grounds existed for the forfeiture, it had not been claimed by re-entry or otherwise.

Tisdale & Gray and Orlando P. Schmidt for appellant.

Wm. Goebel for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

In the month of September, in the year 1884, J. H. Deglow, of the city of Covington, under a contract called a lease, sold to the appellees what is known as the Bavarian Brewery for the sum of $24,000. The writing, executed by the parties evidencing the sale, or the substance of it, is as follows:

"This lease, made between J. H. Deglow, of the city of Covington, and John Meyer and William Riedlin, of the same place, witnesseth: In consideration of the sum of $2,000 in hand paid, and in consideration of the rents reserved, and the covenants and agreements contained, said Deglow does hereby lease and demise to said Meyer and Riedlin the following real estate [describing it]; to have and to hold the same from the first of September, 1884, for the term of five years, and fully to be completed and ended on the first day of August, 1889, paying therefor the following annual rents: $2,320 on the first of September, 1885; $2,260 on the first of September, 1886; $2,200 on the first of September, 1887; $2,140 on the first of September, 1888, and $2,080 on the first of September, 1889, &c. And it is further agreed that at the end of the term of five years, if the lessees have fully performed the covenants contained therein, the lessor binds himself that, for the consideration of $17,000, he will convey said premises to the lessees by a good and sufficient deed of general warranty, the purchase money to be evidenced by four

promissory notes, to be due and payable at the times specified in the writing, and a lien retained in the deed to secure their payment."

Another provision contained in the writing is to the effect that, "if the lessees assign the lease, or underlet the premises, without the written consent of the lessor, then it shall be lawful for the lessor, his heirs or assigns if they choose, to re-enter and enjoy his former estate, and the lease to become void. Other stipulations are found in the contract that have no bearing on the question involved.

The appellees paid all the notes due, within the five years, as they matured under that part of the contract calling it a lease, to the lessor, and the latter having died leaving a will, the last of these notes was paid to his executor.

The lessor, at his death, left infant children, and with no power conferred upon the executor to make a deed in accordance with his bond for title, this action was instituted against his devisees and his executor by the appellees, alleging a payment of the five notes, and a readiness to perform their part of the agreement by executing their notes for the $17,000 upon the execution of a conveyance by the devisees retaining a lien to secure their payment.

It is insisted by the appellants, the infants, who are represented by their attorney and guardian *ad litem*, that a demurrer should have been sustained to the petition because of the failure of the appellees to allege an offer to perform by a tender of the notes to the executor, and that a general averment of a readiness to perform is insufficient. While a general averment by a party seeking relief on a writing, when performance of some stipulation is a condition precedent on his part to the relief sought, that he has duly performed his part of the agreement, is bad pleading, in this case it seems to us that the averment of the payment of the five notes to the testator and his executor, and that the testator died leaving devisees and an executor, none of whom could pass the title, and of a readiness to execute these notes, was all that could have been required of the appellees when seeking to obtain a conveyance from those vested with the legal title. If the notes had been tendered no conveyance could have been executed, and, therefore, the only remedy was to apply to the chancellor, asking him to accept the notes and have the contract fully executed by a deed from his commissioner.

It is further insisted that the appellees had no cause of action, because prior to the filing of these petitions they had sold the brewery to the Bavarian Brewing Company; that it operated as an assignment of the lease and divested the appellees of all title.

The testator, if living, nor his devisees would be compelled to accept the notes of the vendee of the appellees under the contract, and, therefore, it was necessary for the appellees, who had conveyed to the Bavarian Company, to place themselves in a condition where they could perfect the title in their vendees, by complying with the contract made with the appellants' testator.

It is urged that this sale and conveyance operated as an assignment of the lease without the written consent of the lessor or his representatives, and for that reason, by an express stipulation of the agreement, it operated as a forfeiture of all the rights of the appellees under it. The forfeiture in this case evidently applied to the period during which the first five notes were to be paid, their payment being required as an indemnity or security for the performance of the contract by the appellees; and if not, there has been no entry by the appellants, or those under whom they claim, or an intention even to rely on the forfeiture until the bringing of this action; and if there had been, when it clearly appears that the appellees have

complied fully with their agreement by paying the notes as they fell due, and when it is manifest that the parties regarded the writing as a sale of the property from its inception, although termed a lease, and when the lien of the vendee is better secured by reason of improvements made on the property more valuable than the original price to be paid by the appellees, the chancellor should not hesitate to enforce the contract and perfect the title by a conveyance according to its terms.

This action was filed in less than two months after the maturity and payment of the last of the five-year notes; and even if the writing is regarded as a lease, with the privilege of purchasing at the end of the five years, the appellees have performed all their covenants and were entitled to a specific execution of the agreement. The lessor was certainly bound to convey at the end of the five years, if the lessees performed up to that time their part of the agreement. If there was any option in this regard it was with the appellees. They paid four of the five notes to the testator, and the fifth note to his executor.

The Bavarian Brewing Company is before the court as a defendant in the action and is making no complaint, and we perceive no reason why this title should not be perfected by compelling the devisees to convey.

Judgment affirmed.

PITMAN V. PITMAN.

(*Filed March* 28, 1891—*Not to be reported.*),

Fraudulent conveyances—A creditor considering a deed made by a debtor to his brother as fraudulent, levied her execution upon the land as the property of her debtor, and the court having decided that said conveyance was fraudulent, this court will not on appeal disturb that judgment, as the evidence discloses a multiplicity of transactions of doubtful character.

Alcorn & Craft for appellant.

W. O. Bradley, J. H. Tinsley and W. L. Brown for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

The debt of Mrs. Pitman, the appellee, was created in March 1875, and these transactions between the two brothers did not occur until long after. It is not pretended that John Pitman paid off the debt of $2,000 to Jackson, but he claims to have set off or that he had paid the Jackson debt in some other manner. John and C. Pitman were the joint owners of the mill property, and C. Pitman, by a deed recorded, conveyed his half to John in consideration that he would pay $2,000 to one Jackson, who held a mortgage on C. Pitman's property, including his interest in the mill property, to secure the debt.

The property of C. Pitman was then sold at the instance of Jackson and the proceeds of sale paid off Jackson's debt, leaving the mill property unincumbered save by the deed to John Pitman; in other words, the property mortgaged excluding the mill satisfied Jackson.

The appellee then had her execution levied on the mill property,

or the interest of C. Pitman, and sold it, in the year 1878, regardless of the deed to John Pitman, because that deed was, as she alleges, fraudulent.

John Pitman claimed that he paid $122 on the Jackson debt in some manner, through his son, and that C. Pitman was indebted to him in a large sum. In 1878, August, he filed his petition in bankruptcy, and C. Pitman also. John listed the mill property with his schedule of debts, and claims that the appellee knew it. This fact appears, but it is further shown that the appellee had purchased the mill or C. Pitman's half, and had a deed for it from the sheriff, and that the assignee in bankruptcy, as well as John Pitman, knew it. At the bankrupt sale the wife of John Pitman, who in the meantime had been declared a *feme sole*, purchased the mill property for $3,500, and she also had notice in fact of this purchase by the appellee. At the sale of C. Pitman's property by Jackson, the son of John Pitman was the purchaser, with his father as surety, and the mingling up of these several interests with the bankruptcy of both, and a lodgment of the title in the wife of John Pitman in such a short space of time bear the marks of a purpose to place this property beyond creditors; and while John Pitman and C. Pitman claim a large indebtedness by the latter to the former and a settlement between them, we are not disposed to disturb the judgment below affecting transactions of such doubtful validity between these parties. While the chancellor in subjecting the mill property to the payment of the debt should not have canceled the deed, it being good between the parties, the Pitmans are not complaining, and the judgment being in accordance with the facts, we must affirm it.

PICKETT, SUP'T, V. ADAMS.

(*Filed March* 28, 1891—*Not to be reported.*)

Schools—Compensation for services of county superintendent—This action was instituted to obtain a mandamus requiring the superintendent of public instruction to certify appellee's account for $195 for reporting census of common schools, as superintendent for Henry county, for the school year ending June 30, 1884. For defense the plea of payment was made, and the proof showing that the county court on January 4, 1884. and on the 4th day of August, 1884, allowed to appellant sums aggregating $183 for *visiting* schools for the year ending June 30, 1884, *Held*—That said allowances, although made for *visiting* schools, was actually compensation for *reporting* the census, as the duty of visiting was included in the general duty of the superintendent for which he was compensated otherwise. The special allowance of $3 for each district census reported being for this special service, which is considered of great importance to the administration of the common school system, but the allowance lacking $12 of paying the amount due for said service, the mandamus is awarded for that amount.

Ira Julian for appellant.

George C. Drane for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, the common school commissioner for Henry county, by petition asked the Franklin Circuit Court to award him a man-

damus against the appellant, as superintendent of public instruction, compelling him to approve and certify to the auditor the apellee's claim of $195 for reporting sixty-five common school districts in Henry county, at $3 each. The court awarded the mandamus, and the appellant has appealed.

It is to be observed that the appellee's claim is for reporting the common school districts in Henry county for the common school year of 1884, ending on June the 2d of that year. To this claim the appellant interposed the plea of payment, which, as is alleged, occurred in this way:

The county court, under the law as it then was, made semi-annual allowances to the common school commissioner; and in the allowances made to him on the 1st of January, 1884, and on the 4th of August, 1884, there was allowed to him the aggregate sum of $183, it being $3 each for the number of schools in said county that the appellee visited during the common school year of 1884, ending June the 30th of that year, or rather, by the act of May the 12th of that year, ending on the first Monday of August; that said sum, in said allowances, was said to be for visiting the schools for that year, it being erroneously supposed that the sum of $3 each was allowed for the number of schools visited by the appellee for the year 1884, instead of the number reported by him for that year; hence, although under the name of visiting the schools, he had received the pay allowed him for reporting them.

The settlements named and the appellee's evidence put it beyond doubt that the appellee received the sum indicated for visiting the schools for the common school year of 1884, and not for any preceding year, and this sum the appellee contends, and the circuit court seems to have agreed with him, he is entitled to in addition to the sum of $3 each for schools reported by him in 1884. This contention springs from the fact that this court said, in the case of the appellant v. Harrod, 9 KY. LAW REP., 687, that under section 12 of the common school law, as it then was, the common school commissioner was entitled to $3 each for the number of common schools reported by him.

This contention is clearly untenable. It is not thus decided, nor is it thus intimated. Harrod in that case, as the appellee did in this, obtained a mandamus against the appellant to compel him to approve and certify to the auditor his claim of $3 each for the number of schools reported by him for the year 1884, ending June the 30th of that year. The appellant contended, first, that Harrod was allowed said sum as pay for each school visited by him, and not for reporting the same, and he did not show that he had visited them; and, second, the law, under which the commissioner acted, having been repealed before the report was made, he was not entitled to any pay for the same.

As to the first defense we decided that, while it was made the duty of the commissioner to visit the common schools in his county at least once a year, he was not allowed as compensation $3 each for the schools visited, and of course it was clearly, impliedly held that such service was a part of his general duty, and the sums of $100 and one per cent., to be deducted from the whole amount due to each county, composed the commissioner's pay for his general service, and the $3 deducted for each school district reported "was designed as pay for that particular service."

By section 7, article 5, it is made the duty of the commissioner, "on or before the first day of June of each year, to prepare, mail to, and cause to be placed in the hands of the superintendent, &c., a

report certified by the county judge, or clerk, as having been sworn to by him, showing the whole number of white children, between the ages of six and twenty years, residing in the county, and the whole number residing in each district, described by its number. He shall base his report upon the census taken during the month of April, and reports thereof made to him by the district trustees." In case this census is not taken it is made the commissioner's duty to have one taken and report the same.

It will be readily seen the great importance of this report. It forms an intelligent basis upon which the superintendent can make an equitable distribution of the school fund among the several counties and the districts thereof, according to the respective number of school children therein, and without which, or some similar basis, no equitable distribution could be made by him. Now, it is not the onerous, complicated or long service that the $3 per district reported is designed to compensate, but the $3 per district reported is designed to induce promptness in making the report, in order, as said, that the work of the superintendent may be intelligently and equitably done; hence, the commissioner is allowed said pay only for the number of districts reported, and if he reports none he gets no pay. Besides, as we have seen, the statute directs that $3 be deducted "for each district reported, not visited." This language, fortified by the reasons indicated, clearly shows that the sum was to be paid to the commissioner for reporting, and to insure a prompt report; and it clearly appears from the whole act that the visitation of the schools by the commissioner was a part of his general duty relating to his conduct of the schools in his county, and the sum of $100 and one per cent. was designed to compensate him for his general duties.

It was also decided that the pay of the commissioner was not superseded by the act of the 12th of May, but he was entitled to pay for the time the law required him to serve. Also, the plea of payment was not made in the Harrod case; here it is made; and it seems to us that the plea, to the extent of $183, the amount received for visiting the schools, should prevail. The way the county judge and commissioner fixed it up, the commissioner, in fact, received pay twice for visiting the schools, and now wants the State to pay him extra for making his report, the result of a misapprehension of course, which is clearly wrong.

But this money belonged to the appellee for reporting, and while he received it as pay for the wrong service, for which he was paid in another way, and to prevent injustice, it should be allowed as a payment for reporting. But as it is not enough to compensate for reporting by $12, the appellant must approve and certify that sum to the auditor.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

Judge Bennett delivered the following response to a petition for rehearing:

The exhibits referred to in the record, making up the sum of $183, show said sum was for visiting schools for the common school year ending June the 30th, 1884. Besides, the appellee swears that the said amount was received for visiting the schools for the common school year, 1884. This sum, we decided, he was not entitled to for visiting the schools, and it should be applied as a *pro tanto* payment for reporting the schools for said year. This fact the counsel, all along the line, has overlooked. If his view were adopted, the State would be compelled to pay out thousands of dollars unlawfully.

Mark it: The record shows that it was for the school year ending June the 30th, 1884, that this money was received.

The petition for a rehearing is overruled.

SCHMIDT, &C. V. MILLER.

(Filed March 31, 1891—Not to be reported.)

Commissioner's allowances—In an action to ascertain the net earnings of a railroad company, for the purpose of paying the interest on certain bonds, the court appointed as deputy commissioner a man familiar with the operation and business of railroads. After making a report, which required about ten months' time to prepare, appellee, as commissioner, obtained from the court an order allowing him $2,000 as part compensation for making said report, the cause being still pending and undecided. *Held*—That courts have a large discretion in making allowances to commissioners, as they are the better judges of efficiency nd nature of the work done, and allowances made by chancellors to their commissioners will not be disturbed on appeal, unless evidently unjust and excessive, which does not appear in this case.

Simrall & Bodley for appellants.

H. L. Stone and L. L. Parks for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

The appellants instituted their action in equity against the L., C. & L. R. R. Co. for the purpose of subjecting its net earnings to the payment of the interest on some bonds, which interest had been accruing several years and had not been paid.

The case was referred to appellee, as master commissioner of said court, to take proof of said net earnings, &c., &c., and report. By agreement of all parties E. T. Calvert was appointed deputy commissioner in said case, because he was an experienced railroad accountant, and it required that kind of person to make a correct and intelligent report. It took Calvert about ten months to make the report, and he filed it, and it was suspended some time for exceptions; and before the exceptions were finally disposed of the court made the commissioner, the appellee, a partial allowance of $2,000 for the services rendered in the case. It seems that this allowance was asked at the time principally to enable the commissioner to meet some liabilities that he had incurred in furnishing Calvert with supplies, &c., while he was making the report. The court made, as indicated, a partial allowance of $2,000, and the appellants objecting to this sum as excessive, they have appealed.

Section 779 of the Civil Code provides that the master commissioner "may, with the approval of the chancellor, appoint deputies" Section 782 provides that the commissioner shall be entitled to such fees for reports and other services rendered, under order of the court, as the court may allow.

The chancellor is certainly entitled to a large judicial discretion in making allowances for the services of his master commissioner. His familiarity with the issues involved, he being face to face with the lawyers engaged in the case, and having the benefit of their suggestions about all matters appertaining to the questions involved; his own knowledge of the competency, honesty and application of

the commissioner, besides the evidence of men of experience in such matters as to value, peculiarly fit him to pass upon the question of the value of the commissioners services, and the value having been fixed by him, this court will not disturb it, unless it clearly appears that he has abused a sound judicial discretion.

Now, the commissioner was required to report all the net earnings of the L., C. & L. R. R. Co. from 1882 until the filing of the report, on its own lines, which accrued to it by reason of business coming to it from and over the lines of the Northern Division of the Cumberland & Ohio R. R. Co., and for this purpose the defendant was required to produce its quarterly returns, and all the books, vouchers, way-bills, &c., relating to said business, and report who are the owners of the mortgage bonds, &c.; to report the quarterly returns of the defendants' company over the lines of the C. & O. R. R. Co., over its own lines which accrued to it from or over the lines of the northern division of the C. & O. R. R. Co.; to report a statement of the monthly net earnings of the defendant, on its own lines which accrued to it by reason of business coming to it from or over the lines of the northern division of the C. & O. R. R. Co. from the 1st of October, 1885, to the 1st of December, 1887.

From this order the importance of the service will be seen. And there is no complaint of the efficiency of the services rendered, but the main complaint is that the deputy did unnecessary work, consisting of reporting in full the gross earnings of the C. & O. R. R., E. D., pertaining to said lines.

It is to be observed that this work was done, presumably, at least, under the eye of appellant's attorneys, and we no where hear of their interposing any objection to the manner of doing it, and, doubtless, if the work as to reporting the gross earnings had resulted advantageously to the appellant, there would have been no word of complaint. But the deputy, doubtless, thought that the net earnings of the defendant, accruing to it over the lines mentioned, could be best ascertained by ascertaining the gross earnings of said lines as they appertained to the defendant. In this opinion the chancellor seemed to concur, and in which we concur. But it is said that the appellant never questioned the correctness of the gross earnings of these lines, but it seems that the net earnings could not well be ascertained without ascertaining the gross earnings of these lines. And if it was the desire of the appellants to cut off inquiry into that matter, they could have easily instructed the deputy to take their short statement of it as correct. The proof is clear that the deputy's service, outside of said gross earnings, was worth as much as was allowed.

The judgment is affirmed.

MARION COUNTY V. L. & N. R. R. CO., &C.

(*Filed March* 31, 1891—*Not to be reported.*)

Taxation—Retrospective statutes—In 1886 Marion county levied a poll tax, a tax of twenty cents for turnpike roads and thirty cents for general purposes on each $100 of taxable property in said county. In 1887 it levied the same poll tax, and also ten cents jail tax, twenty cents turnpike tax and fifteen cents for county indebtedness upon each $100 of taxable property. The appellee resists the payment of the twenty cents turnpike tax for 1887, alleging that no indebtedness for turnpikes exists. It also resists payment

of the thirty cents tax for general purposes for 1886, and the fifteen cents tax for county indebtedness for 1887, alleging that the county had no statutory authority to levy said taxes. *Held*—That it appearing from the evidence that the turnpike debt had been paid only by borrowing the money from the sinking fund, the indebtedness for turnpikes still existed in 1887, and the tax levied to meet said indebtedness was legal. It is also held that the levy of the taxes for general county purposes for 1886 and 1887, although not authorized by statute when the levy was made, has been legalized by the curative act of April 10, 1888. The action of the county court in making such levies was not void for the want of jurisdiction, because it had power to act upon the subject of county indebtedness; it had jurisdiction to levy a tax for the purpose, but not one of a certain character, the power conferred was so restricted as not to embrace it. The levying of it was a mere irregularity.

The legislature had the power in advance of making these levies to have authorized them, and where this is so, it may by a subsequent healing statute validate them, though no authority existed at the time of their creation.

S. T. Spalding and Lewis Edelin for appellant.

W. J. Lisle for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Holt.

The Marion county court for the year 1886 levied for county purposes, not only a head tax, but twenty cents for turnpike roads and thirty cents for general purposes upon each $100 of taxable property in the county.

In 1887 it levied the same head tax, and also ten cents jail tax, twenty cents turnpike tax and fifteen cents for county indebtedness upon each $100 of taxable property.

The appellees paid the turnpike tax of 1886, but resist the payment of the thirty cent tax of that year for general county purposes.

The tax of 1887 to pay for the building of a county jail is not in contest; it is suggested that it has been paid; but the appellees deny the right of the county to compel the payment for 1887 of the twenty cent turnpike tax, and the fifteen cent tax to pay county indebtedness.

The answer denies the existence of any legislative authority in the county court to levy the turnpike tax.

The act of April 19, 1882, however, expressly gives it (volume 2, Acts 1881, page 664), and the power is conceded in argument; but it is said there was no turnpike debt in 1887, and that a tax levy to pay what is not owing is void, because there is no taking of private property for public use, but a taking where no use exists.

It appears, however, that in 1885 there was a deficit as to the county indebtedness of several thousand dollars. It was carried to 1886, when it was still more. We can not tell how much of it was turnpike indebtedness. This is not shown by the record, but at least a portion of it accrued on that account. The money to pay this deficit was borrowed from the sinking fund of the county, and the county clerk testifies that at the time of giving his deposition (1889) it had not been paid.

While, therefore, there may not in 1887 have been any turnpike debt, *eo nomine*, owing, yet an indebtedness existed which was created on account of it.

It is said, however, that, considering the value of the property of the county, the turnpike tax of twenty cents for 1886 was certainly

sufficient to discharge all the turnpike debt of the county existing in that year. This is not shown, however, and, as already stated, it was still owing at a subsequent date.

As to the levy in each year to pay the general indebtedness of the county, it is said that there was then no law authorizing the levy of an *ad valorem* tax for this purpose. This is true. The statute did not authorize such a tax, but only a head tax for county purposes generally.

The Legislature, however, passed an act, on April 10, 1888, which, after reciting that these levies had been made, and the existence of doubt as to their legality, declared them "valid, and in full force and effect, as fully as if said county court of levy and claims had been empowered to levy said amount for the purposes mentioned in said levies." Volume 2, Acts 1887-8, page 1067.

It is contended that the levies when made were void for the want of legislative authority to make them, and that the Legislature could not, therefore, by subsequent legislation, make them valid.

The county court had power to levy a head tax to meet the general indebtedness of the county. It could not levy the particular tax in contest. It had power to act upon the subject; it had jurisdiction to levy a tax for the purpose, but not one of a certain character. The power conferred was so restricted as not to embrace it. The levying of it, therefore, was a case of irregularity, and not of want of jurisdiction.

If a town having legislative authority to create town liabilities, contract one outside of its authority, but for a town purpose, the debt might undoubtedly be validated by retrospective legislation.

This case, it seems to us, would fall within the same rule.

Unquestionably the Legislature could in advance of the making of these levies have authorized them; and where this is so, it may by a subsequent healing statute validate them, though no authority existed at the time of their creation.

This legislative power is, of course, confined to validating acts which the Legislature could antecedently have authorized. The exercise of such a power is not forbidden by our State Constitution, and while retrospective legislation is in the main impolitic, yet the rule above stated has been often declared. Cooley on Taxation, page 305.

These levies were not for an illegal purpose. They were permissible by legislative authority in advance. The power to pass the curative act, therefore, existed, and it is equivalent to an original authority.

Acting upon this rule it has been held that an act validating the void judicial rule of an infant's property is constitutional; also an act validating municipal bonds, void when issued; and validating a void power of attorney executed by a *feme covert*. Thornton v. McGrath, 1 Duvall, 354; Bryce, &c. v. Sinclair, 3 Bush, 261; Read v Plattsmouth, 107 U. S., 568.

There has been no impairment of any contract or vested right in this case. The rule relating to such cases has no application here. There is no contract between the tax-payer and governmental power which protects him and his property, and to which he must, therefore, pay the tax as a duty he owes to it, and instead of this curative statute impairing a vested right, it merely takes away the opportunity to avoid the discharge of a duty.

The existence of general indebtedness by the county, when these levies were made, is virtually admitted, and if it were not, it is shown.

Equitably it was the duty of the appellees to discharge their fair proportion of it, and the act which is now assailed as unconstitutional merely prevents them from acting unjustly by refusing to bear their equal portion of a common burden from the imposition of which they equally, with others, receive a benefit. The constitutional provision forbidding the impairment of a vested right by legislation was never intended to apply to such a case. One should have no vested right to do wrong or act unjustly; and courts decline to regard that as a vested right which is contrary to justice and the equity of the case.

These levies were of uniform operation. They imposed a public tax, common to all the tax-payers of the county, for a local purpose, which may be done.

Nor can it be said that the Legislature has intervened in pending litigation, and thus invaded the domain of the judiciary.

It is true if the Legislature, during the pendency of litigation, were to pass an act, having a retroactive effect, in favor of one of the litigants, it would be an invasion by one independent department of the government of another, and, therefore, unconstitutional. Thweatt, &c. v. Bank of Hopkinsville, 81 Ky., 1.

But this has not been done in this case. It is true the act in question was passed after the lower court, in another action between these parties, had passed upon the validity of another levy for a different year by the Marion County Court; but this fact should not lead to our declaring this act unconstitutional. It does not relate to that litigation, and a court should not declare it unconstitutional unless clearly required to do so.

For the reasons indicated the judgment dismissing the petition is reversed, with directions to render a judgment in conformity to this opinion.

DOTY, &C. V. TRUSTEES OF BEREA COLLEGE.

(*Filed March* 31, 1891—*Not to be reported.*)

Appeals—Correcting transcript after decision rendered—After the Court of Appeals had rendered a decision reversing a case for want of service on a party in interest, as the record then showed, the record was permitted to be corrected by the clerk of the lower court, and it then showed proper service on all the parties, and a rehearing was granted and the case affirmed.

It is the duty of counsel to look to the condition of the record before submission, but where the error resulted from the oversight of the clerk, the correction of the record will be permitted to prevent injustice being done.

R. H. Tomlinson for appellants.

Wm. Herndon for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor.

In this case the children of Mrs. Doty are claiming that the chancellor below has sold the land of their mother for the payment of their father's debt, and that the mortgage given to secure the payment of the loaned money, which was signed by their mother, was only intended to pass the interest she had, if any, in her husband's estate.

We have been unable to ascertain from the record that any interest whatever existed in the wife, or that she had title to any part of the land sold. Counsel seem to argue the question as if an interest was vested in the wife, but when looking to the record there is none whatever disclosed, and, therefore, we can not well determine that question.

The judgment below was rendered by default, and on one of the children of William Doty there was no service. The sheriff seems to have authorized, by a proper indorsement, one person to serve the summons, and the affidavit, which is the proof of service, was made by another.

The Code provides that the service may be "by any person appointed by the officer to whom it is directed by an indorsement on the summons, and the affidavit of such person indorsed thereon shall be proof of the manner and time of service." Subsection 2 of chapter 2, article 1, Civil Code.

It would be a loose practice, if adopted, by which another, not connected with the official act, is permitted to show service. Where the right of property is involved it often becomes an important inquiry, both as to the time and mode of service, and when the sheriff or other officer, or their regularly appointed deputies, recognized as such by law, have not returned the summons executed, but is returned by one who is the mere agent, the proof of the service is confined to the agent by his affidavit, and it should be made and become a part of the return. It is true this agent may make his affidavit in open court, even after his return, but to permit another to do so would be a dangerous precedent.

The judgment, if there was no service, is necessarily void, and could be set aside by motion in the court below, but here the chancellor, where a conveyance by way of mortgage has been made, by different parties, of distinct and separate interests, and with defined boundaries, has no authority, it seems to us, for selling the land as a whole, without the consent of the parties. It also appears that the two tracts of land are connected with another tract in some way, and that these two tracts lie within the larger tract, but where does not appear. It may be apparent that neither tract can be divided, but there is no reason why each tract can not be sold separately, and the fact that it may be to the interest of all to sell the two tracts of land as one, will not authorize a sale of both as one tract without consent.

The judgment, therefore, is reversed, and the parties can then make defense, if any they have. Remanded for proceedings consistent with this opinion.

Judge Pryor delivered the following response to a petition for rehearing:

The reversal of this case was made alone for the reason that one of the parties in interest had not been summoned. It now appears that the appellant had filed a defective record, and although he made the point of the want of service in his brief, still the appellee first filed his brief, and did not know or have any reason to believe that such a question could be raised. While this court has always ruled that parties must look to the record before submission, and that it is too late to complete the record after the decision here adverse to the party who ought to have seen the record was perfect before submission; yet, in a case like this, where service was had and the clerk omitted to copy it, or erred in making the copy, it seems to us the error ought to be corrected, and, therefore, a rehearing is granted and judgment affirmed.

JONES BROS. v. MCEWAN.

(*Filed March* 31, 1891.)

Sales of personal property—Estoppel—A sale of wheat to grade as No. 2 on delivery is a warranty that it shall be of that quality, but if the purchasers have an opportunity to inspect it, and do so, and receive it without objection, they are estopped to claim damages for its failure to grade as No. 2 wheat.

W. M. Beckner and L. H. Jones for appellants.

George B. Nelson for appellee.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellants, grain and commission merchants, of Winchester, purchased of the appellee, engaged in the same general business at Pine Grove and Colby's, stations on the C. & O. R. R., all the wheat that the appellee had engaged in the vicinity of these stations, which was to be delivered at said stations in car-load lots, and to grade as No. 2 wheat. The appellee delivered said wheat at said stations, and it was there received by the appellants, and they personally inspected a part of the same as it was delivered, and pronounced it all right. They caused the wheat to be shipped to Newport News, the place of destination, where it was inspected and pronounced, at least a part of it, not No. 2 wheat in that market.

The appellee sued the appellants for a balance of the purchase money, to which they plead as counter-claim and set-off that, by the terms of the contract the wheat was to grade No. 2 at Newport News, the terminal point, and as it did not grade No. 2 at said point they were damaged in the sum of $649.

The appellee contended that by the terms of the contract the wheat was to grade No. 2 at the place of delivery, and the appellants, after inspecting or having an opportunity to inspect the wheat at said place, received the same in discharge of appellee's contract, which released him from all damage, &c.

The question as to whether the terminal place, or that of delivery, the wheat was to grade No. 2, having been passed upon by the jury, and they having decided from the evidence that the grade was to be at the place of delivery, we must regard that fact, for the purpose of this review, as settled.

So the question arises, conceding that the wheat did not grade No. 2 at the place of delivery, did the reception of it by the appellants at the place of delivery, after having inspected it, or after having had a fair opportunity to inspect it, satisfy the terms of the contract to deliver wheat of No. 2 grade?

This court, in the cases of Dana v. Boyd, 2 J. J. M., 594; O'Bannon v. Relf, 7 Dana, 320; Kerr v. Smith, 5 B. M., 553, which have been subsequently evidently approved by this court in a number of cases; also Benjamin on Sales (the text, 4th edition, sections 600 to 609), has held that where there is a contract to deliver goods or chattels of a particular description or quality at a future day, and the vendor tenders goods not of the agreed description or quality, in discharge of the contract, and the vendee, after inspecting them, or after having had a fair opportunity to do so, receives them in discharge of the contract, he can not thereafter maintain an action

against the vendor to recover damages for the defects in the description or quality.

The stipulation that goods of a certain description or quality are to be delivered is made an essential part of the contract, which must be complied with by the vendor as a condition preceding the obligation of the vendee to receive the goods and pay for them; and if the goods tendered in discharge of the contract do not come up to the terms of it as to description or quality, the vendee has a right to reject them and hold the vendor responsible in damages. But if he, after having inspected them, or after having had a fair opportunity to do so, receives them in discharge of the contract, although they do not as to description or quality comply with its terms, he thereby waives these defects, and he can not recover damages on account of them.

For this rule, as it seems to us, the sound and equitable reason is given, to-wit: When the vendor tenders the goods in discharge of the contract, and they do not come up to the stipulation, if the vendee, after having inspected them, or after having a fair opportunity to do so, would reject them, the vendor in many cases could comply with his contract by delivering other goods of the contract description or quality, or in the absence of such right or opportunity he would have the opportunity to take charge of them and dispose of them himself, rather than confide the sale of them to the vendee, whose interest might be to have recourse on the vendor, and to handle the goods with that view alone, or his business capacity might be such that the vendor would not be willing to trust him. But if the vendee, after inspecting, or having a fair opportunity to inspect the goods, were allowed to receive them in discharge of the contract and then hold the vendor responsible for actual or supposed defects, by exposing him to actions on the warranty on account of defects, but really to cover losses resulting from short-sighted speculation or the wayward changes in the market, after he had been led to believe that all was satisfactory, would be most inequitable. Hence, to regard the stipulation as an essential part of the contract, a compliance with which precedes the vendee's obligation to receive the goods, but if he receives them in discharge of the contract, after having inspected them, or after having had a fair opportunity to inspect them, the terms of the contract are complied with, and he has no action on account of the fact that the goods are not as stipulated, saves the rights of all parties. Of course this rule supposes that there is no fraud and that the vendee has had an opportunity to inspect the goods.

It is true there are many States that hold such stipulations to be warranties, and that fact was doubtless known to the members of this court at the time the decisions mentioned were rendered; but, nevertheless, they chose to hew out the more equitable rule regardless of those high opposing authorities. Besides, as there is scarcely any uniformity of decision among the several States upon the same subject—many sometimes deciding one way, and only a few the other—if we were to undertake to overrule our repeated and long-standing decisions to make a rule to conform to what is supposed to be the rule of the majority of the States, we would find ourselves overturning many long-standing legal landmarks of this State. Besides, instead of this State having an appellate court, some other State would practically fill that position for us. Which one should it be?

The judgment is affirmed.

CARTER V. BANK OF COLUMBIA.

(Filed April 4, 1891—*Not to be reported.)*

1. *Bills and notes—Pleading non est factum on renewal note—Liability on former note*—In 1882 a note was presented to the appellee, bank, and discounted by it, with the names of J. D. Carter & Co. and the appellant, Josiah Carter, signed to it. In 1884 a renewal of that note was given to the bank, which appellant signed in person. The note was renewed from time to time, until 1886, when this suit was brought on the last renewal to recover a balance due. Appellant pleaded *non est factum*, and an amended petition was filed alleging liability of appellant on the note of 1884, and seeking a recovery on same. From a judgment against him on said note this appeal is prosecuted. *Held*—That the amended petition was properly allowed, and a recovery on same was legal, as the renewal note, if void for want of proper authority to sign appellant's name thereto, was not a satisfaction of the note signed by him, and his liability is unquestioned.

2. *Novation—Release of sureties*—A note given to a bank as a renewal of a former note, and bearing the signatures of the former parties, which is accepted in good faith by the bank, is not a novation of the former note if it shall be afterwards discovered that the signatures to such renewal note were forgeries. Nor will any of the parties to the former note, if they are only sureties, be released by acceptance of such note and extension of time for payment of their liability.

Sandidge & Sandidge for appellant.

H. C. Baker, James Garnett and M. D. Allen for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Lewis.

In 1882 a note for $5,000 was given to appellee, Bank of Columbia, to which were signed the names of J. D. Carter & Co. and appellant, Josiah Carter. It is contended, and may be, that the signatures to the original, as well as several renewal notes, were all written by J. D. Carter, without the presence of Josiah Carter. But January 8, 1884, one was given for $4,934.40, which it is admitted Josiah Carter signed in person.

October 3, 1886, the last one was given for $3,004.36, and to recover judgment for that amount this action was instituted. But Josiah Carter, having made defense that the note was not his act and deed, Bank of Columbia filed an amended petition in which the note executed January 8, 1884, was alleged to be evidence of a subsisting debt, and judgment was prayed therefor, less credits, which reduced the amount to $3,004.36; and, in pursuance of the verdict of a jury, judgment was rendered for the amount of the note executed January 8, 1884, subject to the credits which reduced it to the sum just mentioned.

There was, previous to 1882, a firm of J. D. Carter & Co., of which Josiah Carter was a member. But we think the evidence shows there was another firm of that name, of which he was not a member, which borrowed the $5,000 in 1882, and that he signed the note of January 8, 1884, as surety merely. It seems to be further established and admitted that he did not sign nor give written authority to another to sign his name to either the note executed October 3, 1886, or any other one of the several executed subsequent to January 8, 1884; and if his plea of *non est factum* to the note of 1886 was the only legal issue in the case, no judgment could go against him.

But, though his attitude was that of security on the note of Janu-

ary 8, 1884, the execution of the subsequent renewal notes did not necessarily operate to satisfy that note, nor release him from liability; on the contrary, "it is the settled doctrine of this court that, where a creditor holds a note on two or more obligors, and accepts what purports to be a renewal note, signed by all of the obligors, and it turns out that the names of some of them were forged, or that the renewal note is, as to some of them, invalid, their obligation on the original note revives, and the obligee may bring suit thereon and recover judgment against them." First National Bank v. Gaines, 87 Ky., 597. And the fact the renewal note is valid as to some one or more of the obligors does not alter the rule. Stratton v. McMahon, 84 Ky., 641.

Under an instruction of the court the jury seems to have found all the facts, in our opinion, essential to a recovery in this case. They are that Josiah Carter signed the note of January 8, 1884, in person; that J. D. Carter procured the bank to accept a note, purporting to be signed by Josiah Carter, in renewal, and it was accepted by the bank in good faith, believing he had signed it; and that it turned out to be a forgery as to the name of Josiah Carter.

Those facts existing, there was no other alternative than judgment for the plaintiff.

It is, however, contended that acceptance of the renewal notes, whereby time for payment of the original note was extended, operated to release appellant as surety. It is a sufficient answer to that position that the new notes purported to be and were accepted by the bank as the notes of the same persons, including Josiah Carter, who were bound in the original note. If the renewal notes were binding on him, the indulgence to the principal was with his consent and resulted from his own act. If they were not binding on him because void, they certainly did not have the effect to release him from the original note; for if the name of Josiah Carter, the surety, was forged by S. D. Carter, the principal, the bank was not bound by the renewal note, even if it had been a novation of the original contract, which was not the case, and the bank had, for a consideration, agreed not to sue.

In no aspect of this case, as it appears to us, can the note of January 8, 1884, be considered satisfied by the renewal notes.

Judgment affirmed.

BANK OF COLUMRIA V. CARTER.

(*Filed April* 4, 1891—*Not to be reported.*)

Sale—Redemption—The court directed that its commissioner should sell a tract of land belonging to a debtor, also his equity of redemption in another tract, offering them separately and then together, and accepting the highest amount bid. The sale was made as directed and the bid for the two tracts together accepted as the highest bid. The creditor complains that he was deprived of his right to redeem. *Held*—That as the amounts bid for the tracts respectively were each greater than two-thirds the appraised value, and the bid accepted being larger, the debtor was not prejudiced by the sale.

H. C. Baker, James Garnett and M. D. Allen for appellant.

Sandidge & Sandidge for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Lewis.

This appeal is from an order of court setting aside a judicial sale of land, upon the ground stated in the exception filed that the sale was made in such way as to deprive the debtor of his right to redeem in the manner and upon conditions provided in article 8, chapter 63, General Statutes.

It appears that Sandidge, having judgment against appellee, Carter, caused execution levied upon his land, being in quantity about 800 acres; but about 383 acres thereof was cut off and left by the sheriff unsold, the residue having brought enough to satisfy the debt, which was about $1,521.

Subsequent to that sale, which took place in April, 1889, a judgment was rendered in favor of appellant, Bank of Columbia, against Carter for more than $3,000, and for a sale of the 383 acres and Carter's equity of redemption in that part already sold under the Sandidge execution. In that judgment the commissioner was directed as follows: He shall offer said 383 acres in one body and equity of redemption aforesaid to itself, and, if necessary to raise the money, offer them together and accept the bids which will realize the largest amount.

In pursuance of that judgment the commissioner caused the two parcels of land to be legally appraised, the 383 acres being valued at $700, and the residue of the tract at $3,000, and February 10, 1890, he sold the whole for $1,100, Bank of Columbia becoming purchaser. But, as directed in the judgment, he first offered the two parcels separately, there being bid for the 383 acres $585, and for the equity of redemption $500, which bids, aggregating less than $1,100, were rejected and the other bid adopted and reported to court. After its purchase at that sale, Bank of Columbia paid to the purchasers, under the Sandidge execution, the amount then bid and paid by them, including interest and costs, which was about $1,648.

The separate bid for the 383 acres was more than two-thirds of its appraised value, and adding to the aggregate bid of $1,100 the amount of redemption money paid by Bank of Columbia, $1,648, the total amount realized from the entire tract of about 800 acres was about $2,748, which was more than two-thirds of the appraised value, $3,700, and, consequently, it now appears appellee, Carter, was not substantially injured by the mode of sale directed by the court; for if the bid of $585 for the 383 acres had been adopted, he would not have had the right to redeem, and the only theory upon which the action of the court can be based is, that if the 383 acres had been sold separately it would not have brought as much as was actually bid for it when it was so offered. The condition upon which section 3, article 8, chapter 63, General Statutes, gives to a defendant the right to redeem real estate sold in pursuance of a judgment is, that it does not bring two-thirds of the appraised valuation.

In this case it would be directly opposed to the facts, as they appear, to decide it brought less, because it did actually bring more.

The judgment sustaining exceptions to and setting aside the sale is reversed, and cause remanded for proceedings consistent with this opinion.

AMERICAN MUTUAL AID SOCIETY V. BRONGER.

(*Filed April* 4, 1891.)

1. *Insurance—Misrepresentation in application*—The insured in his application for insurance on his life in answer to the question as to whether he had made application to another company for insurance, and had that application refused, replied no, when in fact his application had been refused by another company. In an action on said policy, the insured having committed suicide, *Held*—That said representation was immaterial, as it appears that the examining physician discovered the same trouble that was the basis of the former company's refusal to accept the application, but after a second examination by the examining physician. with the concurrence in opinion of another physician, the application was accepted.

[2. *Separations of findings of law and facts*—If a court, without the intervention of a jury, tries both law and facts, the decision of the court on questions of law can not be questioned on appeal, unless there has been a separation of conclusions of law and fact and exceptions saved thereto. This is the proper construction of section 332, Civil Code of Practice.

Simrall & Bodley for appellant.

O'Neal, Jackson & Phelps, and Lane & Burnett for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

This case involves a question of law and one of fact. It was heard by the court without the intervention of a jury.

The insured made application to the appellant to have his life insured for the benefit of the appellee. The appellant is a mutual aid society. In answer to the question, "have you made application for insurance in any other company," the insured responded no.

An application had been made to another company, and the insured or his application refused. The examining physician, discovering, as he thought, some trouble with his heart. The examining physician for the appellant made the same discovery, but upon a more thorough examination became convinced that he was all right. A second physician examined him, and concurred in his views with the regular examining physician.

Not long after the insurance had been effected, the insured committed suicide, and there is no pretense that his heart was the cause of his mental trouble, or that he had any other physical disease.

The court held, as a matter of law separating the findings of law from those of fact, that the failure to answer the question as to his prior application for insurance correctly, was not a material representation, as it would not have affected the application made to the appellant, because the latter had the same knowledge in reference to his heart trouble that the physician had who first examined the insured.

Whether this was a correct exposition of the law on the facts, it is not necessary to decide, as there was no exception to the findings of law. Section 332 of the Code, provides: "Upon trials of question of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state, in writing, the conclusions of fact found separately from the conclusions of law." This court has not passed directly upon this question of practice, but the Superior Court

has held in several cases that it is as much necessary to except to the finding of law by the court, so as to raise the question in an appellate court, as in a case where the jury is passing on facts under findings of law made by the court. That in the admission or rejection of testimony, or the determination of any legal question during the progress of the case, the exception must be reserved at the time.

It is too late after judgment to raise the question by a motion for a new trial, if otherwise, it then becomes unnecessary to except at all until the judgment is rendered. The court could have told the jury that the answer to the question propounded was not material, and an exception must be made in such a case, to be available in this court. It may be argued that the council may not know how the court will interpret the law until final judgment, and this may be so, still an exception to the judgment would not raise the question, and, therefore, when separating the one finding from the other in a case where the court reserves a decision of the legal question until he is ready to pronounce judgment, the exception should be entered to the finding, if desired by either party, but it seldom occurs when the trial judge is hearing both questions of law and fact, that he fails to decide the legal question before pronouncing judgment.

There is no necessity of separating the findings, but to enable a party to except, and if a motion for a new trial raises the question, it is then not necessary to except. The court below held as a matter of law that the burden was on the defendant to show something more than that the answer complained of was false, and to that finding there should have been an exception.

This ruling makes the practice in both courts uniform, and we think carries out the provision of the Code on this subject. Other States have similar provisions in their Codes of Practice, and construe them in the same manner. In Peden's adm'r v. King, 3 Ind., 181, it is said: "To prepare a case for the Supreme Court under section 341 of the Code, the court below should first state the facts in writing, and then the conclusions of law upon them, to which the party aggrieved should except, the questions of law are not saved by a motion for a new trial."

In 46 Michigan, 436, Chatterson v. Parrott, the court held an exception to the judgment was unavailing. "Had there been findings, an exception that they did not support the judgment might have been considered." In Gilmore v. Thies, 18 Wis., 554, "In cases tried by the court, where there are several facts found or conclusions of law stated, the exceptions should show to which one of them objection was made." In Smith v. Davidson, 45 Ind., 399, the court in alluding to this question of practice said: "The only way to do that is to except to the conclusions of law. It is not enough to except to the finding generally. Nor can the question be saved by a motion for a new trial." Decisions of a similar character will be found in other States, and it is apparent that the purpose of this provision of our Code was to enable a party to except to the legal finding in the same manner that he would except where an instruction had been given the jury.

Upon the question of fact as to the fraud, we concur with the opinion of the court below, and must, therefore, affirm the judgment. The opinion of the Superior Court seems not to have discussed this question, and whether or not the point was raised in that court, we are unable to say.

L. & N. R. R. Co. v. Sharp.

(*Filed April* 5, 1891.)

Supersedeas bond—Interest on judgment for personal injuries—Retrospective statutes—A judgment for personal injuries rendered in 1881, having been affirmed by a divided court, and ten per centum damages awarded, appellee, on the return of the case, refusing to accept the amount of his judgment with ten *per centum* damages awarded, instituted this action to recover further damages that he sustained by reason of the supersedeas bond delaying him in the collection of his judgment. *Held*—That ten *per centum* damages is all that he was entitled to, as judgment for personal injuries rendered prior to the amendment to section 6, chapter 60, General Statutes, adopted in 1888, did not bear interest. Nor can that amendment be considered as retrospective. It is a rule that no statute will be so construed unless there be something in the nature of the case or the language used showing that it was so intended by the law-making power. Unless this appear new statutes will be held to apply only to future cases.

Jno. McChord and W. J. Lisle for appellant.

W. E. Russell for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Chief Justice Holt.

In 1881, the appellee, Thomas G. Sharp, recovered a judgment against the appellant for $800 for a personal injury.

The statute then in force provided: "A judgment, except for malicious prosecution, libel, slander or *injury to the person* should bear legal interest from its date." General Statutes, chapter 60, section 6.

This judgment did not, therefore, bear interest, and was so entered.

The appellant appealed, and superseded it.

The bond is of the usual form. It stipulates: "The appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal; also that they will satisfy and perform the judgment above stated (for $800 damages), in case it shall be affirmed, and any judgment or order which the Court of Appeals may render or order to be rendered by the inferior court not exceeding in amount or value the judgment aforesaid (and also pay all rents, hire or damages, which, during the pendency of the appeal may accrue on any part of the property, of which the appellee is kept out of possession by reason of the appeal")).

The portion of the bond in parenthesis was doubtless inserted by the draftsman because it is given in the form to be found in the Civil Code; but it is there stated that it is only to be added, if the appellee will be kept out of the use or possession of property; and it was not a proper or necessary stipulation of the bond in this case, the judgment superseded being only for money. The form was intended for all cases, whether a delay in the payment of money or the delivery of property resulted from the supersedeas.

The judgment was affirmed in 1889 by a divided court, and the appellee allowed ten *per centum* damages.

He refused to accept the $800, together with the ten *per centum* damages and his costs in satisfaction of the judgment, and brought this action upon the appeal bond to recover damages for being kept out of his money. His pleadings clearly show that he seeks to recover damages in lieu of interest upon the judgment, and whether he is entitled to it, is the question before us.

After the mandate of this court had been filed in the lower court, showing the affirmance of the judgment, the appellee, on October 15, 1889, and after the two actions had been consolidated, entered a motion in the old suit to allow him, *nunc pro tunc*, interest upon his judgment from the time of its rendition in the lower court. This was properly refused.

The Legislature, on March 1, 1888, amended the statute above cited by striking out the words "except for malicious prosecution, libel, slander or injury to the person;" but this amendment is not retrospective in its terms, and there is nothing evidencing any legislative intention that it was to be so regarded.

It is a rule that no statute will be so construed unless there be something in the nature of the case, or the language used, showing that it was so intended by the law-making power. Unless this appear, new statutes will be held to apply only to future cases.

Judge Cooley says: "There is no doubt of the right of the Legislature to past statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State Constitution, and provided further that no other objection exists to them than their retrospective character. Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Cooley's Con. Lim., page 370.

The counsel for the appellee needlessly complains in the pleadings that this court in affirming the judgment delivered no opinion. He cites the statutes, which says: "The court must deliver written opinions in all cases." We by no means claim never to err in opinion.

It might be well for the experienced counsel, even as to himself, to recollect that it has been said, *aliquando bonus domitat Homerus*. We do not see, however, how *the court* could deliver a written opinion when its members are equally divided in their views. It has not been the usual practice to do so in such cases, and we do not think there was any failure of duty in this respect.

Section 748 of the Civil Code, provides: "A supersedeas shall not be issued until the appellant cause to be executed before the clerk of the court, which rendered the judgment, or the clerk of the Court of Appeals, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment appealed from, if it should be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment, and all rents or hire of damages to property during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal."

This provision requires an appellant in a case like this one to give a bond, stipulating that he shall pay to the appellee all costs and damages that shall be adjudged against him on the appeal, and satisfy the judgment appealed from, if affirmed, and any judgment this court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment.

The further provision in the section as to rents, hire or damages to property, was not intended to apply to a judgment merely for money.

In fact, another provision of the Code (section 764) expressly says:

"Upon the affirmance of, or the dismissal of, an appeal from a judgment for the payment of money, the collection of which, in whole or part, has been superseded as provided in chapter 2 of this title, ten *per cent.* damages on the amount superseded shall be awarded against the appellant."

The law fixes in this character of a case what the appellee is entitled to as damages upon an affirmance of a superseded judgment. It has defined and limited the meaning of the word "damages" as used in the section of the Code, directing what character of a bond shall be executed. The words of the bond, were it necessary, would be so construed as to limit them to the requirements of the law. He gets his judgment in the lower court, and ten *per centum* damages thereon; also his costs.

When the appellant has paid these sums, he has not only complied with the law, but all the provisions of his bond. Both the terms of the contract and the law have then been fulfilled.

As the judgment did not bear interest, and could not by law be made to do so, the appellee can not recover it by way of damages in an action upon the bond. It stipulated for the payment of the judgment, if affirmed, and it, therefore, covenanted for the payment of the $800 without interest. This court in the order of affirmance determined what the appellee was entitled to as damages, and it embraced all that either the law or the covenants of the bond allowed.

This conclusion renders it unnecessary to consider the cross-appeal of the appellee, based upon the fact that the lower court, while it allowed as damages interest upon the $800 up to the date of the judgment in this action, did not give any interest thereafter, and the judgment is reversed, with directions to dismiss the action.

FINLEY V. UNTHANK, &C.

(*Filed April* 7, 1891—*Not to be reported.*)

Contract—The testimony in this case shows that the appellant is entitled to one-half interest in the land in controversy, and not to the entire land, the remaining one-half interest being divided equally between the two appellees.

R. D. Hill and W. O. Harris for appellant.

J. M. Unthank and Wm. Lindsay for appellees.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Pryor.

It is apparent from the testimony that the land in controversy was purchased for the benefit of Unthank, Moss and Finley, Finley to have one-half and Unthank and Moss one-fourth each. The devisees of Williams are willing that the agreement of sale, or in fact the sale made by the executor, should stand, and the executor being authorized by the will to sell the land for the payment of debts, and in the exercise of that power he has carried into execution the contract made by his testator with Unthank for the land, by receiving the purchase money and paying off the testator's debts. The land brought its value, and the only controversy in this case is between

Finley, Unthank and Moss as to the extent of their interest as purchasers.

Finley claims that the entire land was purchased for him, and that he alone is the real owner. He is not asking to be relieved from his agreement, and when the chancellor gives him one-half the land and a lien on the other half to secure him in the money advanced to Unthank and Moss to pay for their half, it seems to us he has been fully secured in all his rights.

That there is a misunderstanding between the three as to the extent of their interests is manifest, but the evidence fully explains the nature of the transaction, and this judgment must be affirmed.

HICKS, &C. v. SMITH.

(*Filed April* 9, 1891—*Not to be reported.*)

Wills—Estoppel—Appeals—By his will a testator devised to his sister $100, leaving the bulk of his estate to his widow. The sister resided in a county remote from the county of the testator's residence, and had no knowledge of the contents of the will until a short time after it was admitted to probate. When she received from the executor by mail a check for the amount of her legacy, which she, on the advice of her friends and without consulting her husband, accepted under the belief that she would not thereby waive her right to contest said will. Shortly afterwards she prosecuted an appeal to the circuit court from the order of probate, to which proceeding is pleaded the receipt of said check as an estoppel. *Held*—That owing to the fact of the devisee being a *feme covert* at the time of receiving said check, as well as want of knowledge of the contents of said will, and the circumstances attending the receipt of said check, she is not estopped from prosecuting the appeal.

H. Clay White and Robert Richardson for appellants.

Crum & Willis and W. W. Dickerson for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor.

John G. Smith, of the county of Grant, died, leaving a last will and testament by which he devised his entire estate to his widow, except a small legacy of $100 to his sister, Mrs. Hicks, who, together with her husband, is an appellant in this appeal. The testator left no children, and his will was probated in the Grant County Court, by the executor, a short time after his decease.

The appellant had no notice of the probate of the will, or of its contents, as appears from the pleadings, but received from the executor, through the mail, without any explanation, a check inclosed in an envelope for $100 in full of legacy. She consulted one of her friends, who advised her that its indorsement and collection would not prejudice her rights, and having done so, it is claimed she recognized the devise as valid and is now estopped from showing a want of capacity on the part of the testator to make it. Her husband was not even consulted as to the rights of wife, either by the wife or the executor, and the latter, in sending the check, gave no information as to the contents of the instrument. The devise might have been of the most of the estate to this sister, and a special legacy in addition, and the act of inclosing such a check to a *feme covert*

not advised of her rights and ignorant of the provisions of the will, or the manner of its execution, works no estoppel on the part of the appellant.

When learning of the probate in the county court, the appellant appealed to the circuit court, and the fact that the *feme covert* had received this check was pleaded in bar of her right to prosecute the appeal, and a reply was filed setting up the coverture and the circumstances under which the check was received. To this reply a demurrer was entered and sustained by the court below.

It seems to us if any one has been prejudiced, if the reply is true, it has been the appellant, by reason of the act of the executor. She was in no condition to know the disposition made of the testator's property, or the effect the receiving of the check would have on her rights; besides, if she had known all about the contents of the will, and after this ascertained the condition of testator's mind, and that he was incompetent to make a will, it would work no estoppel.

This check was sent in a few days after probate and in less than one month after testator's death, to the appellant, a *feme covert*, who indorsed it without ever seeing the will. There is no estoppel in such a case, and it is a matter of doubt as to the validity of the payment to the *feme* without the knowledge and consent of the husband. The indorsement of the check works no estoppel, and the party should be allowed to prosecute the appeal.

Judgment reversed and remanded for proceedings consistent with this opinion.

BRANNIN, &C. V. SHERLEY.

(*Filed April* 9, 1891.)

Trusts—Undue influence—A young man of reckless habits and without business experience, shortly after arriving at the age of twenty-one years, at the instance of his grandmother and sister, who seemed desirous of protecting his estate from waste, executed a deed of trust to his grandmother of all his property, providing that she should pay over the annual income to him until he married, and after marriage the income to be paid to his wife; and in the event that the grantor died without leaving children surviving, said property should go to his sister. In an action to cancel the conveyance, *Held*—That as said deed was entirely voluntary and executed under the influence and advice of the grantor's grandmother and sister, for the purpose of protecting the estate, said deed was properly cancelled, the proof showing that the grantor had married and gotten rid of his reckless habits.

Simrall & Bodley and John C. Doolan for appellants.

W. O. Harris for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

Brannin C. Sherley, the appellee, being the owner of two tracts of land in the city of Louisville, one lying on the south side of Market street, between Brook and Floyd, and the other lying on the south side of Market, between Fifth and Sixth streets, on the 11th of November, in the year 1886, conveyed all this estate, including both lots and the improvements, to his grandmother, Elizabeth A. Bran-

nin, to be held by her in trust, and controlled and managed by her as she might deem proper, requiring her by its terms to pay to him the net annual income until his marriage, and after his marriage to pay the income to his wife and children, and upon his death to convey his property to them, if any survived him; if not, then to convey the lots to his sister, Bettie Sherley, if living; and if she should be dead, then to his heirs on the side of her mother, who was a daughter of the trustee, Elizabeth A. Brannin. The appellee married not long after arriving at age, and his wife is now living with one child, the offspring of the marriage. These lots of ground, with the improvements, are valuable, producing a handsome income for the support of appellee's family.

The appellee instituted this action in equity in the Louisville Law and Equity Court, on the 15th of November, in the year 1890, seeking to cancel the trust deed to his grandmother, so as to give him control of his estate. The trustee, Mrs. Brannin, the wife of the appellee and his child, Bettie, also his sister, Bettie, and her husband, George W. Ewing, she having intermarried since the deed was executed, are all defendants and before the court.

The wife of the appellee answers and is desirous of having the title vested in her husband, and, upon privy examination by the chancellor, so declared. The infant daughter, Bettie Sherley, makes defense by her guardian *ad litem*, and so does the trustee, Mrs. Elizabeth Brannin.

The principal ground for cancelling the conveyance is the exercise of an improper influence over him by his grandmother, the trustee, and his sister, by which, in the event of his marriage, he was deprived not only of the *corpus* of his estate, but of any interest whatever in the annual income for his support and maintenance. No power of revocation existed in the conveyance, and the only relief the appellee has, if any, is in a court of equity.

This is a peculiar character of case, as it is manifest from the testimony that the influence exerted over the appellee by his grandmother and sister was prompted alone by their affection for him, and their desire to prevent the wasting of an estate that, by reason of his extravagant habits, would soon all be gone and the appellee reduced to poverty. The motive of the trustee can not be impugned, nor can that of his sister, but still the effect of the conveyance that was *purely voluntary*, with no other consideration on his part than the desire to gratify the wishes of the trustee and his sister, is to deprive the appellee of all his estate. He had just arrived at age when this deed was made; had left the home of his grandparents before arriving at age, expending his means in such a generous and improvident manner as amounted to recklessness, and on his return from a trip to China and Japan executed the deed.

He was subject to the absolute influence of his grandmother and sister when about them; they dominated his will, and, in fact, it was necessary they should do so on account of reckless habits that he seems now to be rid of. He had no business experience whatever when the deed was executed, nor did the parties to it comprehend fully the nature and effect of the conveyance, because all were unacquainted with such transactions. The fact that the appellee divested himself of all title to his property shows that neither the trustee nor the appellee considered the legal effect of the instrument. The sister and her husband, George Ewing, both answer and consent to the cancellation. The appellee evidently exercised no judgment or discretion in the transaction. It was left to his grandmother and sister. At that time he would not have known a deed from a

will, but now that circumstances have changed, with his family surrounding him, his eyes have been opened to the business affairs of life, we perceive no reason why the conveyance should not be cancelled and the title restored to the appellee.

It is true that the trustee has derived no immediate beneficial interest from the conveyance, but if construed as in the nature of a family settlement, it should be reasonable and just, and where the contents of the trust or settlement deprives the grantor of all his estate, it will take but slight testimony to induce the chancellor to say that it was unreasonable. If the extravagant and reckless habits of the grantor still continued, the chancellor would hold the property, but would at least, where the income was sufficient, let him have it for his support.

In Villers v. Beaumont, 1 Vernon, 99, it is said: "If a man will improvidently bind himself by a voluntary deed, without the power of revocation, this court will not loose the fetters he hath put on himself, but he must lie down under his own folly." This doctrine has been greatly modified by recent decisions, and certainly was never intended to apply where the grantor was wrongfully advised and did not know the legal effect of the act by which he was giving away his entire estate.

The attorney preparing the deed wrote it as directed, and supposed the family with which the appellee was connected desired it written in that way, and that the appellee understood what he was doing.

The appellee was unmarried when he made the deed, and no moral or natural obligation then rested upon him to provide for the first takers, his wife and child, but under the influence of his grandmother and sister, who thought and acted for him, he deprives himself of his entire estate, not even retaining, in the event of his marriage, the income derived from it.

In Everitt v. Everitt, L. R., 10 Eq., 405, the court said: "It is very difficult, indeed, for any voluntary settlement, made by a young lady so soon after she attained twenty-one, to stand, if she afterwards change her mind and wishes to rid herself of the fetters that bind her in the disposition of her estate."

In Garusey v. Mundy, 24 N. J., 243, the grantor having arrived at age without any business experience, and but little knowledge of her legal rights, made a conveyance of her estate in trust in a manner similar to the grant before us. It was made at the instance of and under the advice of her mother and uncle. The property was placed beyond her control, and although the motives of her mother and uncle were praiseworthy, as in this case, the grantor applied to a court of equity for relief, and the facts leading to the conveyance having been shown, the chancellor cancelled the deed. The influence exerted in that case, as in this, was injudicious and unwise, and over one whose will was subordinate to that of the grandmother, who, in conjunction with his sister, caused its execution.

There can be no doubt but that a voluntary settlement or gift, made by one who is competent to act for himself and understands what he is doing, where the transaction is the result of his own judgment and will, will be sustained by the chancellor, although there is no power of revocation. But a gift of all one's estate, without any rescission or power of revocation, would be of itself a suspicious circumstance, and, aided by mere slight proof "of mistake, misapprehension or misunderstanding" on the part of the grantor, will be sufficient to set aside the deed. Besides, in this case, those who influenced or caused the execution of the paper were remotely,

and the sister directly, benefited by the conveyance, because the appellee, then having no children, the title was vested in his sister; still we are satisfied that no desire for personal gain induced the execution of the deed. It was done, as we think the facts show, under a misapprehension of what the legal rights of the appellee were in relation to the estate and in the earnest desire to save the brother's property.

The testimony satisfies the chancellor that the instrument was the act and deed of the grandmother and sister, and that they were not even aware of its effect upon the rights of the appellee. The chancellor has cancelled the entire conveyance. This was right, leaving the grantor to make such an equitable settlement on his family as he desires, and this he seems to have done.

Judgment affirmed.

CASSIDY, &C. V. CITY OF COVINGTON.

(*Filed April* 9, 1891—*Not to be reported.*)

Constitutional Law—Streets and alleys—The city authorities may be authorized by the Legislature to reconstruct its streets, with as full powers of taxing abutting property in aid of such improvements as it possessed in making the original improvements. It is no objection to the exercise of such power that the council may order the principal thoroughfares improved before improving the less prominent streets. The city possesses the same power to improve a street that it has acquired by surrender from a turnpike company, as if it was acquired in any other way.

C. B. Simrall and W. K. Benton for appellants.

W. A. Byrne for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

From an agreed statement of facts it appears E. G. Cassidy, wife of J. S. Cassidy, is owner of a lot on Madison avenue, in the city of Covington, which avenue or street the city council has, by ordinance, authorized and required to be reconstructed by paving with asphalt or granite, or both, one-half the cost of which is to be paid by the city and the other to be assessed against lots abutting on that street.

The power to reconstruct that and all other streets in the city of Covington, at the pleasure of the city council, is conferred by an act of the Legislature, approved March 21, 1890, and one of the questions raised is whether the act, in that respect, is unconstitutional. As the identical question has been considered and determined by this court at the present term, in the case of Maddux v. City of Newport, it need not be now discussed. There it was held the power existed in the Legislature to authorize reconstruction of a street by assessment of property bordering on the street, just as was done for the original improvement; and it was also decided that, though the amount to be expended is insufficient to improve every street, the right to improve the principal thoroughfares, or such as will prove of most benefit to the city, may, nevertheless, be exercised by the city council.

It further appears that the portion of Madison street, on which appellant's property abuts, though within the corporate limits of Covington, formerly belonged to a chartered turnpike company, which, of course, had the right to charge toll for the use of it, and was required, at the same time, to keep it in repair without cost to property owners. But that company was, by an act of the Legislature, empowered to contract with the city of Covington for the surrender to it of all that part of said road which lies within the limits of the city, and subsequently the surrender was made, which, we think, had the effect to invest the city with as full authority and control of the land, as a public street, as could be acquired to any other land not previously dedicated or acquired for such purpose; for a turnpike company may, by an act of the Legislature, be absolved from the duty of keeping its road in repair in consideration of giving up its right to charge toll, or authorized to abandon its road altogether, thereby surrendering its franchises and rights, and being, at the same time, released from its charter obligations. And whenever any part of a toll road is, by reason of increase of local population and business, included within the corporate limits of a town or city, which frequently occurs, the public interest and convenience necessarily requires that not only the toll-gate be removed, but that the way be improved in a more durable and extensive mode than a turnpike company is required by its charter, or was originally expected, to do; and, therefore, when the object can be accomplished, as was done in this case, without violation of vested rights, no reason can exist why the municipal corporation may not have and exercise the same power and supervision over the way thus acquired as any other street or way within its limits.

As the statutes referred to are valid, and the action of the city council, taken in pursuance of them authorized, the injunction in this case was properly discharged, and the judgment is affirmed.

KEARNS V. CITY OF COVINGTON.

(*Filed April* 9, 1891—*Not to be reported.*)

C. B. Simrall and W. K. Benton for appellant.

W. A. Byrne for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

The state of facts agreed on in this case are set out in the case of Cassidy, &c. v. City of Covington, just decided by this court and here referred to, except as to names of the plaintiffs and owners of property affected, and the same question here presented was in that case expressly decided, and, therefore, it is unnecessary to state in full the facts, or discuss the question presented.

Wherefore, the judgment dissolving the injunction and dismissing the action must be affirmed.

COSBY V. COMMONWEALTH.

(*Filed April* 9, 1891—*Not to be reported.*)

1. *Appeals—Weight of evidence*—On an appeal in a criminal case the Court of Appeals can not reverse on the evidence, unless the verdict is altogether unsustained by it.

2. *Same—Exceptions to motion for new trial*—The decision of a court in refusing a new trial is not subject to exceptions and can not be considered on appeal.

O. J. Owen Brewster for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Holt.

This is a conviction for the larceny of a watch. The only question presented by the record, which this court can consider, is whether the verdict is altogether unsustained by evidence. If it be merely conflicting, then in a criminal case this court has no power to interfere.

The testimony for the prosecution shows that the stolen property was found in the possession of the accused, and that he denied having any watch, claiming that it was something else.

Upon the other hand, the evidence offered by him tends to show that he obtained the watch in pledge for money loaned by him, and that he used it openly.

Upon this state of case the weight of the respective testimony was for the jury, and the conclusion reached by them can not be disturbed.

Their position afforded them the better opportunity to judge of the credibility of the witnesses, and the degree of credit to be given to each of them.

The only exception in the record to any ruling of the court is to its refusal to grant a new trial.

There is no diligence shown as to the alleged newly discovered evidence offered in support of it; but if there were, and it were material, it could not avail upon appeal, because by section 281 of the Criminal Code the decision of the trial court upon a motion for a new trial is not subject to exception, and an error in refusing it is not, therefore, ground for a reversal in this court.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

GAYLE V. MCDANIEL.

(*Filed May* 11, 1891.)

1. *Landlord and tenant*—A landlord's lien for supplies furnished, provided for by section 5 of article 6, chapter 66, General Statutes, is not lost by his failure to proceed to enforce it within the time and in the manner in which

he is required to proceed in order to preserve his lien for rent. The remedies afforded him for the collection of his rent do not apply to his lien for supplies furnished, which must be enforced by suit in equity.

2. *Lien for supplies furnished*—A tenant having abandoned his crop, the landlord, having a half interest in it and full control of it, had the right to sell it, and, having sold a part of it, he had the right, as against a creditor whose attachment was issued after the sale, to credit the proceeds upon his demand against the tenant for supplies furnished; and even if his lien for supplies furnished were placed upon the same footing as his lien for rent, he did not lose his lien by failing to take legal steps to enforce it for more than one hundred and twenty days, as he could not be required to issue his distress warrant when he had already sold the tenant's property and had the proceeds in his pocket.

Lindsay & Botts for appellant.

J. W. Greene for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Yost.

The appellee brought this action against one Chandler, and sued out an attachment which was levied upon his interest in a crop of tobacco found on the appellant's premises, who was made a party, defendant, the petition alleging an indebtedness on his part to Chandler, which it was sought to subject to the payment of the debt sued on.

The appellant, who was appointed a commissioner to sell the tobacco and hold the proceeds subject to the order of the court, filed his report in the action to the effect that the tobacco had been sold, and that Chandler's interest therein brought $79.64. He then filed his answer, alleging that he had leased to Chandler a certain tract of land for one year under a contract, by the terms of which they were to divide equally all crops raised on the leased premises. He then alleged that, before his tenancy expired, Chandler abandoned the land and surrendered the crops to him, and that he was thereby compelled to and did take full charge and control of them, and expended time, labor and money in preparing them for the market; and further, that during the year he had furnished him, as his tenant, certain money and property for the purpose of enabling him to subsist and raise his crop, amounting in the aggregate, with the sum expended by him on the crop after Chandler had abandoned it, to $404.96, for the payment of which he claimed a lien on Chandler's interest in the whole crop. He then stated that, before the institution of the action, he had sold Chandler's interest in the hay and corn for $234.15, and had collected the money and applied it as a credit on his account, leaving due him $170.81, and he sought to have the proceeds of the sale of the tobacco adjudged to him as a payment on that balance. This pleading showed that more than a year had elapsed from the termination of Chandler's lease to its filing.

On the hearing the court adjudged that the appellant was indebted to Chandler in the sum of $100, and rendered a judgment against him in favor of the appellee for that amount, and for the further sum of $79.64, the proceeds of the sale of the tobacco. From that judgment this appeal is prosecuted.

We fail to see upon what hypothesis the court acted in finding that the appellant owed Chandler $100. The only evidence introduced upon the matter of the account was the deposition of the appellant,

who therein swore that Chandler was a poor man, who had no money to run the farm, and that he furnished him the articles mentioned in the account to enable him to do so. He further stated that the corn and hay sold by him had been in his possession from the time Chandler abandoned the crop until he had sold them, and that the tobacco had been in his possession from that time until it was sold under the order of the court. There was no proof whatever introduced by the appellee to contradict or rebut any of these statements.

From the evidence it must be conceded that, under section 5, article 6 of chapter 66, General Statutes, the appellant had a lien upon Chandler's interest in the crop to secure him in the payment of his account. This being true, he, having taken control of the hay and corn and sold them before the attachment was issued, had the right to apply the proceeds to the satisfaction of his demand against his tenant. Bowden v. Clark, 7 KY. LAW REP., 674.

If, however, he did not have a lien upon the corn and hay for the whole of his account, he had a valid debt against his tenant for that amount, who surrendered his crop to him by abandonment, and he, having a half interest in and full control of it, had the right to sell it, and, having sold a part of it before the attachment was issued, had the unquestionable right to credit his debt by the proceeds.

If it was true that a landlord's lien for supplies furnished the tenant was placed upon the same footing as his lien for rent, and could be collected by the same proceedings, we still could not agree with appellee's counsel, who contends that appellant lost his lien by failing to take legal steps to enforce it for more than one hundred and twenty days.

Why should the landlord be compelled to have his distress warrant issued, when he had already sold his tenant's property and had his own money in his pocket? How would he proceed to do this? Would he bring an action for debt against one who had paid him, and, making himself a garnishee, enjoin himself from paying back the money to his tenant? If we were to run this argument to a fair conclusion, we might well ask if the landlord would be safe from the attaching creditors of his tenant, if the tenant had himself sold the crop and paid the rent. It would, it seems to us, be as reasonable to hold the landlord responsible for the proceeds of the crop in one instance as in the other.

The more serious question is, did the appellant lose his lien upon the tobacco, which was on the premises at the time of the issual of the attachment, by failing to take steps to enforce it, under the provisions of the 13th section of article 2 of the chapter above referred to? We think not. This whole article applies to claims and liens for rent only, and to remedies for its collection. The thirteenth section gives the landlord a lien on the produce of the premises rented for one year's rent, and provides that this lien shall not be for any rent which has been due for more than one hundred and twenty days.

On the other hand, the 5th section of article 6 has no reference to rent. There the landlord is given a lien upon the whole crop of the tenant, not for rent, but for any money or property furnished the tenant to enable him to subsist and raise his crop. He is given none of the remedies, afforded him for the collection of his rent, to collect this lien debt. It is simply placed upon the footing of any other contract or statutory liens (other than liens for rent), and the claimant must enforce it by his suit in equity.

Having, then, none of the remedies given him in the second

article for the collection of this debt, we are not inclined to hold that the landlord is, in this case, bound by its restrictions.

Chandler abandoned the tobacco, and thus surrendered it to the appellant. His lien upon it was a superior lien to that of the attaching creditor, and the judgment is, therefore, reversed and cause remanded, with instructions to the court below to dismiss appellee's petition against the appellant.

SUPERIOR COURT ABSTRACTS.

ROSENBERGER, &C. v. ROSENBERGER.

Filed Februrary 25, 1891. Appeal from Louisville Chancery Court. Opinion of the court by Judge Young, affirming.

Garnishment—A proceeding by rule is the proper mode of enforcing payment by a garnishee.

John W. McGee for appellants; John Roberts for appellee.

STUCKY, ADM'R v. SHECKLER.

Filed February 25, 1891. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Young, affirming.

1. *Pleading—Waiver of objection*—No objection by demurrer or otherwise having been made to any of the pleadings in the lower court, the appellant will not be heard to object in this court for the first time to a pleading on the ground of mere irregularity, the case having been submitted to the jury on the issues made by the pleadings.

2. *Account books as evidence*—The defendant being a merchant, original entries in his account books were competent evidence.

C. B. Seymour and A. C. Rucker for appellant; Kohn, Baird & Speckert for appellee.

MARTIN'S TRUSTEE v. L. & N. R. R. Co.

Filed February 25, 1891. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Separation of conclusions of law and fact*—Where the law and facts in an ordinary action are submitted to the court there is nothing upon which to base a motion for a new trial until there has been a separation by the court of its findings of law and fact; therefore, the appellant must, before the motion for a new trial is made, ask the court for a separation of its conclusions of law and fact, and if he fails to do so, no error of law occurring at the trial can be reviewed upon appeal.

2. *Same*—A finding by the court of the law and facts can not be considered, unless made part of the record by order of the court or bill of exceptions.

G. W. Duvall for appellant; F. W. Darby for appellee.

PITTSER, BLACK & CO. v. LITTLE.

Filed March 4, 1891. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Young, reversing.

Transfer to common law docket—As this was an action to recover damages for breach of a contract, it should have been brought at law instead of in

equity, and a motion made by defendants for a transfer of the action to the common law docket should have been sustained.

J. T. Baker and O'Neal, Jackson & Phelps for appellants; J. M. Chatterson for appellee.

GRINSTEAD & Co. v. RICHARDSON.

Filed March 4, 1891. Order overruling motion.

Consent to reversal—This court will not reverse a judgment by agreement of parties.

James Montgomery and W. H. Marriott for appellants; J. P. Hobson for appellee.

BRADFORD v. WARE'S EXECUTOR.

Filed March 11, 1891. Appeal from Bracken Chancery Court. Opinion of the court by Presiding Judge Barbour, reversing.

Attorney's lien—Set-off—An attorney has a lien only upon the amount to which his client is entitled upon the termination of the litigation. And if, upon a settlement of the different liabilities incurred by the parties, the one to the other, during the litigation, the client is entitled to nothing, the attorney has no lien which he can enforce against the adverse party.

Where an appeal granted to the defendant was dismissed with damages, because of his failure to file the transcript on time, but upon a subsequent appeal granted by the clerk of this court the judgment was reversed with directions to dismiss the petition, which was done, the defendant is entitled to have his final judgment for costs set-off against plaintiff's judgment for damages upon the dismissal of the first appeal, and the plaintiff's attorney can not complain that he is thereby deprived of his lien.

O'Hara & Bryan for appellant; A. Duvall and E. Whittaker for appellee.

RICH GRAIN DISTILLING CO. v. WESTERN UNION TELEGRAPH CO.

Filed March 11, 1891. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Measure of damages for failure to deliver telegram*—Where a distilling company sent a message to boiler-makers in a neighboring city notifying them that a boiler was out of repair and asking them to "send man at once," and by reason of the failure of the telegraph company to transmit or deliver the message the distilling company was compelled to suspend operations for twenty-four hours longer than it would have done had the message been transmitted and delivered in the regular course of business, the sender of the message, in this action against the telegraph company, is entitled to recover for the additional expense incurred in feeding cattle and the additional amount paid to hands, by reason of the delay caused by defendant's failure to transmit the message. As it was the business of the firm to which the message was sent to send men to repair boilers, it must be presumed that they would have followed their usual course of business; and it is not reasonable to presume that had the man been sent he could not have done the work.

2. *Same*—The profits which the plaintiff might have made on the liquors it was prevented from making during the twenty-four hours are too remote to be recovered.

J. F. Clay for appellant; Burnett & Dallam for appellee.

LEWIS v. WILLIAMS.

Filed March 11, 1891. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Suit to vacate judgment*—As this action to vacate judgment was not brought until two years and a half after the judgment complained of was rendered it is too late to vacate the judgment upon the ground that the case was tried prematurely. Civil Code, section 519.

2. *Same*—The allegation that plaintiff was prevented by unavoidable casualty or misfortune from appearing or defending the action in which the judgment was rendered is not sustained by the evidence, nor does the evidence sustain the charge that the judgment was obtained by fraud.

J. R. M. Polk and James T. A. Baker for appellant; Zach Phelps for appellee.

DANIEL, &c. v. SCHULTZ, THURMAN & CO.

Filed March 11, 1891. Appeal from Ohio Circuit Court. Opinion of the court by Judge Young, affirming.

Liability of one who holds himself out as partner—One who holds himself out as a partner, or knowingly permits another to do so, is liable as such to one who gives credit to the firm upon the faith of his being a partner.

In this action against a firm of distillers upon an account for repairing machinery, two of the three members of the firm claimed that they were not partners in the machinery, that the credit was not given to them, and that the partnership did not commence until after the plaintiffs had repaired the machinery and shipped it to them. *Held*—That as defendants held themselves out as partners in the machinery, and, knowing that the repairs were being made by plaintiffs under the belief that they were partners, made no objection, they are liable as partners.

E. D. Walker and S. E. Hill for appellants; LeRoy Gregory and E. D. Guffy for appellees.

RAUBOLD v. COMMONWEALTH.

Filed March 11, 1891. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, reversing.

Keeping tippling-house—Under a special statute for the town of Glasgow, which makes it unlawful to sell liquor in that town to be drunk therein, and provides that whoever shall "sell the same and the same shall be so drunk shall be guilty of keeping a tippling-house," it was error to instruct the jury that they should find defendant guilty if they believed he had sold the liquor as charged to be drunk, "or" that the same was drunk in the town of Glasgow. The jury was not authorized to convict unless they believed that defendant sold the liquor to be drunk, "and" that it was drunk in Glasgow.

H. C. Gorin for appellant; P. W. Hardin for appellee.

WILLSON v. WILLSON.

Filed March 18, 1891. Appeal from Whitley Court of Common Pleas. Opinion of the court by Judge Young, reversing.

Divorce—Abandonment—In this action by the husband for a divorce, upon the ground of the wife's abondanment of him for one year, the evidence shows the abandonment and that the husband was not in fault, and, therefore, the divorce should have been granted. The fact that the wife absented herself from home day and night without her husband knowing where she was, her exhibitions of temper and her declaration she did not love her husband and would never live with him again, are persuasive evidence that her desertion was wilful and without the husband's fault.

Crawford & Mason for appellant.

HAMILTON v. NICKELL.

Filed March 18, 1891. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Young, affirming.

New trial—Newly discovered evidence—The court properly refused a new trial asked upon the ground of newly discovered evidence, it appearing that the evidence could have been discovered and produced at the trial by the exercise of proper diligence in the preparation of the case.

Peters & Tyler and J. H. Hazelrigg for appellant; Wood & Day, White & Brooks and Ed. C. Orear for appellee.

L. & N. R. R. Co. v. Page.

Filed March 18, 1891. Appeal from Hart Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Railroads—Duty to passengers*—It is the duty of a railroad company to provide cars free from all defects which endanger the lives of their passengers, and to employ competent men to operate and manage their trains.

The fact that several cars with defective brakes, in charge of an inexperienced brakeman, were started down the track toward a car in which the employes in charge of the train knew there were passengers, exhibited a reckless disregard of their safety, and the moving cars having struck the passenger car with such force as to throw the passengers from their seats, severely bruising them, the company is liable for the injuries received.

2. *Excessive verdict*—While a verdict for $1,000 was more than was commensurate with the actual damages received by plaintiff, this court can not say, that under the circumstances of this case, the lower court erred in refusing the defendant a new trial on the sole ground that the verdict was excessive.

H. C. Martin and Wm. Lindsay for appellant; Rousseau & Scott for appellee.

Booth v. Booth.

Filed March 18, 1891. Appeal from Whitley Circuit Court. Opinion of the court by Judge Yost, affirming.

Divorce—A single act of adultery upon the part of the husband will not entitle the wife to a divorce. To entitle her to that relief, upon the ground of the husband's adultery, she must allege and prove that he is living in adultery with another woman.

Crawford & Mason for appellant.

Commonwealth v. Evans.

Filed March 18, 1891. Appeal from Lawrence Criminal Court. Opinion of the court by Judge Yost, affirming.

Local option—Board for examining poll-books—As the local option law does not create a board for comparing the polls and certifying the result of the election, that duty falls upon the board provided by section 1 of article 5, chapter 38, General Statutes; and if any two of the board can not act their places must be supplied by the two justices of the peace living nearest the court-house.

The clerk and sheriff being candidates for re-election at an election at which the question as to whether liquor should be sold in a particular district was submitted to a popular vote, the polls should have been examined and the certificate signed by the county judge and two justices of the peace. Therefore, the certificate of the clerk and sheriff was void, and no evidence as to the result of the election. And as the local option law is not in force until after the entry of the certificate of the examining board as provided ay statute, the Commonwealth can not read the poll-books as evidence of the result of the election.

P. W. Hardin for appellant; Alexander Lackey for appellee.

Page's adm'r v. White's adm'r.

Filed March 18, 1891. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Payment—The mere fact that one of two obligors in a note happens to have the possession of receipts which, upon their face, acknowledge the payment by both, should not, as between the obligors, be regarded as evidence that he who has the possession paid them.

W. L. Porter and Lewis McQuown for appellant; George T. Duff for appellee.

FUQUA v. MOSELEY.

Filed March 18, 1891. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. *Bills of exceptions*—As the bill of exceptions was tendered by appellant within the time allowed by the court, the delay in filing it must be attributed to the action of the court.

2. *Exceptions—Objections waived*—The only exception recited in the order overruling motion for a new trial was this: "To which the defendant excepts so far as the judgment for costs is concerned, and prays an appeal to the Superior Court, which is granted." *Held*—That by thus specifying the ground of exception the appellant waived all other objections to the rulings of the court in the progress of the trial, and as no appeal lies from a judgment for costs alone, there is nothing for the court to consider but the pleadings.

3. *Part of evidence omitted from record*—As a deposition, which was read as evidence to the jury, is not made a part of the record by bill of exceptions or otherwise, the court can not consider alleged errors in giving and refusing instructions, or inquire as to the sufficiency of the evidence to support the verdict.

4. *Executors—Judgment for costs*—Although the defendant claimed to hold the horse sued for in his executorial capacity, yet, as he was the sole devisee and was sued as an individual, it is not unreasonable to suppose that his defense was for his individual benefit, and the judgment for the recovery of the horse being against him as an individual, it was proper to render judgment for costs against him individually.

Sweeney, Ellis & Sweeney for appellant; Weir, Weir & Walker for appellee.

CHESAPEAKE, &C., R. R. CO. v. MCLEAN.

Filed March 18, 1891. Appeal from Muhlenburg Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

Sale of railroads—Liability of vendee for debts of vendor—Where one railroad company sold to another all its road and properties, the purchaser undertaking "to pay all sums lawfully due for taxes, and all current indebtedness incurred in the operation of said railroad and property," the term "current indebtedness" is limited to contract liabilities, and does not embrace liabilities incurred by the wrongful act of the other contracting party. The purchaser is not liable, therefore, for damages resulting from the negligence of the vendor in failing to provide a proper smoke-stack to its engine, although the claimant has judgment and return of "no property" against the vendor.

Holmes Cummings, Hay & Thompson and P. H. Darby for appellant; Charles Eaves for appellee.

BANNON v. MORAN.

Filed March 18, 1891. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Young, affirming.

1. *Libel*—Not only the actual publisher of a libel, but all who in any wise aid or are concerned in the production of the writing published, are liable as publishers. And every one who requests, procures, induces or commands another to publish a libel is answerable as though he published it himself.

If defendant, by his communication of the libel to another, intended that said communication should be published, he is liable as publisher.

2. *Same—Right of joint defendants to separate trials*—While in a joint action for libel against the publisher of a newspaper, and one who procured the libel to be published, there may be separate verdicts, the defendants are not entitled to separate trials.

3. *Same—Erroneous instruction not prejudicial*—While it was error to instruct the jury that they must find for plaintiff, if they believed the libelous writing was written "or" published by defendants, the error was not prejudicial, as the publication was virtually admitted by the pleadings.

4. *Same*—The admission of defendant that he had stated that plaintiff "admitted that he had been compelled to leave Liverpool because he had been suspected of being an English spy; that it looked suspicious that Mr. Power should be such a friend to that kind of a man," was an admission of substantially the same language as that charged in the petition, which was that plaintiff "was driven out of Liverpool because it was discovered that he was an English spy. It certainly looks suspicious that Mr. Power should be such a friend of an English spy.

5. *Bills of exceptions*—As time to file bill of exceptions was extended to a certain day, and when that day arrived the bill was not tendered and no further time asked, the right to file the bill was lost.

6. *Same*—Time for filing bill of exceptions in the Jefferson Court of Common Pleas can not be extended beyond 120 days after the overruling of the motion for a new trial.

J. R. M. Polk and Matt O'Doherty for appellant; O'Neal & Phelps for appellee.

CRAWFORD & CO. v. COLYER.

Filed March 25, 1891. Appeal from Pulaski Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. *Settlement of accounts presumed to include all claims*—The defendants having furnished the plaintiff the money to pay off a mortgage upon a sawmill he owned, and then entered into an agreement with him whereby they were to furnish the necessary capital and supply him with goods and provisions to enable him to engage in sawing timber, whereby he might be able to pay them their debt and save his mill, the business relation of the parties was somewhat of the nature of a partnership, and a settlement of that business could not well be had without including every thing connected with it. Therefore, the presumption is that a settlement between the parties, after the contract had been in operation for some time, whereby defendants agreed to take the mill and release plaintiff from liability, included a claim by plaintiff against defendants for a breach of the contract, although the claim was unliquidated, and the burden was on plaintiff to show that the claim was not included in the settlement.

2. *Same—Estoppel*—If at the time the settlement was made the defendant purposely withheld mention of the claim asserted in this suit, that he might be able to effect the settlement he made with defendants, he is not entitled to recover.

3. *Consideration for contract*—The mutual agreement of each party that the contract, which was executory, should be abandoned, was a sufficient consideration as to each.

4. *Evidence* as to the value of the mill at the time of the settlement was competent.

O. H. Waddle for appellants; W. A. Morrow and J. W. Colyer for appellee.

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